Chapter One

THE FALL AND RISE OF GOOD FAITH AND FAIR DEALING

Chapter Contents

1. THE HISTORICAL EMERGENCE OF GOOD FAITH AND FAIR DEALING IN CONTRACT LAW ................................................................. 13
   1.1. Good Faith Prior to the Nineteenth Century .................................. 14
   1.2. The Nineteenth Century and the Development of the 'Pure' Theory of Contract ................................................................. 21
      1.2.1. Defects in the Pure Theory of Contract Exposed ...................... 26
      1.2.2. An Historical Caveat ............................................................. 33
   1.3. The Twentieth Century ............................................................. 36
      1.3.1. Good Faith and Machination of Contract Doctrine .................. 38
      1.3.2. The 'Socialisation' of Contract Law ...................................... 43
      1.3.3. The Re-Emergence of Good-Faith Jurisprudence .................... 47

2. TOWARD "GOOD FAITH", "FAIR DEALING", AND A DISTINCTIVELY AUSTRALIAN LAW OF CONTRACT .................................................. 52
   2.1. The Australian Historical Setting .............................................. 53
   2.2. A Legal Watershed: Breaking Away from England ...................... 56
   2.3. Conclusion ............................................................................. 65

* * * * *
One might be forgiven for thinking that the quality of Australian commercial life could only profit from an infusion of good faith.\(^1\)

In theory, contract doctrine is the currency of law used to impose economic order on human beings for certain purposes; defences to contract formation such as fraud, duress, and undue influence are, I think, a theoretical attempt to impose an ordered humanity on economics.\(^2\)

It being 'harder than ever, on these battlefields, to tell friend from foe,'\(^3\) many find it especially pertinent nowadays to ponder the morality of contract law.\(^4\) This has culminated in the conclusion, at least by some, that 'modern contract law appears to support and promote good faith conduct based on reasonable standards in the formation, performance and discharge

---

1 The Hon. Sir Anthony Mason, "Foreword" (1989) 12 U.N.S.W. Law Journal 1, at 3. The quotation continues:

No doubt that notion would be opposed by those who believe that commercial men, and presumably women, should be encouraged to be 'robust'. Just what the term 'robust' means in this context is not altogether clear to me. The word is apt to cover a multitude of sins.


of contracts. Exaggerated as such a claim may be—perhaps—it is not entirely new, nor is it particularly novel. In the United States, for instance, an ‘overriding’ or ‘super-eminent’ principle of good faith is embodied in both the Uniform Commercial Code and the Restatement (Second) of Contracts, and these have been influential in the emergent status of good


6 See Section 1.1., infra.

7 Civilians, for example, have long been preoccupied with the contractual and precontractual process. Many civil codes, therefore (notably Germany, France, Italy and Switzerland), all contain some generalised contractual good faith provisions. For a summary of the respective legal positions of a number of Civilian jurisdictions, see E. H. Hondius (ed), Precontractual Liability (1991).

8 Article 1-203, for example, states:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

The accompanying commentary adds: ‘This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties’. “Good faith” is expressly mentioned in some fifty of the four hundred sections of the Code: Farnsworth, “Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code” (1963) 30 U. Chi. L. Rev. 666, at 667.

Cf. also § 1. 301 of the Uniform Land Transactions Act (originally adopted in 1975) (U.S.), which also enshrines a similar good faith requirement in the performance or enforcement of a contract or duty governed by that Act.

9 Section 205 provides:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

The Restatement, of course, unlike the U.C.C. does not have the force of law. It is a code-like document purporting to be a comprehensive and systematic statement of sound common law. It is, accordingly, regarded as highly persuasive authority. Section 205, therefore, can be traced back to its origins in judicial pronouncement. An oft-cited example of such a pronouncement is the case of Kirk La Shelle Co. v. Paul Armstrong Co. 263 N.Y. 79, 87; 188 N.E. 163, 267 (1933). In that case it was said by the New York Court of Appeals, in the context of good faith performance:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which
faith in contract law generally. Both the Code and the Restatement, however, only prescribe good faith in the performance and enforcement of contracts; neither relates to the negotiation and formation of a contract. In the United States, therefore, as indeed throughout the British Commonwealth, unless the contract is one uberrimae fidei (of the utmost good faith), or the relationship existing between the contracting parties is fiduciary in nature, unfairness or bad faith in the contractual process must be addressed in a 'piecemeal' fashion, and through 'crab-like' movements. The "good faith and fair dealing" idea finds its expression through an amalgam of seemingly diverse and disparate substrata: technical doctrines, concepts, rules, etc. such as misrepresentation, duress, undue influence, unilateral mistake (in equity), unconscionable dealings, promissory estoppel, and the like. This reality is perhaps most starkly apparent in Britain:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such

means that in every contract there exists an implied covenant of good faith and fair dealing.

10 See Restatement (Second) of Contracts, § 205, Comment (b). This might appear to be somewhat of a surprising omission, especially since a number of provisions in the Restatement dealing with formation issues could be rationalised in terms of a general good faith standard. See, e.g., § 25: option contracts and irrevocable offers—see Official Comment (b); § 34(3): uncertainty; § 45: option contracts concluded by actual performance; § 69: acceptance by silence; § 87(2): offers inducing reliance; § 90: promises inducing reliance; § 129: part performance and the Statute of Frauds; § 161: misrepresentation and nondisclosure; § 172: misrepresentation and fault; and § 208: unconscionability. Some courts will, however, try to enforce an agreement to negotiate in good faith: see Channel Home Centres v. Grossman, 792 F.2d. 291 (1986); and see generally, Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations" (1987) 87 Colum. L. Rev. 217, esp at 265-6. American courts have begun to enforce express promises to bargain in good faith, and perhaps as this practice becomes more common there will be increased pressure to imply such a promise when it is not express, thus making the duty to negotiate in good faith a general one: see Gergen, "Liability for Mistake in Contract Formation" (1990) 64 Southern Cal. L. Rev. 1, 31, n. 149. The trend in England, however, would appear to the contrary: see Courtney and Fairburn Ltd v. Tolaini Brothers (Hotels) Ltd [1975] 1 W.L.R. 297; Walford v. Miles [1992] 2 W.L.R. 174; cf. Brown, L., "The Contract to Negotiate: A Thing Writ in Water?" (1992) 1 J.B.L. 353; Cumberbatch, J., "In Freedom's Cause: The Contract to Negotiate" (1992) 12 Oxf. J.L.S. 586. The position in Australia looks slightly more promising: cf. Coal Cliff Collieries Pty. Ltd v. Sijehama Pty. Ltd (1991) 24 N.S.W.L.R. 1 (esp. per Kirby P.); Buckley, R., "Walford v Miles: False Certainty About Uncertainty—An Australian Perspective" (1993) 6 J.C.L. 58.
metaphorical colloquialisms as ‘playing fair’, or ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is in essence a principle of fair and open dealing.... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.11

Yet for all that, even in the United States, where the broad relevance of a generalised standard of good faith and fair dealing is now ‘widely conceded’ among contemporary contracts scholars,12 its gestation has been described as a ‘laborious’ one.13 Elsewhere, the subject has received varied attention. Throughout the British Commonwealth, the traditional stance

11 Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All E.R. 348, at 352 per Bingham L.J.


has been to deny, doubt, ignore or avoid it. A But in recent decades, it seems to have become increasingly difficult to persist in this stance. The major common-law world has witnessed in these times a steady stream of literature dealing with the apparent emergence of a conception of good faith and fair dealing in contract law. This has been a sustained analysis, to be sure, and it can fairly be anticipated that the movement will gain momentum into and throughout the nineties. There is today a discernible concentration of effort being dedicated to the subject. And yet, while there remains for the most part, a far from universal recognition of the immanence, relevance,


15 Reference may be made to the writer's bibliography. Some of the more important and influential pieces of writing have been:


significance or expedience of this "good-faith" trend,16 we also find an increasing absence of contemporary critical dissent.17 Good faith does not yet occupy centre stage. At best, [it] is accepted de facto, if not de jure, as a behavioural and legal baseline.18 The idea is certainly pervasive (if not to some persuasive).19


17 Notably in Canada (and owing, perhaps, to its geographical proximity to the United States), the Ontario Law Reform Commission made recommendations in favour of a legislative recognition of good faith in the form of § 205 of the Restatement (Second) of Contracts, as being applicable to all contracts: Report on Amendment of the Law of Contract (1987), 176. See also the Reform Commission's Report on Sale of Goods (1979), 169 et seq., where similar recommendations were made in relation to contracts for the sale of goods, modelled instead along the lines of § 1-103 of the Uniform Commercial Code (although containing a more expansive definition of good faith). With respect to whether the obligation of good faith should apply to contract negotiation and formation, however, and whilst acknowledging that such a principle can play an important role in precontractual dealings, the Commission was not convinced of the need to legislate such an obligation specifically (id, 174). Without suggesting that a general obligation would be redundant, it thought that the recommendations made in regard to legislative protection for precontractual reliance (id, 25 et seq.), existing remedies in tort for fraud and negligent misrepresentation would nevertheless provide adequate protection to victims of bad-faith conduct during the processes of contract negotiation and formation (id, 174). The Commission also observed that the relevant provisions in the European Civil Codes and the Uniform Commercial Code, as well as § 205 of the Restatement (Second) of Contracts, similarly limited the scope of good faith scrutiny to exclude contract negotiation and formation.


19 It is particularly noteworthy that in the recent N.S.W. Court of Appeal decision in Renard Constructions (ME) Pty. Ltd v. Minister for Public Works (1992) 26 N.S.W.L.R. 234, Priestley J.A. was prepared, in the course of interpreting a clause conferring a discretionary power in a building and engineering contract, to enter into a rather detailed discussion of "good faith" (in contract performance) (id, 263-8). In the course of that discussion, his Honour noted that there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.
Ours is an age of ‘legal nationalism’. Now is a time for Australia to seize control of its own legal destiny, albeit in the context of decidedly international legal trends. Australia is an emergent legal nation which has placed paramount importance on the calling to formulate and to apply legal solutions which are appropriate to meet its own ‘circumstances, needs and values’. Now with the freedom squarely to pursue their own

---


Additionally, the International Institute for the Unification of Private Law (UNIDROIT) and the Commission on European Contract Law are in the process of establishing Principles of International Commercial Contracts. In Chapter 1 of the 6th consolidated draft of November 1989 (UNIDROIT 1989 Study L. Doc. 40 Rev. 4), containing the general provisions, § 1.5, for example, provides that ‘the formation ... of a contract shall be in accordance with the principles of good faith and fair dealing’.

jurisprudential objectives, there comes a corresponding responsibility for
Australian law-making institutions openly to address and re-examine the
established rules and enquire into the quintessential values which underlie
them. After all, ‘the technical rules are but clues to the submerged
principles of the law’, and arguably it is these principles which articulate
(albeit sometimes imperfectly) the governing values of the broader
community. It is these prevailing values from which relevant legal doctrine
should be stated in the clearest of terms. Moreover, if it is principally to be
the courts which are to carry through this responsibility—and the recent
activism of the High Court of Australia would suggest this to be the case—they
should do so openly and not in secret: ‘A just decision is surely more
likely if the judge recognises a responsibility to be frank’.

The traditional reluctance to openly recognise a general legal
obligation to contract according to the dictates of a standard of good faith and

common law not made in its own juristic system’. See further, Wood, “Adjudication and
Community Values: Sir Anthony Mason’s Recommendations”, in Ellinghaus, Bradbrook and
Duggan, The Emergence of Australian Law (1989), 89, esp. at 94-5.

23 Australia abolished Privy Council appeals progressively between 1975 and 1986. See, Cook


cases, law embodies a degree of unarticulated normative wisdom’.

27 Cf., generally, Horrigan, B., “Taking the High Court’s Jurisprudence Seriously” (1990) 20
Q.L.S.J. 143.

28 The Hon. Sir Robin Cooke, President of the New Zealand Court of Appeal, “Fairness” (1989)
19 Victoria University of Wellington Law Review 421, at 421. Cf. also, The Hon. Sir Anthony
Mason, “Australian Contract Law” (1988) 1 J.C.L. 1, at 6: ‘It is ... all the more important that
courts express clearly in their decisions exactly what it is they are doing and why’; Wood,
“Adjudication and Community Values: Sir Anthony Mason’s Recommendations”, in Ellinghaus,
Bradbrook and Duggan, The Emergence of Australian Law (1989), 89, esp. at 92-4. Reiter, too,
highlights the dangers of ‘dressing decisions in disguise’: “Courts, Consideration and Common
Sense” (1977) 27 U. Tor. L.J. 439, 445-6; and Summers (1968), op. cit., 198, argues that not to
recognise the shift to good-faith standards would be ‘at the cost of fictionalizing existing legal
concepts and rules, thereby snarling up the law for future cases’. Of course, one would also do
well to mention in this connection Llewellyn’s famous admonition that ‘covert tools are never
fair dealing, and its concomitant lack of settled definition, is perhaps best understood when one considers the historical impediments to such an obligation becoming part of general contract jurisprudence. An understanding of the historical patterns in this context, too, is helpful to divine a better perspective for predicting future trends and tendencies. Accordingly, this chapter is principally concerned with tracing (compendiously) the conception of good faith through history until the present day. It is not intended to be an encyclopaedic account of the historical emergence of that conception in the law of contract, however; for owing to the broad historical sweep of this chapter the writer will be speaking in generalisations, and there may well be exceptions, qualifications, etc. to be made to what is said. The chapter's main purpose is, simply, to demonstrate broad and dominant themes or trends in the law of contract, with the view that this may, in turn, provide a backdrop against which a subsequent discussion of good faith and fair dealing in the particular context of contract formation can take place. It should readily be observed that the writer does not in this chapter generally distinguish between trends within and among the various common law jurisdictions falling under this study's scrutiny, although some specific differences in detail are highlighted along the way. Principally, there are two reasons for this. First (and as was recently recognised by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd v. Minister for Public Works*), the writing and legal developments of nineteenth-century America were sufficiently parallel with those of England (and hence Australia) of the same period (at least to the extent that each employed similar language and shared similar backgrounds) as to make them also

---

29 Generally, see Chapter Two, *infra*.

30 One might do well in this connection to recall the warning of Arthur Moxon, K.C., in his "*Sanctity of Contract*" (1945) 10 *Saskatchewan Bar. Rev.* 21, at 21:

> Generalizations about changes or movements in social relations over broad periods of time are always inaccurate and the longer the period chosen and the broader the view attempted to be taken, the greater the inaccuracy tends to become.

31 These are (in no particular order of importance): Australia, the United States, England, Canada and New Zealand.

relevant here. Second, and perhaps more saliently, the writer sees the principles and standards which infuse the law as being reflected (if not actually articulated) in one parallel manifestation or another, throughout the greater common-law world. As between Australia and the United States, for example, each are highly commercialised countries, with broadly comparable economic and social conditions, such that it is probable that the aims of the law in the respective jurisdictions are substantially similar. Particular attention, however, will be focused on distinctive Australian legal trends toward the conclusion of this chapter.

The reader will also observe that the discussion of the notion of good faith and fair dealing is often at a generalised level, and that the operation of these standards in the respective spheres of contract negotiation, formation, performance and enforcement is not at this stage distinguished. Although the writer will ultimately be concerned with the dictates of good faith and fair dealing in the context of contract formation alone, the blurring of boundaries in this chapter is deliberate. Whilst it is to be conceded that the standards of good faith and fair dealing are broadly relevant to all stages of the contractual and precontractual process, the limitation of space (among other things) necessitates that discussion be confined within manageable bounds. Subsequent chapters, therefore, are to focus merely on good faith and fair dealing in contract formation; although sight should never be lost of the fact that heightening standards of acceptable behaviour in that context

---


Of course, one should also note that the divergence between American and English law is pronounced because of the relative ease of modifying the common law in a country of multiple jurisdictions like the United States, where the degree of judicial conservatism generated by stare decisis is not so great: cf. Teeven, A History of the Anglo-American Common Law of Contract (1990), 217, 314, contrasting English resistance to good faith, unconscionability and strict liability, and the reasons therefor. Generally, see, also, Atiyah and Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions (1987), esp. at 118 et seq.

34 Cf., again, the observations of Priestley J.A. in Renard Constructions (ME) Pty. Ltd v. Minister for Public Works (1992) 26 N.S.W.L.R. 234, 268-9, which are instructive.
should be taken to be illustrative of a legal phenomenon perceived to be occurring at a more general level. This thesis, then, is only part of the research necessary to formulate and to present a comprehensive picture of the pervasiveness of a generalised principle of good faith and fair dealing in contemporary contract law (and probably beyond).

Whilst there may as yet be no such general good faith and fair dealing idea universally recognised and articulated in and by Australian law, there are indeed many individualised instances which arguably well illustrate certain exemplifications of it. The writer’s general (though to be qualified) bias in favour of an open recognition of good faith and fair dealing standards in our law is pervasive throughout. As Priestley J.A.’s judgment in the Renard Constructions case must indicate, the time has now come when “good faith and fair dealing” is squarely upon Australia’s legal agenda. Like Professor Lücke, this writer too would endorse the view that ‘good faith deserves to become one of the central values which informs and moulds our

---


law of contract. The precise jurisprudential role to be ascribed to that conception, however, is reserved for subsequent discussion.

1. **THE HISTORICAL EMERGENCE OF GOOD FAITH AND FAIR DEALING IN CONTRACT LAW**

Great history is written precisely when the historian’s vision of the past is illuminated by insights into the problems of the present.

Advances in this area of law have encountered an unusual kind of resistance which stems not from lack of recognition of the desirability of more elevated standards of good faith in contracting, but largely from the historical distinction between the ethical standards required at law and in equity. The English Court of Chancery was established because the common law courts administered law according to extremely low standards of moral values. Now that judges drawn from lay backgrounds have become as moral as those who wore ecclesiastical robes, the distinction has lost its significance.

---


38 Chapter Two, Section 4.


41 Newman, *op. cit.*, 553.
1.1. Good Faith Prior to the Nineteenth Century

The idea of good faith had promising beginnings, especially in the eighteenth century, when equity, substantive justice and natural law thrived. Chancery\(^{42}\) (now equity) was the principal channel through which good-faith jurisprudence first emerged in English law, deriving by way of 'prophylactic inoculation'\(^{43}\) many of its core principles from canon law.\(^{44}\) This process, Holdsworth argues,

\[42\text{ The Court of Chancery emerged as a distinct court in 1340. The relevant statute is 14 Ed III St 1 c 5. Chancery had its beginnings as a court exercising a limited jurisdiction under the common law. Cf. Sayles, G.O. (ed), Select Cases in the Court of King's Bench Under Edward III, Vol. 5 (S.S. Vol. 76, 1957), lxvii. During the fourteenth and fifteenth centuries, the Court provided a rich source of equitable ideas, which was a significant factor for the development of a conception of good faith: cf. Holdsworth, A History of English Law, Vol. 2, at 346. According to one commentator,}

\[\text{[t]he influences and machinery which shaped the rules applied in Chancery included antagonism to rigid common law rules, and ideas as to the function of conscience in determining the morally right and therefore equitable rule, which were borrowed from the canon lawyers.}

O'Connor, op. cit., 5-6.


\[44\text{ Henry Maine, Ancient Law, Sir Frederick Pollock (ed) (1930), 52. Since many of the early chancellors were trained in canon law (for most were churchmen, bishops or archbishops, and generally unacquainted with the common law: see Kerly, History of Equity (1890), 94 et seq., the ecclesiastical chancellors are reported to have contributed to equity 'many of the principles which lie deepest in its structure', the deepest one being good faith, 'because the jurisdiction of the Court itself was based on it': O'Connor, op. cit., 2.}


During this period, the canonists posited that the notion of good faith was a universal moral norm. Lest one breach a duty to God by failing or refusing to keep one's promise, it was necessary to act in an honest and reasonable manner toward others. See Powell, R., "Good Faith in Contracts" (1956) 9 C.L.P. 17, 21-2. About the twelfth century the ecclesiastical courts assumed that a failure or refusal to keep one's promise was a breach of duty to God, but later came to realise that such an indiscriminate enforcement of all promises was not practical. By
put into legal form the religious and moral ideas which ... coloured the economic thought of all the nations of Western Europe [and] contributed to enforce those high standards of good faith and fair dealing which are the very life of the trade.  

The notion of "conscience" became a convenient label to attach to a requirement of good faith, for it had long been associated with the idea of the Chancellor intervening in legal process, even to the extent of interfering with strict and inflexible legal rules (equity's "auxiliary" jurisdiction today). For present purposes, perhaps the most instructive explanation of the notion of "conscience" in early equity jurisprudence is Spence's:

developing the doctrine of causa they managed a reconciliation—a plaintiff had to prove a serious purpose in the promise made: id; Fifoot, C.H.S., *History and Source of the Common Law* (1949), 306. On the doctrine of causa, see Simpson (1975), *op. cit.*, 384-6. This seriousness in purpose seems to inform one possible aspect of the content of pre-contractual good faith: a duty to bargain with a serious intent or purpose. See Holmes, E., *op. cit.*, 402, n. 8. The later natural lawyers expressed the same idea in the terms that the natural law obligation in good faith arising from a promise was owed to God and man: see Suarez, *Introduction to Selections from Three Works of Francisco Suarez*, Scott, J. B. (ed.), (Carnegie Classics), 274.


46 See *Lord Nottingham's Chancery Cases*, Vol. 1., ed., Yale, D.E.C. (Seldon Society [S.S.], Vol. 73), xxxviii. On the notion of 'conscience' generally, see Doe, *Fundamental Authority in Late Medieval English Law* (1990), Chp. 6, "Conscience in the Common Law", 132 et seq., arguing that the appeal to conscience was not confined to chancery—that the common-law judge knew as much about conscience as the chancellor'.

47 By the fourteenth century, the common law courts had become extremely inflexible, especially in their application of rules. Reportedly, this weight of inflexibility produced a virtual submergence of equity and conscience, necessitating, about the time of Henry VII's rule, the emergence of an equitable jurisdiction ancillary to (although still administered within) the common law. Cf. O'Connor, *op. cit.*, 4.

By the time of Elizabeth I's rule, therefore, the court was conceived as being one 'of conscience, appointed to mitigate the rigour of proceedings in law': O'Connor, *id.* 5. Thus, where a petitioner suffered damage through the non-performance of a promise (i.e., by a breach of the canonist notion of good faith), Chancery was prepared to give him or her a remedy: Fifoot, *op. cit.*, 303.

Also, from the beginning of the fourteenth century, the local tribunals which chiefly administered the law merchant—the fair, staple and tolsey courts—were generally perceived as courts which dispensed common sense justice in accordance with wider notions of fairness and justice. This too attracted an increasing number of litigants away from the common law courts and their inflexible principles of justice, to a more 'glamorous' law merchant with its 'democratic traditions' and 'prompt and business-like procedure': see Hubert Hall in *Select Cases on the Law Merchant*, Vol. 3 (S.S. Vol. 49, 1932), xlix, 1. See also, Holdsworth, *A History of the Common Law*, Vol. 5, 103-4; Pryor, J.H., *Business Contracts of Medieval*
[A]s denoting a principle of judicial decision ... it seems to have embraced the obligations which resulted from a person being placed in any situation as regards another that gave to the one a right to expect, on the part of the other, the exercise of good faith towards him.\(^{48}\)

It is clear that this concept of conscience eventually came to be viewed as unified, and external to the individual conscience,\(^{49}\) and this reportedly


Throughout the evolution of the law merchant, the principle of good faith appears as the bastion of international commerce. As Bewes explains in his \textit{Romance of the Law Merchant}, ‘... [A]mong merchants of [sic] good faith [is] ... paramount.’ Human nature, the need for cooperation in trade, has ensured that merchants act with restraint in their mutual dealings. The risk of antagonizing a fellow merchant or losing a share of the market is a realistic reflection of business, whatever the commercial regime might comprise.

No doubt, the continuity of exchange among merchants is attributable to some extent to ‘... fundamental decency [in] ... the common man.’

Quoted by Patterson, D., \textit{Good Faith and Lender Liability} (1990), 32, at n. 59.}

\(^{48}\) Spence, \textit{Equitable Jurisdiction of the Court of Chancery} (1846-50), Vol. 1, 411. Some debate has attended Spence’s explanation of “conscience”, however. Professor Simpson, for example, while accepting that for a fifteenth-century ecclesiastic, sitting as a judge of conscience in a court of conscience, the notion of “conscience” included some principle of injurious reliance or good faith, he failed to agree that it closely resembled the Roman treatment of \textit{bona fides} under the Praetorian Code, in the sense that it embraced any situation which gave rise to an \textit{expectation} by one party of the exercise of good faith towards him by another: Simpson (1975), \textit{op. cit.}, 398. O’Connor, however, argues that Simpson’s objection is misplaced; it being based on a misapprehension of the meaning which \textit{bona fides} had for medieval canonists. O’Connor comments (\textit{op. cit.}, at 8):

It is certainly true that ‘conscience’, as applied in the Court of Chancery in the period in question, connoted the moral law as it applied to particular individuals, and that the late-medieval Chancellors were primarily concerned with the alleged wrongdoing of the respondent from the point of view of sin and its effect on the soul. But in the Middle Ages canon lawyers had no doubt whatever of the moral foundation of \textit{bona fides}, even if there is little in the Roman law texts themselves to suggest that Roman lawyers were avowedly concerned with ethical principle in their treatment of good faith. (Citations omitted.)

\(^{49}\) The conscience of a litigant would of course vary greatly in quality among individuals, no matter how diligent the Chancellor was in striving to purify the consciences of the King’s subjects. The Chancellor, accordingly, became regarded as the ‘keeper of the royal conscience’; and the “conscience” which was to guide decisions in Chancery was the ‘conscience of the
presaged a transition from a jurisprudence based on 'conscience' to one based on 'equity'.\textsuperscript{50} Under equity, the courts were directed to fixity in their rules and doctrines, and away from 'unstable impulse in judicial decision'.\textsuperscript{51} Lord Nottingham, for example, unequivocally stated his views on conscience in \textit{Cook v. Fountain}:\textsuperscript{52}

[W]ith such a conscience as is only \textit{naturalis et interna} this court has nothing to do; the conscience by which I am to proceed is merely \textit{civillis et politica}, and tied to certain measures.\textsuperscript{53}

The origin of Chancery, however, and the system of equity in which a requirement of good faith for a time flourished,\textsuperscript{54} perhaps remains the principal reason why many of the rules of the now administratively fused system of common law and equity reflect canonical ideas of \textit{bona fides}.\textsuperscript{55}

\textit{realm} rather than the individual conscience: O'Connor, \textit{op. cit.}, 8. But even as late as 1491, Simpson argues, the Chancellor still conceived himself as proceeding essentially on the same principle as a confessor: Simpson (1975), \textit{op. cit.}, 399.

\textsuperscript{50} O'Connor, \textit{op. cit.}, 8. Even as late as the early seventeenth century, however, the court was still primarily one of conscience; although there was an increasing perception by the new generation of lay-chancellors that their office was twofold (\textit{id}, 9):

The office of the Chancellor is to correct men's consciences for frauds, breaches of trusts, wrongs and oppressions of whatever nature soever they be, and to soften and mollify the extremity of the law.


\textsuperscript{51} O'Connor, \textit{op. cit.}, 9, citing Yale (ed), \textit{Lord Nottingham's Chancery Cases}, Vol. 2 (S.S. Vol 79, 1961-2), 7. Lord Nottingham's Chancellorship, beginning in 1673, was to prove decisive in the history of the development of the court. Eventually, equity was to become fixed with the acceptance of of the common-law views as to the binding force of precedents. Generally, see, Holdsworth, \textit{A History of English Law}, Vol. 6, 547. On this period of 'systemisation', see also Meagher, \textit{et al.}, \textit{op. cit.}, paras. 114-7; Atiyah, \textit{Rise and Fall}, \textit{op. cit.}, 388 et seq. To be sure, the chancellors had shifted from principles to precedents.

\textsuperscript{52} (1676) 36 E.R. 984, 486.

\textsuperscript{53} It was also Lord Nottingham who stated '... the Chancery mends no man's bargain' (\textit{Maynard v. Mosely} (1676) 3 Swanst. 651, at 655), it later becoming axiomatic that the courts had no general supervisory jurisdiction over contract formation: see \textit{Bridge v. Campbell Discount Co. Ltd} [1962] AC 600, at 626 \textit{per} Lord Radcliffe.


\textsuperscript{55} O'Connor, \textit{op. cit.}, 9-10.
Most saliently amidst this period of conceptual change, by the mid-
eighteenth century, contract was advancing as ‘one of the great organising
categories of liberal thought’.\(^{56}\) While equitable good faith had emerged by
this time, there was, comparatively speaking,\(^{57}\) no corresponding conception
of good faith at common law,\(^{58}\) despite Lord Mansfield’s famous attempts to
invigorate one in the latter part of the eighteenth century.\(^{59}\) The earlier

\(^{56}\) Cornish & Clark, op. cit., 200.

\(^{57}\) It would appear that the basic obligation of good faith arising from a promise or an
agreement (\textit{pacta sunt servanda}), which was enforced on grounds of conscience in the Court of
Chancery, also became the basis of the general remedy for breach of contract in common law—
of liability in the sixteenth-century common law action of assumpsit: see Simpson (1975), \textit{op.
cit.}, 278-9. But the common law courts could hardly be described as overtly concerned with
good faith and conscience in contract; for as O’Connor explains (\textit{id}, 18):

> The long and laborious process which culminated in \textit{Slade’s Case}
> ([1602] 4 Co. Rep. 92b; 76 E.R. 1074) and the confirmation of the action
> of assumpsit as the general contractual action was, perhaps, fuelled by
> less lofty considerations such as jurisdictional and professional
> rivalries. But it is surely true that the pressure on common law judges
> to develop a general contractual remedy must be attributed, to a
> considerable extent, to the inherent, reasonable force of the basic
> obligation of good faith—\textit{pacta sunt servanda}.

26 U.Tor.L.J. 1.

\textit{Cf.,} however, the efforts of the ‘Bereford Bench’ (coined after Bereford C.J.) during the reign of

\(^{59}\) His Lordship seems to have regarded the “good faith and conscience” administered in
Chancery as synonymous with natural justice, and he attempted to inject its substance into the
common law. A classic example of this is his Lordship’s decision in \textit{Moses v. MacFerlan} (1760)
2 Burr. 1005, 1008; 97 E.R. 676, 678 generally considered to be the progenitor of a generalised
concept of “unjust enrichment” (at least in the context of money had and received):

> In one word, the gist of this kind of action is, that the defendant, upon
> the circumstances of the case, is obliged by the ties of natural justice
> and equity to refund the money (\textit{id}, 1012; 681).

The decision was later to be criticised by Scrutton L.J. in \textit{Holt v. Markham} (1923) 1 K.B. 504, at
513, as amounting to ‘well-meaning sloppiness of thought’.

Another well-known example of Lord Mansfield’s attempted injection of natural justice’s
substance into the common law is apparent in his Lordship’s decision in \textit{Carter v. Boehm} (1766)
period of the development of contract law, from Slade’s Case in 1602 to the first half of the nineteenth century, was one in which common lawyers concerned themselves with technical questions about the nature of promises

3 Burr. 1905; 97 E.R. 1162, where it was held that a contracting party ought to disclose unusual facts known to him, but not known to the other party to the transaction. His Lordship’s principle was based on ‘good faith’ and purported to be one applicable to all transactions:

The governing principle is applicable to all contracts and dealings.
Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary.

Id, 3 Burr., at 1909-10; 97 E.R., at 1164. Such a decision was, of course, later to become confined to the realm of insurance law, and was altered to such an extent that it became a method by which an insurer could evade a liability even where he could have himself discovered the facts without difficulty: see Hasson, “The Doctrine of Utterima Fides in Insurance Law—A Critical Evaluation” (1969) 32 Mod. L. Rev. 615. See also the discussion by Holmes, op. cit., 426 et seq. ‘Some relics of this stillborn principle’, Atiyah comments, ‘are even today to be found in the law, although the subsequent history of one of these relics, at least, [referring to Mansfield’s decision in Carter v. Boehm] illustrates how principles of good faith can be perverted to support the most inequitable decisions.’ (Rise and Fall, op. cit., 168).

Yet another famous example is to be found in Lord Mansfield’s drawing upon the theory of quasi-contract in an attempt to transform consideration into a form of moral obligation: see Haukes v. Saunders (1782) 1 Cowper 289; 98 E.R. 1091. Generally, see Holdsworth, A History of English Law, Vol. 8, 34 et seq.; Atiyah, Rise and Fall, op. cit., 162 et seq. His Lordship’s idea that all promises seriously made should be deemed legally binding was, of course, later rejected: Eastwood v. Kenyon (1840) 11 Ad. & E. 438; 113 Eng. Rep. 482 is customarily cited to this effect. See also, Lord Mansfield in Jessops v. Brooke (1778) 2 Cowp. 793; 98 E.R. 1365; Bexwell v Christie (1797) 1 Cowp. 395; 98 E.R. 1150 (bidding fraud).

Lord Mansfield’s judicial philosophy was thus clear: ‘as the usages of society alter, the law must adapt itself to the various situations of mankind’: Barwell v. Brooks (1784) 3 Doug. 371, at 373; 99 E.R. 702, at 703. See generally, Shientag, “Lord Mansfield Revisited—A Modern Assessment” (1941) 10 Fordham L. Rev. 345. Informed of the customs and usages of his time, Lord Mansfield is reported to be a man who often consulted with commercial protagonists, both outside the court-room and as special jurors, about the manner in which their business was conducted: Mason and Gageler, “The Contract”, in Finn (ed), Essays on Contract (1987), Chap. 1, 34. In his Lordship’s court, ‘arguments based upon good faith were admitted as forensic weapons’: Lücke, op. cit., 156, citing Fifoot, Lord Mansfield (1936), 82, et seq.

Good faith in contract law was kept alive under the patronage of Lord Mansfield (and others), at least until the turn of the nineteenth century. As late as 1792, for example, Lord Kenyon stated in Mellish v. Motteux (1792) Peake 156, at 157; 170 E.R. 113, at 113-4:

In contracts of all kinds, it is of the highest importance that the courts of law should compel the observance of honesty and good faith.

However, this represented the high-water mark of good faith at common law, and Lord Mansfield and his followers were soon to find themselves swimming against a strongly receding tide.
and the circumstances in which they should be enforced. As O’Connor comments, ‘at no stage in that development was there a period in which the English courts of common law might have elaborated a principle of good faith applicable to contracts generally’.60

The early commitment to a technical and schematic doctrine ensured that adherence to good faith (if any) would be in the forms of rules which were themselves technical and schematic. Thus the courts which embraced a theory of contract which emphasized free consent to the obligations assumed developed, not surprisingly, technical rules on misrepresentation, duress, undue influence or mistake which vitiated true consent.61

Even in equity there was, toward the end of the eighteenth century, a reaction against, inter alia, the ‘individualized justice’ associated with this period of equity and natural law.62 Judicial discretion was seen by many as being extended too far, especially by judges giving legal force to their purely moral ideas.63 The ensuing reaction cast a dark shadow over the discretionary jurisdiction which had become so synonymous with Chancery. This reaction, moreover, was to accelerate progressively into the nineteenth century, which saw the emergence of a new individualistic order in law and society generally. The courts for the most part came to favour and to foster economic liberalism, and this rapidly extinguished the essentially paternalistic conception of a generalized duty of good faith.64

60 O’Connor, op. cit., 19.

61 Ibid.

62 On the perceived defects of Chancery, see generally, Kerly, op.cit, Chp. 8; Holdsworth, A History of English Law, Vol. 2, 334 et seq.

63 Holmes, E., op. cit., 384. Such practices prompted the famous remark by Seldon in his Table Talk: ‘Equity is a rogush thing. ’Tis all one as if they should make the standard for the measure a Chancellor’s foot’: Spence, The Equitable Jurisdiction of the Court of Chancery, Vol. 1 (1846), 414 n.a.

64 Atiyah, Rise and Fall, op. cit., 168. English law was to witness a marked movement away from the Mansfieldian tradition. American law, however, never went quite so far, and there continued to be the occasional judicial pronouncements by American courts to evidence some continuity in the legal tradition. See Kessler and Fine, “Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study” (1964) 77 Harv. L. Rev. 401, at 408, n. 26.
1.2. The Nineteenth Century and the Development of the 'Pure' Theory of Contract

The outstanding feature of the nineteenth century was the development, especially during the later part of that period, of the "pure" or "classical" theory of contract. This was contract's apogee. A corollary of industrialisation, it is well documented how contract theory became characterised by notions of volition, self-reliance, freedom of contract, laissez-faire, judicial non-intervention, bargained-for-exchange, and the like. This development took place in the context of the consensus or will theory, which regarded contract as involving self-assumed obligations, and, before the end of the century, as also involving the notion of unfettered freedom in the assumption of contractual obligations. Furthermore, and as

65 In his excellent article, Oliver MacDonagh argues that the mid-Victorian era can be measured as a period of 'legal transformation'—in particular, as a 'burgeoning of contract': "Pre-transformations: Victorian Britain", Chp. 7 in Kamenka and Tay (eds), Law and Social Control (1980), 117-32.

66 The industrial revolution is generally seen as the 'great dividing line' in English economic development between medieval and modern times. Much of it actually took place in the eighteenth century, accelerating from about the middle of that century. The most profound effect of this process, of course, was totally to transform Britain from a rural to an urban society, and hence from an agricultural to a manufacturing economy. Contracts, therefore, became an essential feature of the new order, providing the crucial mechanism for exchange in a society where individuals had been drawn together, with the concomitant specialisation of labour, which manifestly increased the number of transactions taking place as citizens found that it became increasingly 'necessary' to engage in dealings and exchange with others. The expansion of the transport system, too, especially the railways, and the spread of vastly populating towns and cities involved a complex set of arrangements between suppliers of money, materials and labour. Contracts very suddenly became a crucial institution in society for the private ordering of its citizens, and as such, they ought not to have been easily broken. Generally, see Plucknett, A Concise History of English Law (5th ed., 1956), Chp. 8.


68 Perhaps the most emphatic statement to this effect is by Sir George Jessel in Printing and Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462, at 465:

... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

21
a necessary modification of the literal will theory, central to the pure theory of contract was the thesis that the whole of contract doctrine was formal and abstract, external and objective—that it had nothing to do with the actual

---


69 As Andrew Kull explains:

If classical contract law tried to protect the voluntary character of contractual obligations, it placed at least as high a value on the stability of contract-based expectations. This meant that it necessarily struck a balance between two important but inconsistent objectives. Perfect autonomy might demand that each obligation reflect a purely voluntary undertaking, but practical necessity normally requires that we be able to take a person at his word, without stopping to inquire whether he knows what he is doing. Classical doctrine thus incorporates a subjective theory where it can, and an objective theory where it must.


state of the parties’ minds. All of these associated conceptions and notions might aptly be described as ‘sycopant[s] of commerce’.

This development also demonstrated, on a grand scale, an attempt by the representatives of the new commercial and industrial order to

---


once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground (*ibid*, 691).


73 Cf. Teeven, op. cit., 218.

74 Greig and Davis, *The Law of Contract* (1987), 22-3, comment that it was Jeremy Bentham (and his positivist followers) who set the tenor of the new age. It was he who vehemently attacked the law which he saw as having become ‘ossified’ in protecting the interests of those with status in the eighteenth century. Bentham was, of course, a well-known utilitarian of the time, the ‘principle of utility’ being that

which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question .... By utility is meant that property in any object, whereby it tends to produce benefit, advantage, good, or happiness, ... or ... to prevent the happening of mischief, pain, evil, or unhappiness to the party whose general interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

rationalise the whole development of the law prior to 1800 in terms ‘that satisfied the morality of a new age’. Cohen accordingly writes:

Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that government is best which governs least. This in turn is connected with the classic economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own selfish gain.75

The proponents of this individualistic order—the legal positivists—therefore opposed ‘anything which shook the obligation of contracts, or, what at the bottom was the same thing, limited the contracting freedom of individuals’.76 This, then, appears to be a period marked by a general disdain for legal principles that contained broadly conceived ethical components and an ‘almost frantic quest for legal certainty’.77 The common lawyers ‘retreated to the familiar territory of strict precedent, concrete categories, precise rules,

75 Cohen, “The Basis of Contract” (1933) 46 Harv. L. Rev. 553, at 558. From a utilitarian perspective, freedom to contract maximised the welfare of the parties and therefore the good of society as a whole. From a libertarian perspective, it accorded to individuals a sphere of influence in which they could act freely.

76 Dicey, A.V., Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century (2nd ed., 1914, rep. 1981), 151. Stated in its extreme form the positivist idea may be described thus:

Justice is an irrational idea .... that only one of two orders is ‘just’ cannot be established by rational cognition. Such cognition can grasp only a positive order .... It presents the law as it is, without defending it by calling it just, or condemning it to call it unjust.


Such an approach has been criticised as ‘mechanical jurisprudence’: see Pound, “Mechanical Jurisprudence” (1908) 8 Colum. L. Rev. 605.

77 Lücke, op. cit., 157.
literalist interpretation[78] and conservative legalism in which good faith cannot flourish.' 79 As Professor Lücke puts it:

In the inescapable and perennial search, common to all legal systems, for the right balance between fairness and justice on the one hand, and certainty and predictability on the other, the scales tipped strongly against fairness and in favour of predictability. 80

In addition to the demands created by the ever expanding scale of commercial activity following the industrial revolution, there was a dramatic change in theorising about contract generally. Professor Simpson thus observes:

When the late eighteenth and early nineteenth-century writers on contract set about the task of systematic exposition of the abstract principles of contract law they were engaged upon an enterprise which was new to the common law (for reasons essentially connected with the history of legal education) but old to the civilian tradition; they were trying to do what the civilians, the canonists and the natural lawyers had been doing for centuries. Hence for plagiaristic purposes they turned, as Bracton had done six centuries earlier, and St Germain three, to the written reason of the Romanist tradition as a source of analysis, categories, and organising conceptions in which the local common law could be presented and its lacunae filled with speculative and, hopefully, influential discussion. 81

A similar process, of course, was contemporaneously evident in the United States. Law was coming to be seen as a science of pure, absolute and abstract principles. 82 It was the American legal pioneer, Christopher

---

78 For such orthodox approaches see Lord Wesleydale in Grey v. Pearson (1857) 6 H.L.C. 61, at 106; 10 E.R. 1216, at 1234; see also, Lord Halsbury L.C. in Leader v. Duffey (1888) 13 A.C. 294, at 301; Norton on Deeds (2nd ed., 1928), 63 et seq.

79 Lücke, op. cit, 157.

80 Ibid.

81 Simpson, “Innovation in Nineteenth Century Contract Law” (1975) 91 L.Q.R. 247. at 254-5. Particularly influential in the theoretical framework was Pothier’s Treatise on the Law of Obligations, originally published in 1761, with the first English translation appearing in 1806.

82 Such was the essence of the so-called rise of legal positivism. Principles that tasted vaguely of ‘natural rights’ were attacked as lacking ‘scientific’ precision and as evidencing
Columbus Langdell, who set about such a systematic task when he published his case book on contracts in 1871. By discarding what he saw as the vast majority of useless case law, he critically selected those cases that appeared to embody the basic doctrines of the common law. By process of induction, he sifted from these the fundamental principles of contract law, supposedly producing 'a rational, harmonious system'.

1.2.1. Defects in the Pure Theory of Contract Exposed

The classical theorists took a very narrow view of social duty when formulating their theories. Clearly informed by popular attitudes of the

'well-meaning sloppiness of thought'. It was Oliver Wendell Holmes Jr. who attacked those 'who think it advantageous to get as much ethics into the law as they can': “The Path of the Law” (1897) 10 Harv. L. Rev. 457, 462. The fact was, the late nineteenth century saw a number of academic disciplines endeavouring to gain a greater degree of legitimacy by adopting the rhetoric and appurtenances of scientific discourse. This seems to have been fuelled particularly by medical advances, but also by technology and communications. The writer acknowledges and thanks Shayleen Thompson of the History Department, R.S.S.S., of The Australian National University, for pointing this out, and for making other useful comments on an earlier draft of this chapter.

83 Langdell, A Selection of Cases in the Law of Contracts (1871). On Langdell's contributions generally, see Simpson (1987), op. cit., 303-4, 318. It is interesting to note that during the same period in Germany, Jhering was criticising conceptualistic and systematic ways of thinking. In his view rules could be understood only in light of their purpose and the interests they were designed to protect. See Horne, et al., An Introduction to German Private and Commercial Law, transl. by Tony Weir (1982), 11.


86 Hence we can find such 'brutal' statements as that of Wills J. in Allen v. Flood [1898] A.C. 1, at 46:

any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right.

Yet another famous (though much later) statement to similar effect is Lord Reid's assertion in White and Carter (Councils) Ltd v. McGregor [1962] A.C. 413, at 430, that there is no obligation to perform a contract in a reasonable way:

It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that

26
times,\textsuperscript{87} and deaf to Solomon's biblical exhortation in Ecclesiastes 9:11,\textsuperscript{88} no-one was his brother's keeper, the race went to the swift, and the devil took the hindmost.\textsuperscript{89} Policy and fairness were not considered in the interest of generality.

But such thinking was eventually to limit the conceptual realm of contract. It was the apparent aim of those who were later to design and to execute Langdell's conceptual framework for the pure theory of contract\textsuperscript{90} to promote certainty and predictability in contract litigation. Although the objective theory was neat, simplifying factual inquiry by looking to external conduct alone, it for the most part 'ignored what the parties really wanted and erected pure doctrinal cathedrals purged of social facts and duties.'\textsuperscript{91} Put simply, the classical theorists failed to place any restraints, short of warranty, fraud,\textsuperscript{92} or a limited number of narrowly circumscribed equitable doctrines,\textsuperscript{93} on parties in the formation or performance of their contracts.\textsuperscript{94} Thus, whilst

\begin{itemize}
\item a court will not support an attempt to enforce them in a unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to allow a party to enforce his full rights under a contract.
\end{itemize}

\textsuperscript{87} Sympathetic to freedom of contract, caveat emptor, judicial non-intervention, and the like.

\textsuperscript{88} 'T]he race is not to the swift, nor the battle to the strong'.

\textsuperscript{89} Gilmore, \textit{The Death of Contract} (1974), 95.

\textsuperscript{90} For example, Oliver W. Holmes Jr., \textit{op. cit.}, and Samuel Williston in his treatise, \textit{The Law of Contracts} (the first edition of which was published in 1920).

\textsuperscript{91} Holmes, E., \textit{op. cit.}, 385.

\textsuperscript{92} And this was narrowly circumscribed by the common law: see \textit{Derry v. Peek} (1889) 14 A.C. 337.

\textsuperscript{93} See Section 1.2.2., \textit{infra}.

\textsuperscript{94} Hence, for example, we find statements such as that of Oliver Wendell Holmes Jr., attacking the moral basis of the duty to perform a contract—that a party had a "right" to breach his contract so long as damages were paid:

\begin{quote}
The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else... If you commit a contract, you are liable to pay a compensatory sum unless the promised event come to pass and that is all the difference. But such a
\end{quote}

27
contract law had surely facilitated social and commercial interaction, little attention was given to the standards of conduct to be expected of parties engaged in that interaction.\(^5\) In particular, contract’s doctrines remained for the most part immune to those considerations of care and of responsibility to or for others that so characterised emerging tort doctrine.\(^6\)

But to the nineteenth century lawyer, the orthodox ideologies were both compatible with good faith and fair dealing in commercial intercourse and morally correct, at least as good faith was conceived by them.\(^7\) *Caveat emptor*,\(^8\) for example, was seen as a ‘pragmatic necessity’;\(^9\) the law was clearly resolute to promote commercial activity\(^10\) and to protect the fruits of mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

“The Path of Law” (1897) 10 Harv. L. Rev. 457, at 462.

For a discussion of this theory see Atiyah, *Essays on Contract* (1986), 57 et seq. Holmes’s ‘bad man’ theory destroyed any idea, at least in the area of contract performance, of good faith, fair dealing and cooperation in classical contract law. Even so, Professor Fried has recently argued the moral basis of contracts: *Contract as Promise* (1981), 17, 41.


\(^6\) *Id.*, 77. Tort’s recognition of ‘neighbourhood’-like responsibilities, of course, was not fully consummated until Lord Atkin’s famous judgment in *Donoghue v. Stevenson* in 1932; [1932] AC. 562, 580.

\(^7\) Cf. Atiyah, P., *An Introduction to the Law of Contract* (4th ed., 1989), 9: ‘It’s would ... be wrong to conclude that the judges of [the classical] period were uninterested in justice: they thought that it was just to enforce contractual duties strictly according to the letter’.

\(^8\) This doctrine has been traced back to seventeenth-century England. For a thorough discussion of the history of *caveat emptor*, see Hamilton, “The Ancient Maxim Caveat Emptor” (1931) 40 Yale L.J. 1133 (note, esp. at 1186: jurisprudence has recognised a close relationship between imposing *caveat emptor* and the development of individualism in English society).

\(^9\) The bargaining process on a “free market” would become tedious and unstable if each bargainer had to tell the other all his reasons for the price he asks or bids: Patterson, E.W., *Essentials of Insurance Law* (2nd ed., 1957), 447.

\(^10\) It was Pound’s phrase that ‘Wealth, in a commercial age, is made up largely of promises.’ *Introduction to the Philosophy of Law* (reprinted New Haven, 1961), 236. It is for this reason that the common law of contract has been so largely associated with the development of commerce. Indeed, it was Anson who referred to contract as ‘the child of commerce’: *Anson’s Law of Contract* (26th ed., 1984), 1.
sophisticated business persons which they had acquired through industry and skill. Superior knowledge and power were advantages which could be exploited almost with impunity. For as Chancellor Kent so famously explained, the law ought not extend to the 'romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information'. In the shadow of Adam Smith's guiding philosophy, there seemed to exist some deep faith in the justice of an order of wealth and power established through exchange relations—that free competition secured community justice among individuals serving their own self-interest in developing society's resources. It was genuinely believed, therefore, that the market order would establish 'equality in place of social hierarchy and reciprocity instead of exploitation'.

In seeking to achieve these ends, contract law broadly insisted that economic relations would not be enforceable unless they comprised an exchange of values—that there should be "valid", albeit nominal, consideration to support a contractual promise. According to the neoclassical economic point of view, by ensuring that each party gave up something of value and received something chosen in return, the law sought to reduce, if not to eliminate, the possibility of domination and exploitation.

But the faith in this order was soon lost. Social excesses were rise—disparity of wealth and opportunity; growth of monopolies; abuse of marketing strategies; wasteful allocation of scarce resources; the list goes on.

103 Cf. Teeven, op. cit., 295.
105 For a discussion of neoclassical economic theories of exploitation, see Chapter Four, Section 2.2.2.1.
106 Ibid.
As a direct counterpart of free enterprise capitalism,\textsuperscript{107} freedom of contract became a means for courts and lawyers to denounce official restraint on private ordering and to promote \textit{laissez-faire}.\textsuperscript{108} Freedom of contract, rather than ensuring a competitive market order, instead provided a ‘cloak under which those with power in the market place were able to legislate in a substantially authoritarian manner’.\textsuperscript{109} With the classical contract ‘myth’\textsuperscript{110} to assist them, sophisticated business persons could impose their terms with seeming impunity on those unequal to the task, usually through impersonal, mass standardised contracts. Those with strength in the market were free to enjoy the power which they had acquired by their routine domination of others through contractual arrangements. The model upon which much of contract theory was built—the ‘paradigm’ contract (a carefully negotiated, executory agreement between parties of relatively equal


\textsuperscript{108} The law, however, did recognise the social importance of assuring access to the market for necessities (although the definition of necessities did change and expand somewhat), and this had some limiting effect, at least for one party concerned, on the freedom of contract. Early on, carriers, farriers and innkeepers were obliged to deal with all comers. For the other party, of course, such ‘compulsory’ contracts indeed promoted the freedom of the shipper, rider and traveller to enter into contracts that were necessitous to him: see Holmes, E., \textit{op. cit.}, 386, n. 15. For a discussion of compulsion and restraint in relation to classical contract law, see Friedman, W., \textit{Law in a Changing Society} (1959), 92-4; Patterson, “Compulsory Contracts in the Crystal Ball” (1943) 43 Colum. L. Rev. 731. Arguably such compulsion exists even more so today: see Atiyah, An Introduction to the Law of Contract (1989), 25-7. It should also be appreciated that even under classical contract law, freedom of contract was not an unbridled licence for \textit{laissez-faire}. Atiyah, \textit{Rise and Fall} (1979) tells us of equitable restraints, such as duress, undue influence and unconscionability (148-9, 476-9), legislative restriction (335 \textit{et seq}), and implied terms (464 \textit{et seq}), all of which had the effect of mitigating the effects of the classical theory. Exclusion clauses were also interpreted contra proferentum, and ‘public policy’ enabled ‘slavery’-type contracts to be set aside: Coote (1989) 1 J.C.L. 181, at 187, citing Horwood v. Miller’s Timber and Trading Co. [1917] 3 K.B. 305; see also Reiter, “The Control of Contract Power” (1981) 1 Oxf. J.L.S. 347, 353 \textit{et seq}. See also the historical caveat given in the text above at Section 1.2.2.


\textsuperscript{110} Holmes, E., \textit{op. cit.}, 387. Professor Childres submits that freedom of contract ‘is a myth, not entirely abandoned verbally, but supplanted \textit{sub silento} by the policy of supporting and promoting good faith conduct according to reasonable standards. The way the courts too often defend their decisions obscures this fact’: "Conditions in the Law of Contracts" (1970) 45 N.Y.U.L. Rev. 33, at 34.
bargaining power, each mindful of their own self-interest and free to choose whether and on what terms to enter into contractual relations)—no longer represented what was actually occurring in the real social-cum-commercial world.\textsuperscript{111} The process of entering into a contract, especially where a contract of “adhesion” was involved (that is, one tendered on a “take-it-or-leave-it” basis), was no longer one of haggling or cooperative process, but rather one of ‘fly to flypaper’.\textsuperscript{112} This in turn increasingly gave rise to serious questions regarding the reality of the assumption of equal knowledge, voluntary choice, and genuine assent in the contracting process.\textsuperscript{113} The measure of equality was perfunctory.\textsuperscript{114}

\begin{flushleft}
\textsuperscript{111} A wit once described classical contract law as comprising a system of rules "based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement.... [T]he last contract fitting this model was signed in 1879": Gordon, J. D., III, "How Not to Succeed in Law School" (1991) 100 Yale L.J. 1679, 1696.
\end{flushleft}

\begin{flushleft}
\end{flushleft}

\begin{flushleft}
\textsuperscript{113} The legitimating image of classical nineteenth century contract law was the ideal of free competition as the consequence of wholly voluntary interactions among many private persons, all of whom were in their nature free and equal to one another. From only one point of view was this true: the practical meaning of the market system was that people conceived of as interchangeable productive units (“equality”) had unfettered mobility (“freedom”) in the market. From another point of view, however, it ignored both the practical limitations on market freedom and equality arising from class position or unequal distribution of wealth, and other meanings of freedom and equality having to do with the realisation of human spirit and potential through work and community. The legitimisation of the free market was achieved by seizing upon a narrow economic notion of freedom and equality, and infusing it in the public mind with the genuine meaning": Gabel and Feinman, \textit{op. cit.}, at 176.
\end{flushleft}

\begin{flushleft}
\textsuperscript{114} MacDonagh, for example, describes the doctrinaires’ concepts as ‘empty abstractions’:
\end{flushleft}

\begin{quote}
Only if they were quite blind to ordinary life about them could they have believed that society existed, or ever might exist, upon the basis of private contractual relationships, or that such relationships were necessarily free in anything beyond the most formal sense. There were a hundred ‘contractual’ activities in contemporary society in which the assumption that the parties were equal or nearly equal in knowledge and bargaining power was absurd.
\end{quote}

MacDonagh, O., “Pre-transformations: Victorian Britain”, Chp. 7 in Kamenka and Tay (es), \textit{Law and Social Control} (1980), 121.
What bound the wise man would also bind the fool. What was good for the individual person was good for the railway company or the international banking corporation.\footnote{Baker, “From Sanctity of Contract to Reasonable Expectations?” (1979) Current Legal Problems 17, at 18-9.}

Particular idiosyncrasies or specificities of the individual were thus, for the most part, rendered legally irrelevant considerations. The legitimate notion of liberty of economic activity was transforming contract theory into an unmitigated legal version of the Darwinian notion of ‘survival of the fittest’.\footnote{Herbert Spencer, a great ‘apostle’ of freedom of contract in the late nineteenth century, linked his beliefs in freedom of contract with Darwin’s new theory of natural selection (\textit{On the Origin of Species}, 1859). Competition, therefore, became justifiable on ‘pseudo-scientific’ grounds. See Atiyah, \textit{Rise and Fall}, 285-6; Ruse, M., “The Significance of Evolution”, Chp. 44 in P. Singer (ed), \textit{A Companion to Ethics} (1991), 500-10, esp. at 500-2 (‘Social Darwinism’). Many spoke out for the cause: see Sumner, W. G., in A. Kelle (ed), \textit{The Challenge of Facts and Other Essays} (1914), 293 (cited id, 501):}

A former system of market exchanges based on freedom of equal contracting parties was replaced by a neo feudal corporate system of relations based on superiors and inferiors.... At least in a feudal state, the overlord had the obligation to provide protection.\footnote{Let it be understood that we cannot go outside of this alternative: liberty, inequality, survival of the fittest; not-liberty, equality, survival of the unfittest. The former carries society forward and favors all its best members; the latter carries society downwards and favors all its worst members.}

The parallel between neoclassical economics and classical contract doctrine existed only in terms of the errors they shared.

\footnote{Op. cit., 291.}

\footnote{This prompted Teeven subsequently to negate Henry Maine’s observation, commenting that the post 1875 period suggested a ‘veering back to status’: \textit{id}, 295. (This expression, however, would appear to be attributable to Isaacs, “The Standardizing of Contracts” (1936) 27 Yale L.J. 34, 39-40.) It was, of course, Sir Henry Maine who declared that ‘the movement of the progressive societies has hitherto been a movement from Status to Contract’: \textit{Ancient Law} (1861), 170.}
Specifically, both were thought to assume important background equalities that in fact were absent, so that the theoretical errors of economics became the practical errors of abstract contract law.\textsuperscript{119}

There was, therefore, an increasing divergence between the theory and the practice of contract formation.\textsuperscript{120} "[T]here was only freedom of contract for the strong."\textsuperscript{121} Contract was becoming a decidedly ‘one-sided privilege’.\textsuperscript{122} The courts, legislatures and legal scholars were thus left with the task of developing techniques for coping with the flagrant inequities stemming from this increasingly marked divergence.

1.2.2. An Historical Caveat

It is commonly asserted that the nineteenth century saw the virtual disappearance of equity as a basis for ameliorating the position of a contracting party,\textsuperscript{123} with that jurisdiction ceasing almost entirely to be the guardian of principles of conscience.\textsuperscript{124} One should, however, forcefully eschew the proposition that notions of good faith and fair dealing left the law altogether. As Professor Lücke reminds us, at no stage did they completely


\textsuperscript{120} When theory and practice conflict, "tension is produced by the contrary pulls of dogmatic prescriptions and the inherent requirements of individual cases": Perillo, J., "Restitution in a Contractual Context" (1973) 73 Colum. L. Rev. 1208, 1223, quoting Von Mehren & Trautman, The Law of Multistate Problems (1965), 78.

While in 1776 Adam Smith, in his Wealth of Nations, identified economic man's 'natural propensity to truck, barter and exchange', and in so engaging an 'invisible hand' converted individual acquisitiveness into a universal good, contemporary novels of the golden age of classical contract (Dickens's Bleak House, first published in 1853, and his Hard Times, first published 1854, for example) demonstrated that Smith's severed invisible hand often suffered from more than a negligible lack of dexterity.

\textsuperscript{121} Teeven, op. cit., 291.

\textsuperscript{122} Priest, G., "Invention of Enterprise Liability" (1985) 14 Jo. Leg. Stud. 461, at 493.


\textsuperscript{124} Id, 25-6.
disappear. They became relevant, in particular, to a developing area of law relating to contracts that involved fiduciary obligations, and in addition found refuge in the category of contracts _uberrimae fidei_. Hence, one must be careful not to over-stress the proposition that the law underwent a greater transformation than in reality it did. There was, reportedly, a sharp contrast between Victorian business morality and Victorian personal morality. Whilst _caveat emptor_ and _laissez-faire_ may have prevailed in

---

125 Lücke, _op. cit._, 158-9. Of special note is the preface to the fourth edition of Pollock, _Principles of Contract_ (1888), at 9, where Sir Frederick described the premises of contract thus:

> The law of Contract may be described as the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the _expectation of good faith_ which has grown up in the mutual dealings of men of average right-mindedness.... He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he is so expressed himself as to entitle the other party to rely on his acting in a certain way. (Emphasis added)


126 Finn, _Fiduciary Obligations_ (1977), 158-70; Devlin, _Enforcement of Morals_ (1965), 47 _et seq._


128 Professor Simpson (1987), _op. cit._, 203 _et seq._, criticises Professor Horwitz’s thesis, _op. cit._, for this reason and praises Professor Atiyah (Rise and Fall, _op. cit._) for avoiding it (id, 328-33).
the commercial sphere, in personal relationships, particularly those of a more intimate and confidential character, the rules of equity reflected a totally different set of moral principles. As Professor Atiyah observes, ‘[h]ere the stress was on the high morality of men of honour, men of integrity, and the strictest codes of conduct prevailed’. Continuing, he states:

All these cases, of course depended on the existence of some special relationship of trust or confidence, but by mid-century Courts of Equity were beginning to re-establish their belief in good faith and fair dealing in contracts in a more general way.  

What is more, while the common law supported a severely individualistic view of freedom and sanctity of contract, equity for a time built up a protective jurisdiction of conscience as a refuge for those unfitted to a world of hard bargaining, or misled during their experience of it.

This was probably possible owing to Lord Hardwicke’s embracing conception of “equitable” or “constructive” fraud in Chesterfield v. Janssen, which comprised actual fraud, fraud apparent from the senseless nature of the bargain, fraud from the condition of the parties, fraud by imposition on non-parties, and fraud in catching bargains with expectant heirs. All this was anathema to the common law; yet through it, concepts of fairness were ‘smuggled’ into contract law, even when classical contract


130 Atiyah, Rise and Fall, op. cit., 477.

131 Ibid. He cites the case of Piggott v. Stratton (1859) 1 De G.F. & J. 33; 45 E.R. 271 as a ‘striking example’ of this.


133 (1751) 2 Ves. Sen. 125, at 155-7.
ideology seemed most secure. Despite the Judicature's Acts' directive to defer to the supplemental equitable grounds for relief, however, the post-fusion period, and the "common" system, were to witness a resolution of the conflict of respective ideologies (as between equity and the common law) clearly in the favour of the common law. One reason why *caveat emptor* and *laissez-faire* continued to flourish for a good while, despite the fact that fairness of contractual exchange was increasingly coming under the scrutiny of equity, lay partly in the fact that the 1870s saw the introduction of new textbooks which did not adequately reflect the return to the common law's earlier more moralistic ideals, and partly in the fact that the post-fusion period saw more common-lawyer judges in the influential courts than those who had been 'Chancery men', and hence 'common law ideology had a real chance to extend its domain'.

1.3. The Twentieth Century

A great problem of contemporary life is how to control the power of economic interests which ignore the harmful effects of their applied science and technology. What was fair in the nineteenth century often seems to modern eyes unfair.

The twentieth century, and modern life, has witnessed marked increases in market mobility, social complexity and division of wealth,

---


135 1873-5.


139 Ralph Nader, *Unsafe at Any Speed* (1965), xcii.

knowledge, skill and labour. Writing in 1907, E. A. Ross exclaimed: 'Under our present manner of living, how many of my vital interests must I intrust to others!'\textsuperscript{141}

Nowadays the water main is my well, the trolley my carriage, the banker’s safe my old stocking, the policeman’s billy my fist. My own eyes and nose and judgment defer to the inspector of food, or drugs, or gas, or factories, or tenements, or insurance companies. I rely upon others to look after my drains, invest my savings, nurse my sick, and teach my children. I let the meat trust butcher my pig, the oil trust mould my candles, the sugar trust boil my sorghum, the coal trust chop my wood, the barb wire company split my rails.\textsuperscript{142}

To have to entrust to others in such a way was invariably to depend, and to depend was to render oneself vulnerable. The social realities of modern social and economic life demonstrated, at least as an empirical matter, that we were indeed a long way from self-reliance.\textsuperscript{143}

It did not take long to realise, therefore, that too rigid an adherence to the pure theory of contract was ethically harsh and often remote from the real world in which contract law operated. As wealth and knowledge became concentrated in large private corporations, the inequities of free contractual relations were exposed to public scrutiny.\textsuperscript{144} It quickly came to be realised that ‘no civilised system of law [could] accept the implications of absolute sanctity of contractual obligations’.\textsuperscript{145} If the market player with some scruples was not given an opportunity to participate in the free market, the

\textsuperscript{141} Ross, \textit{Sin and Society: An Analysis of Latter-Day Iniquity} (1907), 3.

\textsuperscript{142} \textit{Ibid.}

\textsuperscript{143} Id, 3-4: ‘this spread-out manner of life lays snares for the weak and opens doors to the wicked. Interdependence puts us, as it were, at one another’s mercy, and so ushers in a multitude of new forms of wrong-doing’. Cf. also, Gabel and Feinman, \textit{op. cit.}

\textsuperscript{144} Collins, \textit{op. cit.}, 12. The “excesses” of the business community in the 1980s, and popular opinion thereof, perhaps demonstrates that this process of public scrutiny has indeed been a continuing one.

\textsuperscript{145} Cf. Waddams, “Unconscionability in Contracts” (1976) 39 Mod. L. Rev. 369, at 370.
market player with none would soon take over. The labour market, and the emergence of the corporate state, in particular, brought this home.146

The classical theorists, therefore, by according equal freedom of contract to unequals, were inviting inequitable results and consequent criticism.147 ‘Such thinking’, Holmes observes, ‘carried to its logical extreme, may cause its own destruction; ... freedom of contract had to be limited in the interest of its preservation’.148

1.3.1. Good Faith and Machination of Contract Doctrine

In an attempt to preserve and maintain the pure theory of contract, the courts in the early part of this century were possibly compelled to manipulate existing legal concepts and rules in order to accomplish fair results between contracting parties.149 The law seemingly had to mould

---


147 And as Anton Menger once stated, ‘... there is no greater inequality than the equal treatment of unequals’: Das Burgerliche Recht und die Besitzlosen Volkskassen (4th ed., 1908), cited by Green, M., “Public Policies Underlying the Law of Mental Incompetency” (1940) 30 Mich. L. Rev. 1189, 1221. As to what constitutes ‘inequality’, see Beale, “Inequality of Bargaining Power” (1986) 6 Oxf. J.L.S. 123. It should be noted that the ‘freedom’ envisaged by the freedom of contract doctrine was freedom from authority, i.e., the state. In practice, therefore, it could offer no protection from other private individuals outside of the circumstances where the parties were on approximately equal footing or where the stronger party was prepared to exercise self-restraint (i.e., and not engage in fraudulent or coercive practices): see Coote (1989) 1 J.C.L. 183, at 187 et seq.

148 Holmes, E., op. cit, 387. The notion of equality in the classical contract model is (if only in a literal sense) a legal fiction. Parties begin the contracting process with differing intelligence, experience, information, judgment, training, emotional stability, financial resources, and opportunities. These are the types of factors, therefore, which ultimately determine the strength of an individual’s bargaining abilities; determining the contractual advantages that that party can obtain or extract from another. The indiscriminate enforcement of bargains under this model may amount, at times, to judicial countenance of oppression of the weak by those with superior bargaining power. Protection should, therefore, on occasion be extended to those least able to conserve their own interests in the form of controls being placed on those best able to conserve theirs. Generally see, Reiter, B.J., “The Control of Contract Power” (1981) 1 Oxf. J.L.S. 347; Western, P., “The Empty Idea of Equality” (1982) 95 Harv. L. Rev. 537; Temple, G., “Freedom of Contract and Intimate Relationships” (1985) 8 Harv. L.J. Pub. Policy 121.

149 Kessler and Fine, for example, state (op. cit., at 406-7):
market power so that fair conditions of dealing prevailed before bargains were struck,\textsuperscript{150} and this arguably produced unstated processes of judicial reasoning.\textsuperscript{151} Legal fictions were thus created, leading to uncertainty and unpredictability.\textsuperscript{152} The courts employed ‘covert tools’ that camouflaged the operation of an underlying notion of good faith. Rather than openly recognising the simple want of good faith and fair dealing as an appropriate vitiating factor, the courts appeared to shroud their decisions in the conceptual intricacies of devices such as interpretation and construction,\textsuperscript{153}

\begin{quote}
However, in contrast to developments in Germany, precontractual duties of care seem to have become an issue mainly in situations where strict adherence to classical will theory and the meeting of the minds requirement was found to lead to undesirable results.
\end{quote}


\textsuperscript{151} Cf. Holmes, E., \textit{op. cit.}, 388, arguing that judicial analysis was driven ‘underground’, with the result that the legal profession was ‘misled’ by the courts, which failed to articulate the real grounds for their decisions. Clearly, the fact of the subsequent Realist Movement in the United States would suggest that the legal profession was not ‘misled’ at all. This is an unfortunate and somewhat exaggerated articulation by Holmes.


\textsuperscript{153} As Lord Denning said about judges in \textit{Mitchell (George) (Chesterhall) Ltd v. Finney Lock Seeds Ltd} [1983] Q.B. 284, at 297:

\begin{quote}
They still had before them the idol, “freedom of contract”. They still knelt down and worshiped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called “the true construction of the contract”.
\end{quote}

As to the possible distinction between interpretation and construction, see Childres, “Conditions in the Law of Contracts” (1970) 45 N.Y.U.L. Rev. 33, 36. Lieber considered construction as the application of ‘good faith and common sense’: \textit{Legal and Political Hermeneutics} (1st ed., 1839), 65. Corbin espoused the idea that good-faith performance was secured through constructive conditions: “Conditions in the Law of Contract” (1919) 28 Yale L.J. 739. Obvious examples here are the \textit{contra proferentum} rule and the presumption that exemption clauses in contracts are not intended to confer immunity from the consequences of fundamental breach (see the \textit{Suisse Atlantique case} [1967] 1 A.C. 361. See also, Waddams, \textit{The Law of Contracts} (2nd ed., 1984), 365 et seq.
Implication of terms, lack of mutuality, particularised rules of offer and acceptance, and want of consideration.


The case of Adams v. Lindsell (1818) B. & Ald. 618; 106 E.R. 250 was the first reported English case in which the question of offer and acceptance in relation to establishing the moment of 'consensus' or 'agreement' was extensively discussed. See also, Simpson, "Innovation in the Nineteenth Century Contract Law" (1975) 91 LQR 247, 258. For an American authority see Cutler Corp. v. Latshaw, 97 A.2d. 234 (1953).

In New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd. [1975] AC 154, at 167, Lord Wilberforce confirmed this process of canalisation when he recognised that

English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing facts to fit uneasily into the marked slots of offer, acceptance and consideration.

The reason for such a development is probably best understood in its historical setting. It must be remembered that the judges of the classical contract period were unaided by a legislature articulating any particular moral vision, at least in relation to contract law generally. The judges were instead left to resolve particular disputes on a case to case basis, a practice which necessarily discourages the articulation of general principles. Technical rules thus developed, the extrapolation of principle from this being an ex post facto exercise of noting the contrasts and similarities between results from a whole line of decisions rather than by reference to the express reasons given for these decisions. See Collins, The Law of Contract (1986), at 16.

See cases cited in Note (1927) 27 Colum. L. Rev. 178. And conversely, the essential requirements for the formation of a valid simple contract are occasionally manipulated to enforce a promise where it would be contrary to good faith to allow the promisor to resile from his promise. The finding of consideration to support a promise where the court thinks it desirable to do so is a well-known example of this: see Ward v. Byham [1956] 1 W.L.R. 496. The development of promissory estoppel is another well-known and bolder example of this, designed to circumvent the doctrine of consideration and the decision of the House of Lords in Foakes v. Beer (1884) 9 App. Cas. 605; see Central London Property Trust Ltd v. High Trees House Ltd. [1947] KB 130; Legione v. Hateley (1983) 57 A.L.J.R. 292; Walton Stores (Interstate) Ltd v. Maher (1988) 76 A.L.R. 513. In essence, gratuitous promises are enforced in these cases because in the circumstances standards of good faith and fair dealing require that they be kept.
And so the approach the courts have taken to bring about just and fair results in contract cases has been piecemeal, technical and schematic.\(^{158}\) The courts are generally well known for their using 'piecemeal solutions to demonstrated problems of unfairness'.\(^{159}\) The implication of terms on the basis of the Moorcock\(^{160}\) doctrine, for instance, arguably provides a good example of the application of a technical doctrine manufactured to deal with a situation where good faith and fair dealing (in the sense of "honesty", "fairness" or "reasonableness") might have been invoked.\(^{161}\) Traditionally, such a doctrine, or aspects of it,\(^{162}\) have been legitimated in terms of the "will theory", on the basis that the court is merely giving the transaction such efficacy as both the parties must have originally intended it to have. Nonetheless, it seems clear that the judicial deployment of such a technique imposed at least a de facto standard of 'fairness' or 'reasonableness' in the formation or performance\(^{163}\) of a contract, albeit one tailored to conform to the standards of the day.\(^{164}\)

It is possibly owing to this covert process that any notion of good faith and fair dealing has kept its separate identity buried within traditional doctrine, thereby seriously restricting its potential operation. Despite the

\(^{158}\) For reasons why this must be the case, see quotation accompanying n. 61, supra.


\(^{160}\) (1889) 14 P.D. 64.

\(^{161}\) Cf. O’Connor, op. cit., 19.

\(^{162}\) Such as implying a term from local custom (see Hutton v Warren (1836) 1 M. & W. 466; 150 E.R. 517) or mercantile usage (see Laing v Fidgeon (1815) 6 Taunton, 108; 128 E.R. 974).


\(^{164}\) The language of commerce—"business efficacy"—was used rather than the ideologically unacceptable language of conscience. Generally, see Gabel and Feinman, op. cit.
many examples that could be cited of what might be called 'good faith rules',¹⁶⁵ in the common law world there remains no overriding general positive duty that parties are to enter into contracts according to standards of good faith and fair dealing imposed on them by law. If such a duty existed, arguably there would be no reason, other than purely historical ones, for the courts to have resort to 'contortions or subterfuges' in order to give effect to their sense of the justice of any particular case.

Equally and for other reasons, the law might do well to elaborate generalised standards of good faith and fair dealing. It has not otherwise forged adequate tools for coping with contracts of adhesion;¹⁶⁶ nor has it come to terms with the problems created by "transactional disadvantage",¹⁶⁷ or adequately considered the needs of 'relational' contracts, where contract relations span long periods of time between parties linked closely in many dimensions.¹⁶⁸ Under our current state of law, however, good faith is perhaps at best a purely moral postulate, albeit arguably one now resonant in expanding legal doctrine.¹⁶⁹


¹⁶⁷ See Chapter Four, Section 4.1.1.


¹⁶⁹ In particular, through the courts' growing willingness to impose duties of affirmative action for the 'maintenance of reasonable community standards in and for relationships'. Cf. Finn, "The Fiduciary Principle", op. cit.
1.3.2. The ‘Socialisation’ of Contract Law

The above heading is doubtless a misleading one.\textsuperscript{170} Whereas classical contract theory assumed a very narrow concept of social duty, twentieth-century developments have expanded the scope and the significance of social duty implicit in the law of civil obligation.\textsuperscript{171}

\textsuperscript{170} Contract law has never been seen as completely divorced from the society whose socio-economic realities it seeks to justify. The law depends upon society for its future existence. As Ian Macneil has observed, in his \textit{The New Social Contract} (1980), at 1-2:

\begin{quote}
The fundamental root, the base, of contract is society. Never has contract occurred without society; never will it occur without society; and never can its functioning be understood isolated from its particular society.
\end{quote}

For a good discussion of contract law being used as imagery to justify the socio-economic circumstances of the particular era, see Gabel and Feinman, \textit{ibid}. Thus, for example, the authors describe how the socio-economic reality of the eighteenth century can be seen as ‘social organization through traditional statuses and hierarchies, creating relations of class domination determined primarily by distribution of landed wealth, fixed occupation and inherited social position’. The legal system justified these realities by implementing customary moral and religious principles which supported the natural hierarchies. The socio-economic reality of the nineteenth century, however, can be seen as ‘social organization through free competition, made coercive through the operation of an unregulated market, creating relations of class domination determined primarily by the ownership of capital’. The legal system justified these realities through idealizing the formation of contracts as a voluntary process among free and equal individuals, with whose choice the state will not interfere, thus creating a ‘classless’ society where everyone has equal opportunity for personal gain and happiness. The socio-economic realities of the twentieth century, on the other hand, are that social order is ‘largely organized through the predominant control by monopolies of all aspects of production, with the assistance of regulatory planning and ‘stabilization’ by the state, creating relations of class domination determined primarily by the ownership of capital’. The law can be viewed as justifying these realities by giving significance to voluntary cooperation of different groups in the economy (big business, labour, franchisees, the unemployed, etc.) whose good-faith cooperation the state seeks to coordinate purposively toward the general administration of a fair society where class inequalities are compensated for through regulation and redistribution.

Out of the variety of underlying social values that might exist for justifying contract theory (e.g., self-reliance and sole responsibility for one’s actions, the upholding of moral values, freedom of the private sector with controls against excesses, fairness, and economic efficiency), however, it would clearly seem unrealistic to expect our legal system to select just one of these as the sole and exclusive basis of the law of contract. In many cases there will be no irreconcilable clash among them and the courts must make their decisions in light of a particular context.

\textsuperscript{171} The rise of a coordinated economy, for example, has required a concomitant modification of the older images of contract law to conform more closely to the actual organization of daily life in the twentieth century. The transformation that has resulted predominantly defines
Yet, even during the nineteenth century, the law was beginning to recognise, albeit slowly, that unbridled individualism was ceasing to be an accurate reflection of the socio-economic world in which people lived and interacted, if indeed it ever had been. The vast expansion of commerce in the public and private sectors had created new forms of social hierarchy, in which the individual's bargaining position was becoming increasingly and patently inferior to those with whom he or she had by necessity to deal, whether as employee or consumer. The concomitant need for protection did not go unattended, especially in the labour market. During the period 1840-1870, for example, the British Parliament introduced a set of statutory controls over hours and conditions in the work-place.\textsuperscript{172} Despite such reforms and the extension of the franchise during this time to all adult males, and despite a changed attitude toward government generally,\textsuperscript{173} \textit{laissez-faire} persisted in the common law. A possible explanation for this was 'the conservative malaise which had overtaken judicial thoughts and

\begin{quote}
\end{quote}

\textsuperscript{172} Cunningham, N., \textit{Safeguarding the Worker}, (1984), Chp. 4, at 54-5, for example, comments:

By the 1860's, despite the rhetoric of laisser-faire, a growing number of manufacturers had come to recognise that factories legislation was not necessarily antithetical to their interests, and that state intervention to reduce the hours of work was not necessarily incompatible with high productivity.

But such state intervention, and the plethora of legislation that was to follow in the ensuing decade, was seen as a necessary part of the laissez-faire philosophy, and as a legitimate function of the state which would ultimately promote individualistic liberalism through the 'balancing and counter-acting' views of the judges in their interpretation of the legislation. See Dicey, \textit{op. cit.}, 217, 261, 272; also Marx, \textit{Capital}, Vol. 1, sec. 3 (1954), 233 \textit{et seq.} Generally, also see MacDonagh, O., "Pre-transformations: Victorian Britain", Chp. 7 in Kamenka and Tay (es), \textit{Law and Social Control} (1980), 127 \textit{et seq.} For the United States' equivalents, see Teeven, \textit{op. cit.}, 300-2.

\textsuperscript{173} Since people tended now to vote for policies which opposed the wealth distribution of the early nineteenth century.
attitudes in England' at the turn of this century.\textsuperscript{174} It was probably the depression in the 1930s, and then the outbreak of World War II, which to some extent undermined the arguments expounded by the proponents of the laissez-faire philosophy. This occurred against the background of profound crisis confronting the capitalist world, which eventually was to compel the British government, and the courts with it, to abandon its long cherished free trade policy (especially insofar as international trade was concerned).\textsuperscript{175} At the same time in the United States, the classical construction upon which contract law had been formulated also began to disintegrate, though there it was possibly through the advent of the so-called legal realist movement of the 1930s\textsuperscript{176} and New Deal legislation.\textsuperscript{177}

There is, today, much evidence of the effects of 'this profound transformation', which might collectively be called 'the "socialization" of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{174} Greig and Davis, \textit{op. cit.}, 28.
\item \textsuperscript{175} \textit{Ibid.}
\item \textsuperscript{176} See Holmes, "Education For Competent Lawyering—Case Method in a Functional Context" (1976) 76 Colum. L. Rev. 535, at 554-6. The emphasis of the movement was on an open assessment of issues of policy; that the courts in reaching a decision do in fact and should take into account the moral, ethical, economic and social situation in reaching a decision. Its modern offshoots are apparent today in the Law-and-Economics and Critical Legal Studies movements. Reference may be made to examples of such writing at the time: Llewellyn, "What Price Contract?" (1931) 40 Yale. L. J. 704; Cohen, "Transcendental Nonsense and the Functional Approach" (1935) Colum. L. Rev 809; Cohen, "The Basis of Contract" (1933) 46 Harv. L. Rev. 553; Llewellyn, "The Rule of Law in Our Case-Law" (1938) 47 Yale L.J. 1243; Fuller, "American Legal Realism" (1934) 82 U. Pa. L. Rev. 429; Savarese, "American Legal Realism" (1965) 3 Houston L. Rev. 180. More generally see, Rumble, \textit{American Legal Realism} (1968); Twining, Karl Llewellyn and the Realist Movement (1985, University of Oklahoma edition). See, also, the work of Roscoe Pound (sociological school of jurisprudence) antedating the movement; "Mechanical Jurisprudence" (1908) 8 Colum. L. Rev. 605; "Liberty of Contract" (1909) 18 Yale L.J. 454. Stated in extreme form, the realist believes:

[T]he law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on the subject is yet in existence.


\item \textsuperscript{177} On which, see Schlesinger, \textit{The Age of Roosevelt: The Coming of the New Deal} (1959); Thurman Arnold, \textit{Fair Rights and Foul} (1965); Dubofsky and Burwood (eds), \textit{The Law and the New Deal} (1990).
\end{enumerate}
\end{footnotesize}
contract law. Contract, or contract-like, liability is now much wider than it was under the classical bargained-for-exchange formula of nineteenth-century contract law. Modern theories of quasi-contract (unjust enrichment or restitution), estoppel (in equity), unconscionability, contractual privity, fiduciary obligation, reliance and good faith have expanded the scope of "contractual" liability. Coinciding with these developments we have seen a compensating parallel expansion, both judicially and legislatively, of contractual excuses and policing devices designed to


183 Generally, see Starke, Seddon and Ellinghaus (eds), Cheshire & Fifoot’s Law of Contract (6th Aust. ed., 1992) paras. 034-035. Interestingly, Fuller predicted this possibility as early as 1941:

[P]rivate contract as an instrument of exchange will decrease in importance. On the other hand, with an increasing interdependence among the members of society we may expect to see reliance ... become increasingly important as a basis of liability.

Fuller, “Consideration and Form” (1941) 41 Colum. L. Rev. 799

184 The extent of these developments varies among common law countries. They have probably occurred to the greatest extent in the United States and to the least in England. Australia, New Zealand and Canada can be grouped somewhere in between.

assure contractual fairness, and freedom from contract.\textsuperscript{187} But if there is any one single manifestation of social policy currently reflected in emerging legal doctrine, it surely resides, in this writer’s view, in the heightened insistence upon standards of good faith and fair dealing in our voluntary or consensual relations with others. It is likely that these standards are being unearthed as a corollary of the changes in twentieth-century societal values and expectations, expressed within and throughout expanding legal doctrine.\textsuperscript{188}

1.3.3. The Re-Emergence of Good-Faith Jurisprudence

During the second half of this century, and largely through the work of comparative lawyers, civilian examples of the successful operation of a generalised standard of good faith had a marked impact upon American legal thinking,

particularly when civilian jurists, who had fled from the turbulence of European politics in the 1930s and had settled in the United States, began to demonstrate what good faith meant in civilian systems and that similar ideas and approaches were in fact implicit in American jurisprudence.\textsuperscript{189}

\begin{flushleft}
\textsuperscript{186} An obvious judicially created expansion can be seen in the resurgence of the unconscionable dealings doctrine in Australia: see Commercial Bank of Australia Ltd v. Amadio (1983) 46 A.L.R. 402. Obvious general legislative examples also exist in Australian law which are serving to further fuel such expansions: see, e.g., Pt. V of the Trade Practices Act 1974 (Cth) and its State equivalents, and the Contracts Review Act 1980 (N.S.W.). See also, The Hon. Mr Justice Priestley, “Contract—The Borgoing Maelstrom” (1988) 1 J.C.L. 15, at 18 et seq.


\textsuperscript{188} The ‘old rules’, therefore, may be seen to be disintegrating for the same reason they were conceived: ‘there has been a transformation of social and economic life that has brought about a parallel transformation in the ideological imagery required to justify it’: Gabel and Feinman, op. cit., 178. On one view, the essential characteristic of contemporary capitalism is the substitution of integration, coordination and cooperation in the economy for the unbridled competition of the free market: id, 179.

\textsuperscript{189} Lücke, op. cit., 156. The best example of this must be the work of Kessler and Fine, who proved to produce a very influential article in 1964. That article (supra at n. 10) did much to demonstrate what good faith meant in civilian systems and that similar ideas were in fact implicit in American jurisprudence. See also, Dawson, J. P., Oracles of the Law (1968).
\end{flushleft}
This was instrumental, no doubt, in bringing about much of the American good-faith jurisprudence briefly referred to in the opening pages of this chapter.

On a broader level, the twentieth century has witnessed a general and marked reversal of values throughout the greater common law world. Contract law is no longer an ideological prisoner of another era. Property rights, for example, once so highly valued, have fallen to a more ‘restrained appraisal’, coupled with an increasing appreciation of individual rights.\textsuperscript{190} Whereas equity had once imposed moral limitations, derived from the perceived nature of the individual as a moral entity, the law today may be seen as imposing social limitations based upon the interests of a collective society.\textsuperscript{191} The result can be seen in the law’s attempt, at least in the realm of contract, to delimit the individual interest with respect to perceived social interests, values, etc., and to confine the legal right, liberty or privilege to the bounds of those broader social interests.\textsuperscript{192} This approach embodies both the ethic of cooperation and coordination reflective of the modern economic social life, and the recognition of appropriate and necessary ways of doing business nowadays. Whilst it is uncontroversed that self-reliance and freedom are still valued and legitimate concepts in the late twentieth century\textsuperscript{193}—for individual responsibility and the sanctity of bargains are not

\textsuperscript{190} Holmes, E., \textit{op. cit.}, 389.

\textsuperscript{191} \textit{Ibid}.

\textsuperscript{192} Pound, R., \textit{Jurisprudence}, Vol. 1 (1959), 425. Perhaps the best Australian example of this can be seen in the enactment of the \textit{Trade Practices Act} 1974 (Cth), the principal thrust of which makes freedom of contract dependent upon the applicant establishing a resulting public benefit that outweighs any detriment arising from a diminution of competition (see, ss. 90, 93(3)). Another important example is to be found in the \textit{Contracts Review Act} 1980 (N.S.W.), s. 9, where the court, for the purposes of determining whether a contract or a provision of a contract is unjust it must, \textit{inter alia}, have regard to the public interest.

\textsuperscript{193} See \textit{Darlington Futures Ltd v. Delco Australia Pty. Ltd} (1986) 161 C.L.R. 500.

The persistence of contract values in our society is reinforced by the emergence of the school of thought that stresses the economic efficiency of classical contract doctrines and thereby the wisdom of laissez-faire economics. Indeed, such has been influential, it would seem, in that there is evidence of a swing of the pendulum back to freedom of contract ideals—the result, no doubt, of a decade of Thatcherism and of Reaganism in the United Kingdom and the United States, respectively. See Atiyah, \textit{An Introduction to the Law of Contract} (1989), 32 et seq.;
lightly to be cast aside—their less palatable manifestations must be tempered in the furtherance of (arguably) higher and (certainly) broader social objectives.\textsuperscript{194} Experience has clearly demonstrated how freedom must necessarily be, if only in the exceptional case, accompanied by a degree of personal responsibility. The 'general public sentiment of moral wrongdoing' which underlies the duty to one's neighbour in tort\textsuperscript{195} appears to be finding its applications in contract too. The law seems to have become more solicitous for the vulnerable. Like the tort of negligence, therefore, the imperatives of social responsibility, and in particular the spirit of "neighbourhood", are becoming pervasive in our law of contract. The law is being asked to accommodate and to develop 'the now pervasive concepts of duty to a neighbour and the linking of power with obligation.'\textsuperscript{196} It would follow, in Professor Finn's view, that an

atomistic and individualistic view of human endeavour (which so constrains the imposition of legal responsibility to others) is, in consequence, being qualified progressively by one that requires that

\textsuperscript{194} Cf. Arthur Moxon, K.C., "Sanctity of Contract" (1945) 10 Saskatchewan Bar Rev. 21, at 22:

We now know that [sanctity of contract] was one of these hasty assumptions or generalizations which overlooked elemental human weaknesses and deficiencies, misfortunes and tragedies that are man's lot on every portion of this habitable globe and in every era of his recorded history. Freedom to contract and the sanctity of contract will not in themselves bring about millennium that man is always seeking.


\textsuperscript{196} This has been explicitly recognised by Cooke P. in Nicholson v. Permakraft (N.Z.) Ltd (1985) 3 A.C.L.C. 453, at 459.
regard be had to the interests of those with whom we deal and who are affected by our actions.\textsuperscript{197}

Contract, then, is no longer seen as bringing together an antinomy of interests, but rather as offering instances of cooperation and coordination, albeit antagonistic, between the parties and between the parties and the broader community. "Good faith and fair dealing", it is suggested, represents, among other things, the balance to be struck between an individual's concern for himself or herself and his or her responsibility to or for others. To overstate the contrast, supplanting the 'primitive era', when every moral tie was dissolved in 'the icy waters of egotistical calculation',\textsuperscript{198} ours is an era in which legal entities are 'conceived to be partners in a moral community', permeated by notions of equity and the balancing of interests according to standards of fair dealing.\textsuperscript{199} According to Gilmore:

It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and the powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed.... For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.\textsuperscript{200}

The concept and practice of freedom of contract necessarily persists, of course,\textsuperscript{201} but only within the moral and legal (statutory or equitable)

\begin{thebibliography}{9}
\item Finn, "Equity in Contemporary Australian Law", \textit{op. cit.}, 14.
\item Marx and Engels, \textit{The Communist Manifesto} (1964), 62.
\item Gabel and Feinman, \textit{op. cit.}, 180-1.
\item According to Friedman, contract is 'roughly coextensive with the free market': \textit{Contract Law in America} (1965), at 20. Thus any fluctuation in the belief of freedom of choice will be directly related to changes in political values: see Atiyah, \textit{An Introduction to the Law of}
\end{thebibliography}

50
limitations that impinge upon this freedom. As a value, freedom is in a symbiotic relationship with other legitimate values that qualify or expand its acceptability in any given instance. "Freedom of contract" must (among other things) include one's freedom to be immune from the socially undesirable commercial practices of others. The common law is vigilant, therefore, to ensure that "freedom" is not abused. This was pointedly recognised by the High Court of Australia, now a decade ago:

[I]n the early part of this century, overriding importance attached to the concept of freedom of contract and to the need to hold parties to their bargains. These considerations, though still important, should not be allowed to override competing claims based on long standing heads of justice and equity.


203 As we shall see, it must also include a party's freedom to make bad bargains as well as good ones.


Freedom of contract is a great thing. It marks the difference between a regime of status and a regime of opportunity. It is one of the liberties of the free man. But freedom to contract implies also the liability to be bound by one's contract, and here, for the lawyer, the difficulties begin. For there are manifestations of freedom of contract that prejudice and even defeat other freedoms no less important to a civilized and fruitful life. So there must always be some recognised qualifications upon this freedom—for classes of persons, children, idiots, drunkards, and whatnot, and for certain situations, fraud, duress, undue influence, and mistake. It may be said that it is the measure of virility and self-reliance of any society that its law admits few exceptions to the principle that a man's word is his bond. Indeed, not only do moral and religious principles agree upon the pure virtue of keeping faith with one's promises, but also that the readiness to do so, without shift or complaint, is the badge of a responsible man. One may add another reflection: uncomplicated loyalty to one's contract is of peculiar value in the relations of trade, business, and finance. A society, therefore, which glories in its reputation for integrity in business is likely to be a special admirer of the practice and
Whilst parties still remain essentially free to construct their own relationships, and generally to consult self-interest in so doing, it is perceived to be a legitimate function of the law to establish the ground rules within which they must play. The law is both facilitator and regulator. The issue is not one of whether principles legitimising state control of the contracting process should be allowed to subsume freedom of contract, but rather an open realisation that we should not allow our attention to be diverted from the reality that freedom of contract and other considerations (such as principles of fair dealing) are cumulatively and simultaneously all very important. Contracting will always be an exercise involving tension—'[i]t is at once a selfish and a cooperative endeavour'.206 The recognition of standards of fair dealing expected of those engaging in voluntary or consensual dealings with others perhaps best exemplifies the (sometimes imperfect) attempt to reconcile the pressures this process naturally engenders. Conflicting theories, principles, rules, and policies pervade modern contract law, ‘and together govern the relations of people in our society’.207 Consequently, the various competing considerations that these theories, principles, policies, etc., generate may require, in the final analysis, that their respective balance be modified to fit the context and circumstances of each particular case. Arguably, a “mature” legal system operating in a commercial economy must be able to accommodate all that is valuable in a variety of points of view, albeit often tacitly and sometimes inconsistently. These themes will be recurrent throughout the remainder of this thesis.

2. TOWARD “GOOD FAITH”, “FAIR DEALING”, AND A DISTINCTIVELY AUSTRALIAN LAW OF CONTRACT

[T]he political and civil laws of each nation ... should be adapted in such a manner to the people for whom they are

consequences of freedom of contract. It may even be predisposed to carry over this reverence into spheres of life where they are not so obviously appropriate.


made, as to render it very unlikely for those of one nation to be proper for another.208

Contract law has such widespread application in a society such as ours, that courts do well to simplify its concepts.209

Australian contract law .... appears to be a living museum of an earlier and simpler age of the common law, only beginning to be corrupted by the policy-orientation and iconoclasm of modern United States writers on the subject.210

2.1. The Australian Historical Setting

The acceptance of freedom of contract as a socio-economic wisdom in England and the United States until the end of the nineteenth century was probably even less appropriate for the Australian colonies, and later the new Commonwealth. Government participated more significantly in economic development in Australia than in those other countries.211 Yet the adoption in Australia of the English legal system212 meant that “freedom of contract”


It might also be apposite in this connection to recite the sentiments of J. S. Mill:

I am sure that no one is at all capable of determining what is the right political economy for any country until he knows its circumstances.

Hansard, 3rd, cxc, 1525-6, quoted by MacDonagh, O., “Pre-transformations: Victorian Britain”, Chp. 7 in Kamenka and Tay (es), Law and Social Control (1980), 125, n. 24.


210 Maggs (1989) 17 International Journal of Legal Information, 55-6. (From University of Illinois College of Law.)


212 Particularly in relation to commercial legislation.
was nevertheless ‘transplanted’ accordingly, and, subject to some innovation,\footnote{In particular, these innovations were to be found in statutory and public law. Generally, see Finn, \textit{Law and Government in Colonial Australia} (1987); “Statutes and the Common Law” (1992) 22 Western Australia L. Rev. 7.} without due consideration for local circumstances.\footnote{In citing Oliver Wendell Holmes Jr. (\textit{The Common Law} (1964), 5), Finn comments that ‘[i]f it be ... that “[t]he law embodies the story of a nation’s development”, then ... our common law told England’s story’: “Statutes and the Common Law”, \textit{op. cit.}, 9.} This Anglo-centric orientation, especially in relation to commercial matters, was perhaps understandable, at least in part owing to the prevailing (and notably ‘paradoxical’)\footnote{Cf. also, Kercher, B., “Commerce and the Development of Contract Law in Early New South Wales” (1991) 9 Law and History Review 269, esp. at 276-8, arguing that early New South Wales jurisprudence evidenced some signs of indigenous inspiration, but that toward the end of the nineteenth century this had practically dissipated, ‘when a pattern of slavish adherence to English case law was more fully established’: \textit{id}, 278.} political attitudes of the time.\footnote{Finn, for example, comments that ‘our legislation created a “semi-socialist order” in environments sympathetic to individualism’: “Statutes and the Common Law”, 8.} The acceptance of England’s \textit{laissez-faire} dogma was perhaps also perceived to be desirable in the light of the mid-nineteenth century’s period of prodigious economic growth for Australia, first through wool production and then through the gold rush. The end of that century, however, saw the need for more welfarist principles. Declining gold production, and drought, led to depression in the 1890s. The sentiments of \textit{laissez-faire}, nevertheless, remained. Through the pervasive social and political connections with Britain, ‘a notion of freedom had been fostered in the colonies from their inception’\footnote{As a Victorian politician, C.H. Pearson, wrote in the 1890s:}

\begin{quote}
The settlers of Victoria, and to a greater extent of the other colonies, have been men who carried with them the English theory of government: to circumscribe the action of the State as much as possible; to free commerce and production from all restrictions; and to leave every man to shift for himself, with the faintest possible regard for those who fell by the way.
\end{quote}

Although Australia, like England and the United States at this time, was a highly urbanised society, there was little of the visible poverty that afflicted industrialised Britain. Despite this, Australia still faced the problem of freedom of contractual choice, as this was being narrowed through the restrictive or monopolistic developments in the supply of goods or services. Thus, whilst *laissez-faire* remained an omnipotent and motivating force for the courts in this country, they, like their Northern-Hemisphere counterparts, found themselves having to confront the increasing complexity of economic and social realities in the early part of the present century. The judiciary, like their counterparts elsewhere, nevertheless continued to pay homage to freedom of contract,\(^{218}\) and remained imbued with a doctrine which increasingly suited changing conditions.

Statutory intervention became increasingly desirable and inevitable.\(^{219}\) For example, beginning in 1906, legislation was introduced in the wider interests of protecting ultimate consumers from the evils of restrictive trade practices, such as market-rigging.\(^{220}\) Such intervention, which has persisted across the century, was significant in that it showed the Commonwealth Parliament’s willingness to respond legislatively to problems created by unfair and restrictive trade practices, while at the same time recognising that freedom of trade was crucial in meeting the economic and social needs of the Australian community (in terms of the promotion of competition). Moreover, as Greig and Davis comment, it may be doubted whether the courts, on their own initiative, would have been able to develop common law principle sufficiently to provide a concept of

---


\(^{219}\) Cf. Teeven in the United States context, *op. cit.*, 296: ‘it was now argued that state intervention was necessary to provide positive assistance for the furtherance of human progress’.

\(^{220}\) See, e.g., *Australian Industries Preservation Act* 1906 (Cth); *Trade Practices Act* 1965 (Cth) (cf. *Restrictive Trade Practices Act* 1956 (UK)); *Trade Practices Act* 1974 (Cth). Other legislation was also introduced to remedy problems manifested in the common law by general acceptance of *laissez-faire* freedom of contract; for example, the increasing use of onerous exclusion clauses by carriers and sellers of goods. See generally, Greig and Davis, *op. cit.*, 39-46.
public policy in keeping with the changed attitudes and circumstances of the latter part of the twentieth century.\textsuperscript{221}

2.2. A Legal Watershed: Breaking Away from England

\textit{Its uniqueness, or Australian character, lies not in specific doctrinal departures from any other system, although such departures have occurred. Rather it lies ultimately in the situations to which it is addressed, which are ineluctably local, and which have an effect largely on what can be called its 'shape'.}\textsuperscript{222}

In recent years, the law of Australia (particularly in the commercial sphere) has witnessed a marked departure from its historically close ties with the law of England.\textsuperscript{223} With regard to judicial law-making, in particular,\textsuperscript{224} there have been increasing differences in emphasis which have fuelled the evolution of doctrinal adaptation to ‘accord with Australian circumstances,


\textsuperscript{224} Of course, the ‘Republican Movement’ under Prime Minister Keating is more generally abroad in contemporary Australia.
needs and values.225 There is a gradual change, therefore, in the shape and
direction of the law in Australia compared with the equivalent rules as
applied by the contemporary English courts.226 Our common laws are
becoming distinctively uncommon. Australian courts, it seems, have
(although with some internal discordance227) ‘embarked on a transformation
of legal doctrine unparalleled in [Australia’s] legal history’.228 Equity (as we
shall see) has been the chief protagonist in bringing about much of this
transformation in the contractual arena,229 as indeed have been the
complementary statutory innovations, themselves formulated according to
basal equitable precepts.230 Other areas of law also have played their part.231

225 Sir Anthony Mason, “Australian Contract Law” (1988) 1 J.C.L. 1. Generally, cf. also, the
series of lecture essays by Keith Mason Q.C., Constancy and Change: Moral and Religious

226 Id. 2. Cf. also the words of Sir Robin Cooke, President of the New Zealand Court of
Appeal, that despite New Zealand’s still existing bonds with the Privy Council, “a distinct
New Zealand national legal identity” has emerged: Sir Robin Cooke, “The New Zealand
National Legal Identity”, speech delivered at the New Zealand Law Conference in October
1987, 2, cited by Sir Anthony Mason, id.

227 Lack of unanimity of opinion in basic matters has become characteristic in recent judgments,
particularly those of the High Court.

228 Finn, “Equity in Contemporary Australian Law” (unpublished m/s, 1990), 1; “Australian

229 See ibid; Lehane, “New Directions in the Employment of Equitable Doctrines: Some
Australian Developments”, in Youdan (ed), Equity, Fiduciaries and Trusts (1989); The Hon. Sir
Anthony Mason, “Opening Address: The Place of Equity and Equitable Doctrines in the
Contemporary Common Law World”, Second International Symposium on Trusts, Equity and
Fiduciary Relationships, University of Victoria, British Columbia, Jan. 1993:

The underlying values of equity centred on good conscience will almost
certainly continue to be a driving force in the shaping of the law unless
the underlying values and expectations of society undergo a fairly
radical change. (Id, 48.)

230 E.g., Contracts Review Act 1980 (N.S.W.) (see also, Peden, The Law of Unjust Contracts,
(1982)); s. 51AB (formerly s. 52A) Trade Practices Act 1974 (Cth) and State Fair Trading Act
equivalents. Note, especially in regard to the comment made in the text, s. 51AA(1) (as
inserted into the new Part IVA of the Principal Act by the Trade Practices Amendment Act
1992, s. 9):

51AA(1) A corporation must note, in trade or commerce, engage in
conduct that is unconscionable within the meaning of the unwritten
law, from time to time, of the States and Territories.

57
The broad effect of their convergence, however, is progressively to re-shape the classical law of contract, and increasingly to qualify its reluctance to "require an individual to take positive action for the benefit of others"—to make that individual his or her "brother's keeper". And yet, while the changes that are described here are very much the product of a single decade of law-making in Australia, to the extent that a "fair dealing" theme is clearly discernible within it, and especially in comparison to the usages of some countries, it is still in its embryonic stage of development.

The overall impression one gets of twentieth-century trends in contract law is that they are important ones for present purposes. They appear to accompany an amelioration of the more baleful effects of a classical contract theory inherited from the century before. During this century, for instance, we have witnessed a retreat from the nineteenth-century tendency toward unrestricted freedom of contract. We have also experienced a consumer revolution throughout the entire common law world; the rise of social welfare; a renewed concern with equitable principles (including

---

(2) This section does not apply to conduct that is prohibited under section 51AB.

231 Notable examples are the Trade Practices Act 1974 (Cth), tort doctrine (in particular negligence as it applies to reliance: e.g., adviser-client: Rest-Ezi Furniture Pty Ltd v. Ace Shohin (Aust) Pty Ltd (1987) A.T.R. 80-081, and professional relationships: e.g., Hawkins v. Clayton (1988) 78 A.L.R. 69), contract doctrine (such as implication of terms), and the uberrimae fidei requirement under the Insurance Contracts Act 1984 (Cth).


234 Notably the United States and many Civil Law jurisdictions.


their higher profile in the commercial context; a reported shift from individualism to altruism, and from formalism to substantivism; the somewhat exaggerated allegations that contract is dead (to some, but a ‘twitching corpse’); a blurring of the boundaries between contract and tort; and a ‘cornucopia’ of literature dealing with contract law from many, very diverse perspectives. There has, accordingly, been a discernible


244 See also essays collected in (1989) 12 U.N.S.W. Law Journal: “Contract: Death or Transfiguration?”.


246 For an accessible summary of the many different theoretical perspectives on contract law, see, Cheshire & Fifoot (6th Aust. ed, 1992), paras. 026-051.
‘wind-change’ in our law concerning voluntary or consensual relationships and dealings.248 *Caveat emptor* is a shadow of its former self. Contract theory has undergone a renaissance.249 No longer is contract doctrine for the most part immune to considerations of care and responsibility to or for others—a theme hitherto almost exclusively synonymous with tort doctrine in the common law. A contemporary challenge of some consequence in our law is to reconcile individual self-interest with community interests.

247 In particular, contemporary contracts scholars have been attracted—as the legal realists were—by the relation between contract law and other disciplines. For a good discussion, see Coote, “The Essence of Contract” (1988-89) 1 J.C.L. 91 and 183; Drahos and Parker, *op. cit.* Many other allegations have also been made: see, generally, Hillman, “The Crisis in Modern Contract Theory” (1988) 67 Texas Law Review 103. The reactions against classical contract theory have concerned both the academics and the courts of the United States. Outside of the United States, however, the concerns have been mainly voiced by the academic writers; the courts and the profession at large have been largely ‘oblivious’ of the topic: see Reynolds, F.B.M., “Contract, a Category Under Attack”, [1987] Malayan L.J. 246. For a feminist perspective on contract law, see Frug, “Reading Contracts: A Feminist Analysis of a Contracts Casebook” (1985) 34 American University L. Rev. 1065.


concerns and values. The individual’s capacity and right to pursue his or her own self-interest in dealing—a value which was for so long emphasised by classical contract dogma—is progressively being qualified by other social concerns.

Significantly, too, as we approach the end of this century, it is arguable that contract theory has now aged sufficiently to become a useful and more predictable tool. Contract law, we are learning, responds (though not always in pace) to the changing expectations of business and the general community, and with the evolution of political and economic thought—social reality.250 It may by now be possible to view contract within the socio-economic whole at various historical moments and, accordingly, predict more accurately its most likely future direction under distinctively Australian conditions.

In giving more frank recognition to widely held social values such as fairness, trust and cooperation, the courts and legislatures possibly force an alteration in the form of the law and the direction it is to take. The range of such values, however, is not so readily appreciated when law is presented as a closed set of technical rules. ‘Legal discourse’, it has been suggested, ‘now takes place at a higher level of generality in terms of principles and broad standards which reveal their value-laden message’.251 Technical rules are being replaced with general principles and open-textured standards. Broad ‘themes and purposes are now being given where once there was silence’.252 The language of the law appears to be changing too: embracing appeals to ethical standards of acceptable behaviour in our voluntary or consensual relationships and dealings with others. Frequent use is now made in judicial exposition of such rhetoric as “fairness”, “fair dealing”, “reasonableness”, “good faith”, “good conscience”, “unconscionable and unconscientious conduct”, “unfair and oppressive conduct”, “reasonable and legitimate

250 This point can be taken to great extremes: see Taylor, R. D., “Reclaiming Our Roots: Law and Mythology” (1991) 29 Duquesne L. Rev. 271.


252 Finn, ibid.
expectations”, “unjust enrichment”; and the list goes on.\textsuperscript{253} The employment of such language perhaps reveals much about the roles, directions and ends being given by the courts to the common law of Australia. This would appear accurately to reflect the mood of Australian legislatures also, which seem to favour broad ethical premises in contract law.\textsuperscript{254} In essence, ‘the law has shifted its emphasis from a rigid framework to a more flexible basis’.\textsuperscript{255}

All of this, perhaps, is the result of one major realisation: where change occurs in the value system of the broader community, so too must the law adapt to touch more closely the needs of those it is designed to serve.\textsuperscript{256} Ours is perceived to be a period of rapid and (to some) exciting legal change. When the law is expected to place some restriction on obligation assumed when the parties to a contract are not comparably equal to the task of bargaining, so as to prevent the exploitation of one party by the other, and to insist that parties deal with each other fairly and in good faith, the rules of earlier times ‘must be re-adjusted and accorded different priorities and, sometimes, rejected as no longer useful to reflect the values of the community’.\textsuperscript{257} How, and indeed whether, such re-adjustment or rejection should come about will be investigated in sequel chapters.

The moraines of legal and equitable doctrines and rules deposited across our legal landscape over time admittedly present us with something of a \textit{fait accompli}. What we are to do with these eclectic remnants for the


\textsuperscript{255} Greig and Davis, \textit{op. cit.}, 74.

\textsuperscript{256} But this realisation is not new either. Lord Mansfield, for example, was well known for it: see n. 59, \textit{supra}.

\textsuperscript{257} The Hon. Sir Gerard Brennan (1990), 3 J.C.L. 85, at 86.
purpose of shaping and re-shaping the direction of Australian law is a major concern of this thesis. Only where the broad underlying (and unifying?) ideas and purposes of the law are clearly enunciated and established are they likely to be useful in guiding and supervising the re-evaluation of doctrines considered no longer in keeping with the ends they should serve to promote in contemporary Australia. What is more, the doctrinal instruments used to answer legal problems and to achieve purposes common to the laws of the various countries considered in this thesis may vary widely according to the distinctive legal traditions, techniques and perceptions of each country.\textsuperscript{258} The predominant trend during the last decade in Australia, noticeably, has been for judges, legislators and commentators to seize upon the fertile principles of equity to justify some modern departure from classical precedents, and to prescribe minimum general standards of what will be regarded as acceptable behaviour in the negotiation, formation, performance and enforcement of contracts.\textsuperscript{259} However, in attempting by this route to satisfactorily achieve one's desired purposes, at least in the context of most

\textsuperscript{258} Cf. for example, the judgment of Cooke P. in \textit{Gillies v. Keogh} [1989] 2 N.Z.L.R. 327.

\textsuperscript{259} See Finn, "Australian Developments in Common and Commercial Law" (1990) J.B.L. 265, 266-7. That equity should be seen as the appropriate vehicle through which to engineer the changes described above is perhaps readily understood when one considers how it is viewed by the present Chief Justice in his extra-curial writings:

The enduring vitality of equitable doctrine ... has its roots in its natural law origins and in the goals of equity and justice, equality and fairness which have always shaped its principles and its broad range of discretionary remedies. It is for this reason that equity has succeeded in moulding its doctrines so as to make available an appropriate remedy when a transaction or relationship is affected by any one of the elements which have attracted an exercise of its jurisdiction, such as fraud, unconscionable conduct, accident or mistake. And because equity insists on standards of fairness and fair dealing in the making and in the performance of contracts and other transactions, there has been little need to replace them with statutory prescriptions.

contractual transactions and dealings, there will need to be a re-evaluation of the availability of equitable remedies, signs of which are now appearing. 260

Where extant doctrine exists to further or to enhance the legitimate values of certainty and predictability in contract planning, such doctrine must sometimes be compromised where certainty is prone to produce undesirable results. 261 In the writer’s view, existing doctrinal uncertainty should be seized upon and used to prompt judicial efforts at clarification and rationalisation. If the courts do not have recourse to generalised notions such as that of good faith and fair dealing, the desire to do justice in the individual case is apt to perpetuate the problems of doctrinal manipulation which have historically served, and continue to serve, to maintain minimal behavioural standards, and further to lead potentially to even more legal uncertainty than already exists. 262 It is therefore necessary to give recognition to fundamental principles such as good faith and fair dealing simply in order to give meaning and coherence to the technical rules, and to give general guidance to the courts which must apply them. 263

However, in constructing a legal system perceived to be superior to the one which currently serves the law of contract is systematically to be undertaken by Australian law-making institutions, orderly legal development must not be ‘imperilled by the piecemeal dismantling of old


261 It is always apposite to recall Corbin’s famous warning that ‘certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it’: Corbin on Contracts (1960), Vol. 3., para. 609, 689.


263 Drahos and Parker (op. cit.), for example, argue that underlying conventions and standards provide a framework for uncertain legal rules. See, also, Chapter Two, Section 4 (‘The Jurisprudential Role of Good Faith and Fair Dealing’).
principles without substitution of a new coherent body of doctrine.\textsuperscript{264} Clearly, there is no point to our replacing old uncertainties with new and different forms of uncertainty.\textsuperscript{265}

2.3. Conclusion

\begin{quote}
[If Henry Maine is correct in stating that "legal technicality is a disease, not of old age, but of the infancy of societies"\textsuperscript{266} perhaps we should welcome these recent developments as a sign of legal maturity.\textsuperscript{267}]

‘[B]oth as reality and as metaphor’, the institution of contract is central to law and to society.\textsuperscript{268} But to many, it is in a state of conceptual disarray, especially as regards its basal informing ideas. Historically, contract law evolved according to a system of “construction”, which can to a significant measure, be characterised by a process of logical deduction from received, but today largely discredited, philosophical axioms.\textsuperscript{269} The order fell into decline because it failed to recognise that deduction is merely a means and not an end in itself.\textsuperscript{270} While society clearly has an interest in ensuring that contracts are enforced according to their terms, modern contract law extends
\end{quote}


\textsuperscript{265} The problems attending the enunciation of a generalised principle of good faith and fair dealing are practical as much as theoretical. As Holmes reminds us:

\begin{quote}
If courts are to interpret—instruct juries on—the good faith standard, and if society is to comply with this standard, a rational, workable structure for it must be developed.
\end{quote}


\textsuperscript{266} Maine, H., \textit{Early Law and Custom} (1883), 170.

\textsuperscript{267} Mason, K., \textit{Consistency and Change} (1990), 58.


\textsuperscript{270} Thus Eisenberg comments, \textit{op. cit.}, at 742: ‘... in the last thirty to forty years there has been a wholesome reaction against logical deduction as a dominant mode of contract reasoning’.
well beyond the enforcement of bargains. To be sure, contract law is not merely about creating conditions of liability, it must also respond to the social process of promising, negotiation and exchange. Latter day scholarship, accordingly, has been characterised to a large measure by contract's "deconstruction".271

In most common-law countries (though apparently to a lesser extent in England),272 we have witnessed a discernible movement to individualised treatment by the courts of contract cases with an increasingly flexible approach to rules and a more open acknowledgment by the courts of the part played in their decisions by ideas of what fairness requires in the particular circumstances of the case.273

The revolutionary idea, or perhaps more accurately, the evolutionary idea,274 that one party must, in contractual dealings, act according to standards of good faith and fair dealing with the other party, perhaps best exemplifies these developments. '[T]here is widespread agreement that any viable theory of contract will have to take the fairness of a contract into account.'275 This clearly marks a decisive break with, and precipitates a drastic reappraisal of, the classical theory of contractual and precontractual responsibility. It may even provide, a 'rich source of insight into the deeper


272 The English are characteristically suspicious of broad general principle. Cf. Cheshire, Fifoot & Furmston, Law of Contract (12th English Edition, 1991), 316. English lawyers also seem less concerned with the relationships between related doctrines. Indeed, they have in the past seemed to have gone to great lengths to stress the absence of any connection between the legal responses to very similar situations: see Joseph Constantine S.S. Line v. Imperial Smelting Corporation Ltd. [1942] A.C. 154, 186 (H.L.).


mysteries of the social institution of contract.276 As once stated by a United States court, the evolution of modern commercial law places its imprimatur on the accepted moral standards and condemns conduct which fails to match ‘the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society’.277

Australian life and law, it is suggested, seem also to be moving in this direction. And although its judicial framework for requiring good-faith conduct in the formation, performance and enforcement of a contract is still at an embryonic stage of its development, the inchoate good-faith and fair-dealing requirement is burgeoning in modern contract law. What is more, whilst this movement certainly cannot be said to have proceeded apace, the past decade in Australia has witnessed a significant hastening of the process.

Yet for all that, this present chapter has been offered by way of an historical diagnosis of the problem rather than as the cure.278 The challenge now is to fashion a distinctively Australian law of contract.279 As to how this may achieved, however, we find no fixed consensus.280 If there is one thing


278 Teeven, for example, in his A History of the Anglo-American Common Law of Contract (1990), at ix-x, notes the several approaches employed by legal historians, and their consequent view of the common law within these various frameworks: (1) that the common law possesses internal intellectual demands for legal reasoning which guide the direction the law takes (this view emphasises the autonomous nature of law); (2) that common law is a reflection of social and economic forces and is this responsive in the particular conditions of the day; and (3) the law can play an ideological role wherein the powerful repress the oppressed and also persuade them that their conditions are just under the guise of emotive slogans such as “freedom of contract” and “rugged individualism”.


that history has taught us, it is that any attempt to build a coherent system of contract law has ended in failure. This might leave the pessimist with understandable cause for doubt about the possibility of ever reconceptualising contract law through a system of doctrines and principles that are ‘intellectually coherent, yet sufficiently open-textured to account for human reality to unfold over time’, and the cynic with the distinct belief that we should have learned by now that the task is simply impossible. The imaginative pragmatist, nonetheless, should be motivated to do the best she can with what she has to work with. After all, one is naturally to expect that the complexity of modern contract law should mirror the complexity of modern social and economic life—the common law ‘is a maze and not a motorway’. Modern contract law thus understandably forecloses and transcends a single theory or explanation.

---


282 In this regard, the sentiments of Kirby P. in Coal Cliff Collieries Pty. Ltd v. Sijehama Pty. Ltd (1991) 24 N.S.W.L.R. 1, at 21 are perhaps apposite:

Courts and lawyers may expect the agreements of business people to be clear and complete. Unfortunately, in the marketplace, agreements often fall short of these lawyerly desires. Yet the law of contracts serves the marketplace. It does not exist to satisfy lawyer’s desires for neat rules.

283 Corbin, for example, once wrote that contract law rules ‘are merely tentative “working rules”’ that are flexible enough to absorb the usage and policy of a complex society: Corbin on Contracts, Vol. 1, at sect. 3.

And Mason & Gageler, op. cit., 33, comment that

[the ever-increasing complexity and diversity of society appears to lead inevitably to a reduction in the number of generalised contract rules that can be stated, or alternatively to the couching of those rules only in the broadest of terms.


Chapter Two

THE METES AND BOUNDS OF GOOD FAITH AND FAIR DEALING

Chapter Contents

1. INTRODUCTION ................................................................................................................. 71
   1.1. Sources of Meaning: An Interdisciplinary Challenge ............................................ 74
   1.2. The Confusion in Good Faith Terminology ......................................................... 78

2. IN SEARCH OF THE “MEANING” OF GOOD FAITH AND FAIR DEALING .......... 81
   2.1. Defining the Indefinable and Describing the Ineffable? ...................................... 84
       2.1.1. Attempting Definition ......................................................................................... 85
           2.1.1.1. Good faith as ‘honesty’ ............................................................................... 87
           2.1.1.2. Good faith as ‘fair dealing’ ......................................................................... 94
       2.1.2. Negative Definition: Good Faith as ‘Excluder’ of Bad Faith ..................... 97
           2.1.2.1. Criticisms of the excluder analysis ............................................................. 100

3. THE SCOPE OF GOOD FAITH AND FAIR DEALING IN CONTRACT LAW .... 105
   3.1. The Application of Good Faith: Kinds of Contracts and Contracting Parties ... 105
   3.2. Good Faith and the Contractual Continuum ......................................................... 108
   3.3. Defining the Parameters: Scrutinising Good Faith and Fair Dealing in Contract Formation ................................................................. 115
If we fasten our seatbelts and rocket up to the stratosphere inhabited by fundamental principles, capable of identification but not yet identified, and interdependent in a manner not yet perceived, we will find ourselves struggling in waters of oceanic depth unassisted by much in the way of navigational aids.¹

[It is] one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that [the law] always [has] some purpose or object to accomplish, whose systematic and imaginative discovery is the surest guide to [its] meaning.²

Law, as Maitland says, is the point at which life and logic meet. The tendency of a precise and technical language is towards rigidity, and its unyielding severity it fails to meet the needs of common life. "Life will be sacrificed to logic," Holdsworth remarks, "and the lawyers will tend to become the slaves of their own abstractions."³


³ Cairns, H., “A Note On Legal Definitions” (1936) 36 Colum. L. Rev. 1099, 1100. Cairns, however, continues to comment (ibid.):

It is naive to imagine, however, that it is necessary to repudiate all the advantages of a precise vocabulary in order to keep the legal process in harmony with the demands of a changing legal order. Such a belief is due to a misunderstanding of the nature of legal definition.
1. INTRODUCTION

Central to this thesis are the problems created by the questions: What does "good faith and fair dealing" mean? Where, and in what manner or fashion, does it find its application in modern contract jurisprudence? This chapter is offered in search of an appropriate jurisprudential role for good faith and fair dealing in Anglo-Australian law. The writer will also delimit the scope of his thesis.

The vagueness of "good faith" (and associated language) has raised suspicions about the precise force and scope of the notion. And this is understandable. It was Professor Farnsworth who labelled good faith a 'protean' phrase, it having the 'unusual capacity to acquire expanded and altogether new meanings'. Indeed, some (United States) courts have declared futile the effort to explain terms like "good faith", remarking that any 'attempt to explain them renders an explanation of the explanation necessary'.

To those who have concerned themselves with the point—lawyers, judges, legislatures, scholars, historians, philosophers, and the like—good faith has meant 'different things to different people in different moods at different times and in different places'. What is clearly required, therefore,

---

4 Indeed, the great variety of differing interpretations placed upon the concept by various writers tends to suggest that even United States jurisprudence has not yet developed a coherent theory of good faith.


6 Lücke, "Good Faith and Contractual Performance", in Finn (ed), Essays on Contract, Chp. 5, 155, at 160. According to the Restatement (Second) of Contracts, § 205, Comment (a), the concept is context-hungry, since it may be used in a variety of contexts, and its meaning will vary somewhat with the context.

7 State v. Robinson, 23 S.W. 1066, 1069 (1893).

8 Bridge, M., "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can. Bus. L. J. 385, 407. And, doubtless, in a pluralistic society such as our own, good faith might also mean different things to different people in different moods at the same time and in the same place. Cf. The Hon. Mr Justice D. N. Angel, "Some Reflections on Privity, Consideration, Estoppel and Good Faith" (1992) 66 A.L.J. 484, at 493:
at least at the theoretical level, is lucid and appropriate *conceptualisation*. The intellectual constructs that represent or embody the good-faith idea (as it is formulated in words for some general or specific purpose or purposes) must clearly and suitably be enunciated.\(^9\) Proper conceptualisation has practical ramifications too. It is necessary broadly to assist those who are to formulate the applicable law, interpret and apply it.

Expressions in our law, such as "good faith" and "fair dealing", readily present themselves as open-textured\(^{10}\) and all-encompassing; and it is largely from this feature that they derive both their strengths and their weaknesses. The inordinate difficulties involved in injecting synoptic meaning into such amorphous conceptions as good faith and fair dealing are perhaps the most

---

It will be said, of course, that Australia is a country with a "plurality of incompatible faiths", and that one could not readily expect agreement amongst its citizens or judges.

\(^9\) Professor Robert S. Summers presents us with a useful list of abbreviated methodological possibilities for conceptualisation:

1. Conceptualization by formal definition—e.g., resort to necessary and sufficient conditions for the use of a word or phrase.
2. Conceptualization by synonymous paraphrase of the word or phrase in question (including contrastive paraphrase).
3. Conceptualization by paradigmatic sample, specifying what is required for the use of the word or phrase.
4. Conceptualization mainly by recital or representative examples illustrating the application of the word or phrase.
5. Conceptualization by specification of family resemblances that run through diverse uses of the word or phrase.
6. Conceptualization by way of "excluder analysis."

Summers, "The General Duty of Good Faith—Its Recognition and Conceptualization" (1982) 67 Cornell L. Rev. 810, at 817-8. The list is not intended to be exhaustive, *ibid.*, 818. Summers, *ibid.*, suggests that the adequacy of a conceptualisation may be judged by three related criteria:

(1) whether it is sufficiently faithful to the idea involved;
(2) whether it serves sufficiently the purposes of the legal requirement being formulated; and
(3) whether it serves the more general legal purposes associated with the expression "the rule of law."

\(^{10}\) For a general discussion of "open-texturedness" and language, see Bix, B., "H.L.A. Hart and the "Open Texture" of Language" (1991) 10 Law and Philosophy 51.
cogent ammunition in the arsenal of the critics of "good faith".\textsuperscript{11} To them, the imprecision inherent in such terminology makes for great uncertainty (in particular, through idiosyncratic and inconsistent decision-making), and gives free licence to the courts to subordinate the interests of the individual to judicial fancy or 'palm-tree justice': that good faith and fair dealing are no more than legal fictions for judicial expansion.\textsuperscript{12} But the extent to which this and like criticisms have validity ultimately depends, in the writer's view, on the precise jurisprudential role we are to ascribe or to assign such notions, which in turn must determine their meaning. Proper conceptualisation of

\begin{itemize}
\item \textsuperscript{12} Many seem to fear that instead of having to wrestle with the intricacies and limitations placed upon technical legal doctrines such as misrepresentation (deceit and negligence), estoppel and unconscionable dealing, courts may find it much easier to resolve cases by simply holding that there was a breach of a good faith and fair dealing obligation. Even as early as 1933, Gutteridge decried the doctrinal status of good faith, convinced that it 'would become an instrument of dangerous potency in the hands of the demagogue and would unleash a wave of judicial moralism' and would cause 'institutional and commercial havoc': Gutteridge, "Abuse of Rights" (1933) 5 Camb. L.J. 22, at 44. And cf. Snyderman, M., "What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending" (1988) 55 U. Chicago. L. Rev. 1335, at 1338:

[G]ood faith performance ... is a dangerous and unnecessary doctrine that unjustifiably restricts freedom of contract and creates a needless presumption that allows judges and juries to substitute their conceptions of reasonableness and fairness for those of parties more knowledgeable about the realities of the market.

Snyderman's precise disciplinary qualifications are not revealed in his article (he has a Ph.D. in something, maybe economics), but he firmly embraces the 'conscious belief that the market is a better place to work out commercial standards than are the courts or the legislature' (\textit{id}, 1370). It would be somewhat surprising today to find someone other than an ardent economist subscribing to this view. In any event, the sheer naivety, or at least the unmitigated extremity in this view should be revealed in Chapter Three, \textit{infra}.

For a discussion of the concept of "legal fictions", see Fuller, L., "Legal Fictions" (1930-1931) 25 Ill. L. Rev. 363; Fuller, L., \textit{Legal Fictions} (1967); Campbell, K., "Fuller on Legal Fictions" (1983) 2 Law and Philosophy 339; Moglen, E., "Legal Fictions and Common Law Legal Theory: Some Historical Reflections" (1990) 10 Tel Aviv University Studies in Law 33.
\end{itemize}
legal ideas cannot rightly occur in isolation from the desired purposes or
ends for which they are being formulated.\textsuperscript{13} What is more,

a decision to choose one of many conceptual meanings is a decision
concerning how society and the future development of law should be
affected by the concept underlying the term.\textsuperscript{14}

While "meaning", in this writer's view, must comprise both content
and purpose, an analysis of the purposes behind any legal requirement will
often provide the most efficacious method for determining its proper scope
and application.\textsuperscript{15}

1.1. Sources of Meaning: An Interdisciplinary Challenge

One should, in the early stages of a study of this nature, state one's
'conceptual core of legal reference'.\textsuperscript{16} In relation to the ideas of good faith

\textsuperscript{13} Cf., for example, Fuller, L., "American Legal Philosophy at Midcentury" (1954) 6 J. Legal.
Ed. 457, 470: 'The essential meaning of a legal rule lies in a purpose, or more commonly, in a
congeries of purposes'; Llewellyn, K., The Bramble Bush (1951), 157-8: '[T]he rule follows
where its reason leads; where the reason stops, there stops the rule'.

\textsuperscript{14} Stankiewicz, J., "Good Faith Obligation in the Uniform Commercial Code: Problems in
In discussing the relation between meaning and the effects on society which flow from a certain
meaning, one author has written:

The purpose of all legal enactments, judicial pronouncements, contracts,
and other legal acts is to influence men's behavior and direct them in
certain ways. The legal language must be viewed primarily as a
means to this end. It is an instrument of social control and social
intercourse. We may call it a directive language in contrast to a
reporting language. It is advisable to lay stress on this distinction; for
our inveterate habit of regarding language as primarily a means of
describing facts leads to misinterpretations.

Olivecrona, "Legal Language and Reality", in Newman (ed), Essays in Jurisprudence in Honor
of Roscoe Pound (1962), 151, at 177.

\textsuperscript{15} Compare the approach of Patterson, D. M., "Wittgenstein and the Code: A Theory of Good

\textsuperscript{16} The expression is Stankiewicz's, op. cit., at 406. Stankiewicz explains this core as 'the
subconscious sum of all prior cases (precepts) and legal theories (concepts) stored and
and fair dealing in contract law, this writer's frame of reference generally emanates from the common law of contracts; although other cores of reference are doubtless instructive. For example, understanding of both historical and philosophical writings which have from time to time dealt with the subject-matter under present scrutiny, as well as comparative law dealing with the same, would greatly increase the validity and quality of a writer's conclusions. Some rich sources for determining the scope and categorized in one's memory, which in turn is used to approach and make sense out of new legal problems or terms (new precepts)'

According to Stankiewicz, one must also reveal early in the discussion one's 'epistemological bias' towards good faith. By this he means the jurisprudential method by which one, perhaps subconsciously, extracts the 'legal truth' from judgments or other sources of legal meaning (id, 402). If this is in fact true, then presumably the present writer approaches this study from an 'integrationist' perspective (a combining of the 'lateralist' and 'realist' approaches into one epistemology)—as suggesting that the law is scrutinised for what it says as well as what it does: cf. id, 402-3. And whilst this is all fairly trite (cf. e.g., Llewellyn, The Bramble Bush (1951), 2: 'mere forms of words are worthless.... Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet'), in this way it is hoped that one's susceptibility to subconscious bias will substantially be diminished. Cf. also, Komesar, "In search of a General Approach To Legal Analysis: A Comparative Institutional Alternative" (1981) 79 Mich. L. Rev. 1350, 1354-5:

Traditional legal analysis teaches that the reasons articulated by the decision-maker are seldom sufficient as indicators of the actual determinants of decisions. Judicial opinions are more often observations to be explained than sources of explanation.

17 Cf. The Hon. Mr Justice E. W. Thomas, "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 V.U.W.L.R. 1, at 7:

Other equally important sources of principle exist apart from case law. The law can draw on other disciplines such as economics, psychology, political science, sociology, anthropology and the behavioural sciences in general. Foreign law and international treaty and human rights covenants are also highly relevant today. Reference too can be made to social, ethical and philosophical considerations which bear upon the problem in hand.

18 On which, see O'Connor, Good Faith in English Law (1990), Chp. 8: 'The Principle of Good Faith in Civil Law Systems'.

19 Few would disagree with this fact:

The utility of, and the many advantages gained from, and the ways in which comparative law can contribute to the development of the law and the formation of better legal minds has been amply discussed and demonstrated in the last sixty or seventy years ... and it does not seem necessary to restate and enumerate them any more.
meaning of good faith and fair dealing might include the Greek and Roman notions of “bona fides”,20 the canonist conception of “good faith”,21 the German doctrine of “culpa in contrahendo”22 (as well as the development of “treu und glauben”, faith and fidelity),23 and the French24 and German25 conceptions of good-faith performance.26 This thesis, however, does not systematically resort to these sources.


No legal system can be regarded as so advanced that it has little to gain from the study of foreign schools of thought.


A study of the history of opinion is a necessary preliminary to the emancipation of the mind.


21 See Powell, id, 21-2.


23 On which, see Dawson, The Oracles of the Law (1968), 461-502; Lücke, op. cit., at 163.


25 The German conception of good-faith performance can be found in § 242 of the German Civil Code, BGB. See Powell, ibid.; Cohn, Manual of German Law (2nd ed., 1968), Vol. 1, at 96-7; O’Connor, op. cit., at 85-8; Dawson, op. cit.; Girard, ibid.

26 Some other fruitful points of reference may be found within the common law itself, or by using comparative methods among various common law jurisdictions. Examples here might include the concept of “uberrimae fidei” in insurance law (but cf. Hasson, R., “Good Faith in Contract Law—Some Lessons from Insurance Law” (1987-88) 13 Can. Bus. L.J. 93), the law merchant, the equitable development of the fiduciary duty of good faith, and the use of the notion of “good faith and fair dealing” as employed, for example, in American and Canadian legislation and common law.
Few today would view modern Western law as wholly emancipated from other normative or epistemological systems, least of all from social morality—as a truly autonomous phenomenon, independent of other rules and sources of validity: 27

Legal theory stands between philosophy and political theory. It is therefore dominated by the same antinomies.... Legal theory takes its intellectual categories from philosophy, its ideas of justice from political theory. Its own contribution consists in formulating [moral and] political ideas in terms of legal principles. The specific terminology of law has at times obscured this position of legal theory and created an illusion of self-sufficiency. 28

Subject to the somewhat obvious qualifications below, 29 this writer would thus echo Krygier’s sentiment, that ‘each discipline could afford and benefit from more than nodding acquaintance with the other’. 30


The law has always stood apart from other disciplines; it has done so successfully in this country for over two hundred years. This is as it should be. For the law, the privileged institutional arbiter of meaning within the community, must distinguish itself from other disciplines if it is to retain its privileged status. But the law cannot afford to distinguish itself too greatly. It must, in the end, affirm that which binds the community together. The law must remain committed to and embedded in the community’s dominant paradigm.


29 See Chapter Three, Section 1.1.2.

Accordingly, this writer will selectively draw insights from the systems and disciplines of history, philosophy, comparative law, economics, political science, and the like. This said, the instant thesis is nevertheless essentially framed within the scholarly tradition of the common lawyer. As a result, what is to follow in the subsequent pages is not an exhaustive treatment of good faith.

1.2. The Confusion in Good Faith Terminology

The writer will attempt to be precise and consistent with language he employs in this thesis. However, in doing this, he makes no apology for the use of language that may be unfamiliar to the lawyer’s accustomed vocabulary, especially where it is perceived that the new language is more meaningful and precise, less vague or question-begging than that currently constantly does. Such information provides the major premise in reaching social conclusions: id, 261. And see also the quotation by The Hon. Mr Justice E. W. Thomas, supra at n. 17.

31 Language is important in a study of this nature. It provides the medium for understanding ‘reality’, and is thus the main way in which we make sense of the world. All understanding begins in language (cf. Patterson (1988), op. cit., 363, n. 89), and the law is especially a creature, and sometimes a prisoner, of it. Language, after all, is the tool of the lawyer, and legal concepts must be ‘true’ concepts, in the sense that legal concepts have especially precise linguistic contours: cf. Grossfield, The Strength and Weakness of Comparative Law (1990), 92-4. There is increasingly voluminous writing on how important a factor language and the law are: see, e.g., Grossfield, id, Chp. 13 (see esp. bibliographic references at n. 1); Goodrich, Languages of Law (1990); Schauer, F., (ed), Law and Language (1993); Reidy, D., Jr., “The Law, Dominant Paradigms, and Legal Education” (1991) 39 Kansas L. Rev. 415, arguing, inter alia, that law enjoys a privileged status as an institutional arbiter of social meaning within our society. Few would deny the importance of turning one's attention to the uses of language in order to understand the world, legal or otherwise. According to some, the only understanding we ever can, or need to have, is linguistic understanding: see Hallett, Language and Truth (1988), 32: ‘A statement is true if its use of expressions coincides with their conventional meanings, properly understood’; Rorty, Consequences of Pragmatism (1982), xix: ‘There is no way to think about either the word or our purposes except by using our language’.

Indeed, Grossfield offers language as an explanation why German law is more tightly constructed than English law, which strikes him as rather ‘loose’. German language, he explains, is inflected: the ending of one word depends on what word follows it, and the endings of sentences determine their meaning, whereas in English sense depends on word order. German sentences also require more ‘planning’ than do their English counterparts. He thus wonders whether notions we meet in English law, such as good faith, estoppel, trust, are rather vague, more open, and less technically developed than German equivalents. Furthermore, he observes, English statutes go into enormous detail and ‘are long and wearisome’ (id, 100).
employed in legal parlance. It is hoped, therefore, that the reader will tolerate some occasional usages which do not represent orthodoxy. Precise definitions of novel language will be provided at their appropriate points in the discussion throughout this thesis.

Terminology in good-faith discourse, however, is not always so precise. Indeed, it is often confusing. Even within the same piece of scholarship, a commentator may alternate without explanation between referring to good faith as a ‘concept’, a ‘standard’, a ‘principle’, a

32 In this view, the writer would draw upon the support of Williston, himself a great defender of the common law, who, in relation to the then proposed Uniform Commercial Code, could not ultimately oppose the use of language novel to the common law, and hence to the common lawyer, since it lacked an established judicial meaning. Cf. Williston, “The Law of Sales in Proposed Uniform Commercial Code” (1950) 63 Harv. L. Rev. 561, 562-3; Teeven, A History of the Anglo-American Common Law of Contract (1990), 222.

33 Sir Anthony Mason, “Foreword” (1989) 12 U.N.S.W. Law Journal 1. The term “concept” is used in this thesis to refer to a general notion; an abstract or generic idea generalised from particular instances. A concept is the mental referent by which we can identify, classify and store percepts, which are sensory stimuli which we receive from external sources and which form the basis of our external knowledge. “Conception”, then, is the process by which we organise percepts, commit them to memory, and analyse them for the purpose of selecting the best possible reaction to the newly perceived stimuli. “Conceptualisation”, therefore, refers to the formulation of concepts and interpretation by conceptual methods. Cf. Stankiewicz, op. cit., at 390-1; Rawls, A Theory of Justice (1971), 5-6.

34 See Tancelin, “Comment” (1984) 9 Can. Bus. L. J. 430, at 431; Kennedy, D., “Form and Substance in Private Law Adjudication” (1976) 89 Harv. L. Rev. 1685. The term “standard” is used here to refer to the legal measure to which individuals must conform and by which the quality of one’s conduct is judged. It does not, therefore, purport to create liability, as a doctrine or rule does; rather it establishes a minimum norm of conduct, failure to observe which has consequences provided for by the law. Cf. Fox J in Brown v Jam Factory Pty. Ltd (1980) 35 A.L.R. 79, at 86 (re: s. 52 Trade Practices Act (1974) (Cth)). As such, standards are more difficult to identify than rules; and since they are prone to change with the shifting values that underlie them, they are not susceptible of precise definition either.

35 See Summers (1982), op. cit., at 821; O’Connor, op. cit., at 10. The term “principle” is used here to refer to a general or specific organising idea which provides the fundamental truths or explanations underlying particular concepts, doctrines and assumptions. As such, it draws together and accurately encapsulates the various unifying strands of conceptions, etc. that might otherwise seem disparate. A principle, therefore, is that which constitutes the essence of a body or its constituent parts. Principles, however, do not come fully armed with attendant rules, as, for example, does a doctrine (see n. 40, below). Like standards, therefore, they do not create legal liability, but rather provide a “ball-park” image of some fundamental truth. Principles thereby provide a useful basis for legal reasoning, and a baseline upon which legal doctrines, and attendant rules, are fashioned and re-fashioned. Accordingly, they play a central role in the dynamics of law. See, also, n. 39, below.
‘requirement’ 36, a ‘duty’ 37, a ‘condition’, 38 a ‘rule’, 39 a ‘doctrine’ (de facto or de jure), 40 or an ‘obligation’. 41 Care is thus taken to avoid perpetuating this confusing practice; a point to which we shall return in Section 4.1. below.


37 See Restatement (Second) of Contracts, § 205. The term “duty” is used here to refer to the moral or legal obligation to conform to some standard, or to comply with some rule, directive or mandate. It is usually owed by one to some other legal entity and is thus the correlative of “right”. As we shall, see, however, the notion of “duty” in this context does not have the usual connotation associated with true legal obligation. To be sure, the “duty” here is of a self-regarding variety—a duty to oneself, so to speak—and hence does not create a corresponding right, strictly speaking, in the beneficiary of the duty.


39 See Ontario Law Reform Commission, Report on Sale of Goods (1979), 168: ‘minimum rule of decent behaviour’; see also, Report on Amendment of the Law of Contract (1987), 175. The term “rule” is used here to refer to any precept attaching a definite detailed legal consequence to a definite detailed state of facts. A rule thus tells us about how we are to act, and what consequences might follow if we disobey: and in this respect it perhaps allow us to predict when we will be subject to the judgment and sanction of the state. Rules thus operate to control human behaviour by giving legal entities public advance warning that certain price tags attach to certain parts of their contemplated behaviour and then treating them in accord with those warnings. “Rules” are often distinguished from “principles”: see Dworkin, R., Taking Rights Seriously (1977), 22-8; Bayles, M., Principles of Legislation (1978), 42-4. Unlike principles, rules tend to be applied in an “all-or-nothing” fashion, and they tend in this role to be determinate of a particular evaluation. When principles apply, they do not necessarily determine an evaluation. And because principles do not apply in an all-or-nothing way and can conflict, they have “weight”. Unlike rules, conflicting principles must be weighed or balanced against one another, and some have more weight than others. Accordingly, Peczenik described a principle as a ‘yardstick of graded qualification. This mode of qualification is not binary but graded, more-or-less’: Peczenik, A., “Prima-Facie Values and the Law”, in W. Sadurski (ed), Ethical Dimensions of Legal Theory (1991), 91-109, at 95.

Some scholars reject this distinction between principles and rules, contending that principles differ from rules only by being more general (cf. Raz, J., “Legal Principles and the Limits of Law” (1972) 81 Yale L. J. 823). Hence, both can be weighed and balanced against one another. This writer, however, will proceed upon the principal distinction that rules, which tend usually to be more specific, apply in a legally determinative way, whereas principles, which tend usually to be more general, serve more as guiding ideas and less as decision-rendering devices.

2. IN SEARCH OF THE "MEANING" OF GOOD FAITH AND FAIR DEALING

Now, if names of things are not properly defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish. When the arts and institutions of civilization cannot flourish, the law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do.  

*When I use a word, it means just what I choose it to mean—neither more nor less.*

Theories of meaning have tended to concern lexicographers, linguists and philosophers rather than lawyers. As was noted in the introduction to this chapter, in order properly to understand the meaning of “good faith” and “fair dealing” (if indeed they be distinct notions), the writer considers it necessary first to bear in mind the purposes that those conceptions serve (or are to serve) in contemporary legal discourse, theory and practice. The particular legally determinative consequences: contrast, for example, the general principle of unconscionability with the specific doctrine of unconscionable dealing.

41 See Uniform Commercial Code, § 1-203.

42 *Confucius, the Analects*, xiii, 3, as quoted by Perillo, J., “Restitution in a Contractual Context” (1973) 73 Colum. L. Rev. 1208, at 1223, n. 96.

43 So said a scornful Humpty Dumpty in Lewis Carroll’s, *Through the Looking Glass*, (1871), Chp. 6.

44 Although meaning is as important to the lawyer as it is to the lexicographer, linguist and philosopher, it is probably the latter class of persons who are better trained to think and write about such matters. Accordingly, the use of any philosophical material in this chapter is offered for narrative purposes only, and no critical analysis is intended. Generally, see Austin, “The Meaning of a Word”, in Caton (ed), Philosophy and Ordinary Language (1963), Chp. 1; Ryle, “The Theory of Meaning”, in Caton (ed), Philosophy and Ordinary Language (1963), Chp. 8; Hossipers, An Introduction to Philosophical Analysis (2nd ed., 1976), 2-100; Wittgenstein, Philosophical Investigations (1958) (Anscome, trans., 3rd ed., 1968), as discussed by Patterson, “Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement under Article Nine” (1988) U. Pennsylvania L. Rev. 335, at 355 et seq.

45 Cf. Patterson, (1988), *op. cit.*, nn. 110, 111. A great deal of misunderstanding about good faith, especially in its early days (under the Uniform Commercial Code (U.S.)) seems to have been the result of scholarly preoccupation with “defining” the standards of good faith,
purpose of good faith, it is suggested, as it bears on the subject-matter of this thesis (contract formation), is properly to be divined inductively from the content of various familiar, well-established and concrete legal doctrines—duress, undue influence, unconscionable dealings, misrepresentation, unilateral mistake, and the like—as revealed through their current operation in the law. In taking this tact, the writer notes a consistency in approach with Wittgenstein’s centre-piece philosophical writings on ‘meaning as use’. 46 Understanding concepts, on that writer’s view, requires

without rendering explanation of what those standards were to measure and for what purpose. Cf. Burton (1981), op. cit., 2, and 18 et seq.

46 Wittgenstein states:

For a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in language.

Wittgenstein, Philosophical Investigations (1958), at 20, as quoted by Patterson (1988), op. cit., at 355. Wittgenstein’s theories are perhaps most helpful for present purposes because he was not concerned simply with the meaning of words, but the meaning of words in context. Cf. Patterson (1990), op. cit., 35: ‘... meaning is a function of words in context’.

According to Wittgenstein’s theory of meaning, language in itself is an imperfect device for determining meaning. Holmes, for example, op. cit., at 408, describes the problem of ascribing synoptic meaning to the term “good faith” as in part linguistic. Many expressions, legal and non-legal, suffer difficulties when pressed at their most basic level: hence we find the literature of linguistics, language and philosophy heavily attended with discussions of vagueness, equivocation, and the like. Not only do many words have numerous and varied dictionary meanings, but context is also considered essential to a full understanding of many expressions. We cannot always explain or appreciate words devoid of the particular contexts in which they find their application. What is required in Holmes’s view, therefore, is that such expressions contain a sufficient consensus of meaning, over a considerable range of applications; that they may have utility in both practical and legal affairs; that they carry a ‘common core’ of meaning (ibid).

According to Wittgenstein, although a word may have a general or usual meaning, we need it to be placed within a context (i.e., usually its placement amongst other words within a sentence: cf. Austin, op. cit., at 2) before we can begin to understand that word. In that way we learn how we might employ that word (or, for that matter, a “term”, “phrase”, or “concept”, which themselves merely comprise words or groups of words) on a different occasion, so that others may understand it on that other occasion or even predict the way it may be used on future occasions. The meaning of a linguistic sign, therefore, is very much a public, as opposed to a private, phenomenon:

Meaning is not natural but cultural, and like all other things cultural, such as social institutions, it is not, unlike behavior, something that can be seen and thus described; it can only be inferred from behaviour.
that one look at the various activities of which they are a part, and their social roles or purposes.

Madison, *Understanding: A Phenomenological-Pragmatic Analysis* (1982), 137, quoted by Patterson (1988), *op. cit.*, 355, at n. 64. The usage and understanding of language, therefore, is assessed against the background of public, intersubjective practices—meaning lies outside of the speaker. Wittgenstein’s later philosophy, however, is not without its contemporary detractors: see Patterson, *id.*, 358, at n. 73.

Generally speaking, *understanding*, a word depends on using it both correctly and on an appropriate occasion: Patterson, *id.*, 355-6 (and see citations at nn. 65, 66).

47 These activities are the things we “do” with language. As one writer has demonstrated, this is particularly true in the adjudication process:

[As] Wittgenstein suggests, when the rules become more important than the context in which they are applied, “things do not turn out as we had assumed.” When the context in which legal words are used changes drastically, cases with similar factual situations may not at all be alike, and to treat them as such might serve neither justice nor logic. Indeed, when legal language “goes on holiday” and the judge rigidly applies precedent without consideration of the language-game, or context, in which the words of a statute or the Constitution are being used, he may well find himself entangled in his own rules, making distinction after distinction in order to make the factual situation fit the precedent, and in the end, clearly losing touch with the real needs of the community.


48 In short, we cannot understand the meaning of words, propositions and concepts apart from the practices that give those words, propositions and concepts meaning. As one commentator writes:

The meanings of words can only be understood if we understand the purpose or ends of the human activities of which words are part. Ignoring the different language games and their ends or purposes when seeking the meaning of a word is like trying to understand the brake lever in a locomotive without understanding what a locomotive does or what it is for.

2.1. Defining the Indefinable and Describing the Ineffable?

For every complex problem there is a solution that is neat, plausible and wrong.⁴⁹

As with the first men who attempted to ascend Mount Everest and failed, success ultimately depended on the route that was taken. The shape, the appearance of any mountain depends on one's line of approach. Premature commitment to a particular route, however, might result in eventual failure should an unforeseen obstacle impede one's path. So too is "good faith" like a mountain: 'Mount Olympus' perhaps.⁵⁰ An extraordinarily 'circumstance-bound' conception,⁵¹ its shape, its appearance, depends very much on one's line of approach or perspective,⁵² and on the contexts or issues in question.

Now, whilst there is today significant support for the general relevance of good faith and fair dealing in and to modern contract law (both theory and practice), there remains an overwhelming lack of unanimity concerning the meaning(s) or role(s) to be ascribed or assigned to that conception. Commentators have observed that, while courts often distinguish on an ad hoc basis between "good faith" and "bad faith" conduct, 'neither litigation nor protracted academic discussion has reduced [the] concept to a generally accepted set of working rules'.⁵³ What is more, while there has been no scarcity of attempts to elaborate meanings and standards of good faith,⁵⁴ none of these has met with universal approval.⁵⁵

⁴⁹ H. L. Mencken.


⁵² For some suggested alternative approaches to conceptualisation, see Summers, supra at n. 9.


⁵⁴ Professor Reiter, for example, presents an anthology of meanings of good faith found in the literature: (1983) Valparaiso U. L. Rev. 705, at 706, n. 3. Included among these are: 'fairness';
2.1.1. Attempting Definition

All definition in law is dangerous, for one can rarely be found that cannot be overthrown.\(^{56}\)

Definition is a poor instrument....\(^{57}\)

The merit of a definition depends on the theory in which it is embedded.\(^{58}\)

An issue that has featured predominantly in the literature of good faith is whether that term is ever capable of being universally and reportively defined.\(^{59}\) Whether such a mode of conceptualisation is possible,

\(\text{‘fair conduct’; ‘reasonable standards of fair dealing’; ‘good faith and fair dealing’; ‘decency, fairness, reasonableness’; ‘decent behaviour’; ‘a common ethical sense’; ‘a spirit of solidarity’; ‘community standards of fairness, decency and reasonableness’; and ‘an excluder of bad faith’. One could add Reiter’s own meaning to this list: ‘standards of behaviour relevant in the community’ (id, 706), and Lücke’s (op. cit.) conception of good faith (in contract performance) as a certain type of ‘loyalty’; although this is not to be confused with the conception of loyalty in the fiduciary context: generally, see Finn, “The Fiduciary Principle”, Chp. 1 in Youdan (ed), Equity, Fiduciaries and Trusts (1989). Fried describes good faith as an ‘adverbial notion suggesting the avoidance of chicanery and sharp practice (bad faith) whether in coming to an agreement or in carrying out its terms’: Contract as Promise (1981), 74.}\)

\(^{55}\) Although academics often fail to agree on the parameters of the good faith obligation, the desirability of our giving open recognition to a generalised standard of good faith and fair dealing seems to depend largely on its usefulness as a mechanism for achieving justice.

\(^{56}\) Cairns, H., “A Note On Legal Definitions” (1936) 36 Colum. L. Rev. 1099, at 1099, reciting a Roman maxim.

\(^{57}\) Per Lord Scarman in National Westminster Bank v. Morgan [1985] 1 All E.R. 821, 831; 1 A.C. 686, 709. The full quote reads:

\text{Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.}

\(^{58}\) Winston, K., “The Ideal Element In A Definition of Law” (1986) 5 Law and Philosophy, 89, at 89.

\(^{59}\) A “reportive” definition is a report of word-usage. Reportive definitions can only ever be true or false. They may be contrasted to “stipulative” definitions, which say, in effect, “I shall use this word to mean so-and-so”:

I propose to understand by this term such and such, and if, dear reader, you wish to understand by the same term something else, you are free to do so provided that you do not read your definition onto my words. The value of our respective definitions must be judged by their comparative usefulness.
of course, depends upon one’s ability precisely to state all the necessary and sufficient conditions for the use of “good faith”, thereby including all the essential elements or characteristics and excluding all nonessential, so as to distinguish it from all other classes and things.

Attempts to “define” good faith abound (although to varying degrees of specificity) in literature and in legislation. Although most commentators nowadays would appear to concede that good faith cannot, as such, usefully be defined in terms of a single generalised and positive meaning, the temptation of attempting such a task has not altogether escaped us. Many examples can hence be given.


60 The test of whether a certain characteristic is defining is this: would the same word still apply if the thing lacked the characteristic? If the answer is no, the characteristic is defining; if the answer is yes, it is merely accompanying. Thus, a defining characteristic is a sine qua non.

61 Generally, on definitions, see Robinson, R., Definition (1965).

62 These include:


* Good faith performance ‘occurs when a party’s discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively’: Burton, id, 373. Professor Burton does not attempt to apply his analysis to any other stage of the contracting process. For criticism of Burton’s model see Summers (1982), op. cit., at 825-34 (cf., also, Burton’s reply, [1984] 69 Iowa L. Rev. 497); Bridge, op. cit., at 401-4


* Good faith means ‘a real commitment to the laws which govern contracts, to the contract itself, and, most importantly, to the other party’s aims and objectives, provided these are or should be known and understood’: Lücke, op. cit., 164.

* Good faith is ‘a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness
One useful starting point for analysing the meaning of good faith, though directed only at contract performance and enforcement, are the definitions contained in the United States’ Uniform Commercial Code and Restatement (Second) of Contracts.\textsuperscript{63} This also draws into consideration the possible relationship between the potentially distinct conceptions of "good faith" and "fair dealing".

2.1.1.1. Good faith as 'honesty'

On its narrowest (and perhaps most literal\textsuperscript{64}) interpretation, "good faith" may be treated as synonymous with mere "honesty".\textsuperscript{65} Article 1-203 of the Uniform Commercial Code perhaps best exemplifies this approach. Scholarship addressed to the good-faith provisions of the Uniform

and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules': O'Connor, \textit{op. cit.}, 102.

- Good faith requires one 'to subordinate the regular pursuit of one's individual interest to the maintenance of reasonable community standards in and for relationships': Finn, "The Fiduciary Principle", \textit{op. cit}, 11.

One might, however, question the \textit{definitional} utility of the above examples. Although such linguistic formulations provide us with assistance in analogical reasoning with the cases (so that we may be able to understand the distinction between groups of good-faith and bad-faith cases, respectively), they provide little, if any, assistance in \textit{defining} good faith. While they may be helpful as providing, to various degrees, \textit{rationales} for the good faith requirement, they merely \textit{describe} or \textit{explain} the ideas that might figure in the resolution of a good faith dispute; they do not define the general notion itself. This assists to confirm the suggested view that good faith is simply not the kind of idea that is susceptible of definition. In fairness to Finn, he proceeds after the aforementioned quotation to comment (\textit{ibid}):

If [good faith] does not encapsulate a single, readily definable idea, it encompasses at least three overlapping themes: the promotion of cooperation between parties to a relationship; the curtailment of the use of one's power over another; and the exaction of "neighbourhood" responsibilities in a relationship.

\textsuperscript{63} Although both contain provisions relating to good faith in the performance and enforcement of contracts, insofar as they provide minimal behavioural guidelines to parties during the post-formation stages of the contractual process, some meanings that have been enunciated in that context may be relevant to contract formation also.

\textsuperscript{64} Cf. The Concise Oxford Dictionary of Current English (1982): “Faith n. ... good ~, honesty of intention...”.

\textsuperscript{65} In the formation stage of contracting, for example, honesty appears to assure that one party will not mislead another as to the facts in order to benefit in some way by the other's misinformed decision.
Commercial Code, however, highlights the intractable difficulty of defining the scope and meaning of the good-faith obligation under that legislation.\(^{66}\) The key provisions for present purposes are §§ 1-203, 1-201(19) and 2-103(1)(b). Article 1-203, for example, embodies a seemingly mighty imposition:

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.\(^{67}\)

That provision, however, loses much of its operative potential in light of the definition of good faith given in § 1-201(19), as meaning ‘honesty in fact in the conduct or transaction concerned’.\(^{68}\) Apparently based on prior


\(^{67}\) The comment adds:

This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties.

\(^{68}\) But here lies a deeper and more irksome issue. The phrase ‘honesty in fact’ in § 1-201(19) is itself highly ambiguous. The apparent restricted scope of the general obligation to perform and enforce contracts in good faith under § 1-203 might indeed be given a much wider scope depending on the meaning that is to be assigned to ‘honesty in fact’. Honesty can itself be understood in several ways. For example, does the phrase mean something different from ‘honesty in mind’ (or ‘individual moral honesty’); or is ‘honesty in fact’ equivalent in meaning to ‘commercial reasonableness’ in § 2-103?—i.e., is the standard based on individual (subjective), customary (objective or ‘individual commercial honesty’—‘honesty in fact’ according to reasonable commercial standards of customary dealing), or ‘individual social honesty’ (‘honesty in fact’ based upon standards of conduct established by community values and interests) conduct? (cf. Holmes, op. cit., 403.) In the latter case, therefore, presumably it would be open to a merchant to raise his compliance with expected commercial standards as a defence to an allegation that he did not act “honesty in fact”. The possibility that compliance with accepted commercial practices (though clearly unfair) may be a full defence to allegations that a merchant did not act in good faith is illustrated by First National Bank of Philadelphia v. Anderson, 5 Bucks Co. L. Rep. 287, 7 Pa. D. & C. 2d 658 (C.P. 1956). In discussing the Code’s distinction between “honesty in fact” (§ 1-201 (19)) and “reasonable
commercial standards” (§ 2-103 (1)(b)), the court, after implying that there had been a possible breach of subjective good faith, said:

True, section 1-201 defines good faith as being honesty in fact .... [N]o evidence was presented, however, indicating that the failure to make inquiry ... was in any sense a divergence from common banking or commercial practices.


Although the legal phrase “good faith” may quite naturally encompass both the subjective and objective interpretations of “honesty”, difficulties arise given any inquiry into “honesty in mind”, as this necessarily requires an examination into subjective motivation. Moreover, any enquiry into subjective motivation does not rest easily with the objective approach of contract law. According to traditional thinking, good-faith conduct cannot realistically refer to “honesty in mind”, since the law is unable to examine the inner workings of one’s mind. In this regard one may begin by recalling Brian C.J.’s apothegm that ‘the Devil himself knows not the intent of a man’ (Y.B. Pasch. 17 Edw. 4, f.1, pl.2 (1477). This must, of course, be now read in the light of Bowen L.J.’s judgment in Edgington v. Fitzmaurice (1885) 29 Ch.D. 459, at 483: ‘... but the state of a man's mind is as much of a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else’. Thus, although referent to the parties’ respective states of mind, the court relies on objective, external facts from which it can draw a conclusion about the actual state of mind.

The courts’ attempts at resolving this ambiguity have been varied. For a general discussion, see Stankiewicz, op. cit., 392 et seq. Some courts have, for example, attempted to resolve the ambiguity by developing 'hair-splitting' and 'mind boggling' distinctions (e.g., between simple and gross negligence or 'notice' and 'knowledge'). Others have acknowledged and accepted the generality of the Code’s definitions and have simply abandoned the idea that good faith has a comprehensive meaning. For example, in Star Credit Corp. v. Molina, 59 Misc. 2d 290; 298 N.Y.S. 2d 570 (1969), the court stated that 'it is impossible to define “good faith” comprehensively and exactly’. The court concluded that good faith, as used in § 1-201(19), means ‘honesty and perhaps more’: id, at 293; 298 N.Y.S. 2d, at 573, cited by Stankiewicz, id., 393, at n. 12. In the latter writer’s observation, however, some courts 'have neither been stymied nor conquered by the Code’s definition of good faith' (id, 393):

These are the courts which have resolved the issue by reference to the historic and classical import of the good faith concept, the normal commercial expectations of the parties, reasonable intent of the drafters, integrated readings of the Code as a whole and the effect of the courts’ decision on commerce and the Code’s policy of flexibility in commerce. (id, 393-4. Citations omitted.)

These courts have approached the meaning of good faith from the standpoint that, as a commercial concept, it is capable of having a generalised meaning. To them, the Code definitions of good faith are capable of being clearly perceived because they are ‘conceptually correlated’ to the policy behind the Code—the advancement of commerce. The Code itself also appears to encourage such an approach in cases of ambiguity: see, e.g., § 1-102, instructing that questions of doubt concerning the Code should be resolved through liberal interpretations and applications which further the commercial policies of the Code, namely, ‘modernize’,

89
statutes and case law dealing with good-faith purchasers for value or holders in due course, the definition is a very narrow one. It seems to exclude from its purview various forms of opprobrious conduct which regularly feature in the contractual process, notwithstanding that the culpable party has in fact acted “honestly”: this is to say, “unfair” or “unreasonable” conduct is excluded from the meaning of good faith. Although this may not be permit ‘expansion’ and make commercial law ‘uniform’; and § 1-103 expressly incorporates external sources of law to supplement the Code’s provisions, specifically including the law merchant as one of these sources. One American court took up this point in discussing the Code’s broader obligation of good faith for merchants:

While there is no precise definition of the phrase “the observance of reasonable commercial standards of fair dealing in the trade,” nevertheless, departures from customary usages and commercial practices should be viewed as strong indicia that the practice is not reasonable. At the same time, I must be cautious enough to realize that a solution which equates custom and trade usage with only one reasonable commercial standard could be unfortunate for an ever-changing commercial setting. As noted in Malcom, The Proposed Commercial Code, 6 Bus. Law 113, 128 (1951), citing the 1950 Committee, comments:

“... there immediately arises the very difficult problem of what usages, customs and practices are those intended to be included in the standard. Any lawyer who has ever attempted to prove what usage or custom is will immediately recognize how litigious such a standard could grow to be... More serious still is the possibility that “reasonable commercial standards” could mean usage, customs or practices existing at any particular time. This could have the very bad affect of freezing customs and practices into particular molds and thereby destroy the flexibility essential to the grand evolution of commercial practices—a result which the Code draftsmen certainly would never desire.”


70 Despite a party’s purity of mind, therefore, his or her conduct may nevertheless conflict with the dictates of contractual good faith. As one American judge stated:

Good faith in law ... is not to be measured always by a man’s own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other.

First National Bank v. F.C. Trebein Co., 59 Ohio St. 316, 324-325, 52 N.E. 834, 837 (1898).
representative of the chief drafter’s original intent, as a basic behavioural guideline, the criterion of honesty in fact appears to be no higher than ‘the pure heart and the empty head’. In this vein, Professor Farnsworth has argued that § 1-203 has been ‘so enfeebled that it could scarcely qualify ... as an “overriding” or “super- eminent” principle.’

71 Cf. Summers, op. cit. (1968), 312, n. 66. The Comment to the May 1949 Draft of § 1-203 explained the good faith obligation in terms of ‘commercial decencies’ and envisaged commercial practice as a cooperative, rather than an adversarial process:

This Act adopts the principles of those cases which see a commercial contract not as an ‘arm’s-length’ adversary venture, but as a venture of material interest, when successful, and as involving due regard for commercial decencies when the expected favorable outcome fails.

The Comment thus implied that a contract creates a relationship that requires each party to act with due regard for the interests of both parties. The adding of the words ‘commercial decencies’, therefore, appeared to exact ‘an additional and extraordinary degree of concern for others’: generally, see Gillette, op. cit., 623-6. As a result of submissions by the American Bar Foundation, however, the 1952 version of the Code limited the definition of “good faith” to its present form of “honesty in fact” and any reference to “commercial decencies” was omitted from the Comment to § 1-203: Gillette, id, 623-4. Cf., however, Grant Gilmore’s account of the drafting history of the Code: The Ages of American Law (1977), 83-6, as discussed by Gillette, id, 624.


73 Farnsworth, “Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code” (1963) 30 U. Chi. L. Rev. 666, at 674. Professor Summers, in his 1968 article, also sought to demonstrate the truth of this at some length: op. cit., 210-12.

However, good faith was not always so narrowly defined. In the May 1949 version of the UCC, immediately preceding the present § 1-201(19) definition was the following sentence:

Good Faith includes good faith towards all prior parties and observance by a person of the reasonable commercial standards of any business or trade in which he is engaged.

Cf. Summers, “Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 Va. L. Rev. 195, at 207. The reason this sentence was dropped seems to be opposition from the Committee on the Proposed Commercial Code of the Section on Corporation, Banking and Business Law of the American Bar Association and others. In short, the Committee opposed the proposed definition for three reasons: (1) to the average lawyer or layperson good faith primarily signified ‘honesty’; (2) the reference to ‘observance of reasonable commercial standards’ carried with it the implication of usages, customs or practices, and this gives rise to difficult problems in ascertaining what these norms were for a particular trade or business; and (3) the possibility that ‘reasonable commercial standards’ could mean usage, customs or practices existing at any particular time could have the effect of
The “subjective” conception of good faith has been severely criticised as being in need of an “objective” component\textsuperscript{74}—that commercial law should be guided by ethical considerations such as fulfilment of reasonable expectations, altruism and equality of interested parties in addition to the traditional prohibitions on fraud or deceit.\textsuperscript{75} In respect of sale of goods, however, the \textit{Uniform Commercial Code} provides a separate and higher standard of good faith in the case of merchants. Article 2-103(1)(b) accordingly provides:

‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Why the Code’s sponsors decided upon a different definition in the case of merchants is not revealed by the Code itself,\textsuperscript{76} but the general effect of the above provision is to add an objective standard to the test supplied by § 1-203. Article 2-103(1)(b), however, is subject to a number of important restrictions.\textsuperscript{77} First, the definition applies only where § 2 itself imposes a

\textsuperscript{74}Farnsworth, \textit{id}; Summers, “Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 Va. L. Rev. 195; Burton persuasively argues that good faith as honesty is inadequate in his analysis of the contract performance cases—that it is only helpful in a few cases: Burton (1981), \textit{op. cit.}, at 17.

\textsuperscript{75}Cf. Gillette, in “Limitations on the Obligation of Good Faith” (1981) Duke L. J. 619, who questions the propriety of an expansive interpretation of the good-faith obligation. Notwithstanding the Code’s drafting history, which partly supports the use of a good-faith obligation to transform altruistic behaviour into legal responsibility, and subsequent scholarship to this effect, he concludes that the courts have been justified in restricting the scope of the obligation.

\textsuperscript{76}Although one would assume the reason to be historical (merchants historically being subject to higher standards of trade): generally, see Trakman, L., \textit{The Law Merchant: The Evolution of Commercial Law} (1983).

\textsuperscript{77}Cf. Ontario Law Reform Commission (1979), \textit{op. cit.}, 165.
duty of good faith; and, third, it presupposes standards of fair dealing in the trade and there may be none. Hence, although § 2 has been given a wider definition of good faith, it is rather limited in scope.

Moreover, in light of the cumulative obstacles presented by §§ 1-201(19), 1-203, and 2-103(1)(b), Professor Summers has suggested that a more "fertile" source of the Code's requirements of good faith may be found in general principles of law and equity which supplement its specific provisions. The Code's overly restrictive definitions of good faith, however, perhaps illustrate why attempts at definition should be avoided.

78 Only 13 out of the 104 sections in § 2 expressly impose a good faith requirement.

79 Although the term 'merchant' is widely defined under § 2-104 (1).


81 Professor Summers complains that the Code's definitions restrictively distort the doctrine of good faith, and for a number of reasons, including the draftsmen's failure to view good faith as an excluder, their urge to give specific guidance through definitions, and the influence of the subjective-objective controversy in the law of negotiable instruments: Summers (1968), op. cit., at 215. He suggests (id, n. 73) that a possible substitute for § 1-203 might read:

Section 1-203. Obligation of Good Faith

(1) From the negotiation to discharge of contracts or duties this Act governs, parties shall act in good faith.

(2) For the purposes of subsection (1), "good faith" rules out all relevant breaches of faith, e.g., abusing the privilege to withdraw an offer, taking unfair advantage, evading the spirit of a contract, conjuring up a dispute to force a favorable modification, abusing a power to terminate a contractual relation.

82 Id., 197. See also, Summers, "The General Duty of Good Faith - Its Recognition and Conceptualization" (1982) 67 Cornell L. Rev. 810. The UCC provision which sanctions this approach is § 1-103. It provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

The Code case law, although it is not abundant on the point, would appear to support Summers's suggestion, and also indicates a tendency for the courts to blur the distinction
2.1.1.2. Good faith as ‘fair dealing’

It would appear that many of the difficulties in ascertaining the meaning of “good faith”, especially in regard to its relation to “fair dealing”, stem in part from the fact that, as revealed in the previous section, “good faith” has been used in two senses. At times it is used to mean merely ‘honesty in fact’ (perhaps with a gloss of commercial reasonableness), as this was its traditional usage in connection with the doctrine of good faith purchase and the holder in due course. At other times it has been used to mean “fair dealing”, that is, referring to minimally\(^{83}\) decent behaviour according to some relevant standard.\(^{84}\) An immediately obvious way to escape the subjective-objective debate that has tended to surround the good-faith-as-honesty-school is simply to extend its meaning to that of “fair dealing”. Indeed, the phrases “good faith” and “fair dealing”, within United States law, at least, do not always appear to have independent legal significance.

In that country, the objective component to the good faith conception, regrettably believed by so many to be absent from the general provisions of

\(^{83}\) Professor Summers (1982), op. cit., 811, reminds us that good faith and fair dealing is a ‘minimal requirement (rather than a high ideal)’, and that ‘legal good faith is not identical with moral good faith’ (id, 834). Cf., also, The Hon. Mr Justice Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) The Denning Law Journal 131, at 140-1: [T]he law ought not to set its sights too high. These notions [of good faith and fair dealing] ought to reflect not the response of the moral philosopher but the responses and usages of ordinary right thinking people.

the Uniform Commercial Code, was introduced into the general law of contract by the American Law Institute's Restatement (Second) of Contracts, § 205, which provides, starkly:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.85

The broad effect of this provision, together with its accompanying Commentary and Reporter's Note, is to recognise and conceptualise a general 'duty' of good faith and fair dealing in the performance and enforcement of contracts in United States law.86 Comment (a) to § 205 repeats the Uniform Commercial Code definitions of "good faith", and remarks that the meaning of the phrase 'varies somewhat with the context'. It goes on to explain that

good faith performance or enforcement ... emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.

The striking feature of the good-faith obligation under the Restatement is that it appears much broader in definition than its equivalent under the Uniform Commercial Code,87 containing both a subjective and an

---

85 According to Farnsworth, § 205 'reflects a substantial body of pre-Code case law': Farnsworth, "Ingredients in the Redaction of the Restatement (Second) of Contracts" (1981) 81 Colum. L. Rev. 1, at 10. Summers, too, in his 1968 article (op. cit.) surveys many of these decisions. In addition to judicial opinion, however, § 205 also appears to be based on other statutory developments, and the published writings of legal scholars, the most notable of which is Summers's own article in 1968, ibid. Indeed, in his 1982 article, op. cit., Summers comments that his earlier work appears to have been highly influential in the recognition and conceptualisation of the generalised good-faith obligation contained in § 205. The major statutory influence in the drafting of the Restatement provision was the Uniform Commercial Code itself (cf. Comment (a) to § 205 of the Restatement), but it is already noted that the meanings of good faith in those respective authorities 'diverge significantly' (Summers, 1968, op. cit., 824-5) and that the conceptualisation of good faith under § 205 is 'superior' to that under the Code.


87 It is certainly broader in scope: the prescribed good-faith requirement applies to all types of contracts and to all types of contracting parties.
objective component. The linking of "good faith" to "fair dealing" in § 205 seems to command this result. Elaborating on what is "good faith" and what is "bad faith", Comment (d) to § 205 states:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.\(^{88}\)

The drafter of § 205, Professor Braucher, was mindful of the fact that the Uniform Commercial Code's general limitation of good faith to 'honesty in fact' was too narrow.\(^{89}\)

In view of the near-universal practice of treating "good faith" and "fair dealing" isomorphically,\(^{90}\) they are not, for analytic or linguistic purposes, given independent legal or terminological significance in this thesis. Unless the context clearly dictates to the contrary, "good faith" and "fair dealing" are from this point forward employed as thoroughly interchangeable conceptions, and, when coupled together into the single formulation: "good faith and fair dealing" (for this is the phraseology customarily employed in the context of our present concern),\(^{91}\) they are used quite tautologically. If one were required to differentiate between the two conceptions, however (as this writer clearly has done in the title to this thesis), "fair dealing" should ideally be used in preference to "good faith".\(^{92}\) For the latter term is more


\(^{89}\) In particular, he stated that a ‘focus on honesty is appropriate to cases of good-faith purchase; it is less so in cases of good-faith performance’: Restatement (Second) of Contracts, § 205, Comment (b).

\(^{90}\) Lord Devlin, for example, once said that the principles of good faith and fair dealing are so intertwined that it would perhaps be unwise to separate them, even though they cover different ground: Devlin, The Enforcement of Morals, (1965), 47.

\(^{91}\) Cf. the formulation both in the Uniform Commercial Code (§ 2-103) and the Restatement (Second) of Contracts (§ 205).

specifically limited in its intuitive connotation,93 and the former, naturally being the wider of the two,94 is commonly used to refer to the standard, principle, obligation, or whatever, which results from their combined effect.

2.1.2. Negative Definition: Good Faith as ‘Excluder’ of Bad Faith

It is the judges ... that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me.95

Far and away the most common assertion of those who have attempted to throw light upon the possible meaning of good faith is that it is incapable of any positive conceptual or extractable meaning, and therefore must be defined in the negative.96 Ellinghaus, for example, labelled good faith a standard rather than a rule, principle or conception.97 As such, he saw

---

93 That is, “good faith”, as we have seen, is apt to denote the sort of honesty that makes one a good-faith purchaser or holder in due course, a reference quite different from that intended here.

94 That is, it is arguable that “fair dealing” naturally embraces notions of “honesty”, while also appearing naturally to have exclusive domain over notions of “fairness” and of “reasonableness”, the latter notions not naturally falling within the connotation of “good faith”. Cf. also, Toomey, et al., op. cit., 96-8.


96 See Cohen, “Resconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort” (1985) 73 Cal. L. Rev. 1291, 1302-3, defining a violation of the duty of good faith and fair dealing (for the purposes of imposing tort liability in the context of contract formation and enforcement) as a ‘bad faith and unreasonable assertion or denial of a legal obligation that obstructs the injured party’s interest in receiving the substitutionary value of the defaulted performance’.

its function in the law as closely, though not exclusively, connected to the maintenance of negatively perceived ‘residual categories’.98

Every system, including both its theoretical propositions and its main relevant empirical insights, may be visualized as an illuminated spot enveloped by darkness. The logical name for the darkness is, in general, “residual categories.”...

If, as is almost always the case, not all of the actually observable facts of the field, or those which have been observed, fit into the sharply, positively defined categories, they tend to be given one or more blanket names which refer to categories negatively defined....’99

In a similar vein, although adopting a somewhat different approach, Professor Summers analyses the legal term good faith as a mere ‘excluder’ used by the courts to eliminate various forms of ‘bad faith’ conduct:

[T]he typical judge who uses this phrase [good faith] is primarily concerned with ruling out specific conduct, and only secondarily, or not at all, with formulating the positive content of the standard. Good faith, then takes on specific and variant forms of bad faith which judges decide to prohibit.... Likewise, the judge who sees that good faith functions as an excluder should not waste effort formulating his own reductionist definitions. Instead, he should characterize with care the particular forms of bad faith he chooses to rule out.100

In Summers’s view, therefore, some words or phrases are not appropriately formulated in terms of a general positive meaning of their own—through the specification of a set of necessary and sufficient conditions, for example. Instead, by drawing upon certain philosophical

---

98 *Ibid.* And this he saw as a good thing, having a salutary effect upon the well-being of our legal system because it ‘serves to counteract its inherent tendency to become logically closed’: *id*, 759.

Similarly he saw ‘unconscionability’, ‘reasonableness’, ‘due care’ and ‘equity’ as examples concerned with the maintenance of residual categories. The latter term (‘equity’) he considered ‘meaningless’, although ‘it has come to serve not only as a functioning standard in particular situations but as the label for a whole system of rules, principles, conceptions and standards’: *ibid*, at n. 11.


writings, he concludes that these words or phrases instead function to rule out (or 'exclude') various things according to context: a wide range of heterogeneous forms of bad faith. Put simply, if something is an excluder, one cannot say with certainty what it is, but only what it is not. Thus, the legal enquirer, by collating from decisions a sufficient list of 'bad-faith conduct', ought to be able to compile a 'complementary' list of positive good-faith meanings by inference alone. Having attained a reasonable


102 This is reminiscent of Bowen L.J. in Angus v. Clifford (1891) 60 L. J. Rep. (N.S.) C. D. 456: 'What is honest is not dishonest'. Cf., also, more explicitly, Kekewich J. in Mogridge v. Clapp (1892) 3 Ch. 382, at 391:

What does good faith mean? ... I think the best way of defining that expression ... is by saying that it is the absence of bad faith.

103 Thus a lawyer litigating the question of whether a party has acted in good faith, must ask:

What, in the actual or hypothetical situation, does the judge intend to rule out by his use of this phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an "opposite" for the species of bad faith being ruled out.

Summers (1968), op. cit., 202. Summers (id, 203) offers the following list as a representative example of his methodology for finding the meaning of good faith (paraphrased and citations omitted):

1. **Form of bad faith conduct:** concealment of defect in subject-matter of contract. **Meaning of good faith:** full disclosure.

2. **Form of bad faith conduct:** wilful failure by builder to perform in full, though otherwise substantial performance. **Meaning of good faith:** substantial performance without knowing deviation from specifications.

3. **Form of bad faith conduct:** open abuse by contractor of bargaining power to coerce an increase in the contract price. **Meaning of good faith:** desisting from abuse of bargaining power.

4. **Form of bad faith conduct:** hireage of broker with subsequent and deliberate prevention of his consummating the deal. **Meaning of good faith:** cooperative action.
proportion of such cases, the enquirer’s job is then to ascertain whether ‘some single word or concise phrase ... faithfully unifies all such specific meanings into one general meaning of the term’.\textsuperscript{104} Good faith, accordingly, is that unknown entity which remains after eliminating that which the courts have said it does not mean. Such an approach, Summers suggests, avoids ‘the twin hazards of colliding with the Scylla of restrictive specificity and spiralling into the Charybdis of vacuous generality’.\textsuperscript{105}

The excluder analysis, therefore, is premised on the theory that good faith has no general meaning of its own, and it takes the view that decisions cannot be made by a wholly deductive method of reasoning. The conceptualisation has clearly been the most influential of all the attempts to-date,\textsuperscript{106} and it is the perspective which will ultimately (within its precise limitations) be adopted in the present thesis.

2.1.2.1. Criticisms of the excluder analysis

One of the most common objections to Summers’s excluder conceptualisation of good faith is that it lacks any predictive utility: that it in no way changes the fact that the conceptual meaning of good faith will

\begin{itemize}
\item \textit{5. Form of bad faith conduct:} conscious lack of diligence in mitigating other party’s damages. \textit{Meaning of good faith:} diligent action.
\item \textit{6. Form of bad faith conduct:} arbitrary and capricious exercise of power to terminate a contract. \textit{Meaning of good faith:} reasonable action.
\item \textit{7. Form of bad faith conduct:} adoption of an overreaching interpretation of contractual language. \textit{Meaning of good faith:} fair interpretation of contractual language.
\item \textit{8. Form of bad faith conduct:} harassment of other party for repeated assurances of performance. \textit{Meaning of good faith:} acceptance of adequate assurances.
\end{itemize}

\textsuperscript{104} Summers (1968), \textit{op. cit.}, 204.

\textsuperscript{105} Summers (1982), \textit{op. cit.}, 825. Cf. also, Summers (1968), \textit{id}, 206.

\textsuperscript{106} It seems that § 205 of the Restatement (Second) of Contracts was drafted with this conceptualisation in mind. See 47 A.L.I. Proceedings (1970), 489-91, cited in Summers (1982), \textit{op. cit.}, at 814-5. However, while § 205 conceptualises good faith as an excluder, the UCC’s § 1-203 does not do so, i.e., ‘good faith’ is conceptualised positively as meaning ‘honesty in fact’. Many commentators seem to proceed on what appears to be a fundamental misapprehension regarding the respective provisions: see Stankiewicz, \textit{op. cit.}; Holmes, \textit{op. cit.}, at 390; cf. Summers (1968), \textit{op. cit.}, at 207 et seq..
always be unknown before the determination of its effects. Thus, Summers provides us with no more than a ‘boot-strap’ theory of good-faith meaning:

[C]ourts are directed to apply the obligation even though they never fully understand what the obligation is—their decisions in themselves will somehow posit a meaning and give the term direction.  

In this respect, the excluder approach precludes any comprehensive knowledge of what good faith means; but the courts should not be overly concerned about this because, ex hypothesi, their decisions will be based on a “correct” view of good faith. Moreover, because this approach denies any core concept for the good-faith meaning, there is no standard by which to determine the propriety of judicial construction of good faith—that good faith means just what the courts say it means. In this respect, it may be argued that such an approach does nothing to advance the intellectual inquiry regarding the meaning of good faith; nor that it provides a guide to the disposition of future cases, except to the extent that they may be indistinguishable from a previously decided case. Cast in this fashion, good faith provides no less than a licence for judicial ad hocism; courts know bad faith, like obscenity, when they see it. 

One possible reply to this criticism of Summers’s approach is that the philosophy of good faith is just another accurate reflection of the legal world in which some judges seek short-cut solutions to complex legal problems. Arguably, good faith would thus merely provide an overt method for these judges in exchange for the more “acceptable” covert means that are at present used to decide difficult cases: rules of interpretation and construction, unconscionability, the manufacturing of a fiduciary relationship, implied terms, specific rules of offer and acceptance, lack of consideration (or the

---

107 Stankiewicz, op. cit., at 400. See also, Holmes, op. cit., at 401-2; Bridge, op. cit., at 398; Burton (1984), op. cit., at 512; “Comment” (1986) 71 Iowa L. Rev. 893, at 899-901.

finding of a scintilla of consideration), and the like. One might add, too, in this regard, that some courts tend also to demonstrate a remarkable agility when it comes to identifying and characterising the facts in dispute.

Additionally, it might be suggested that through regularity of application, and in light of consistent purpose, the multifarious applications of a concept come to be seen as constitutive of its meaning. Hence, once good faith is sufficiently enshrined in the legal conscience, all the certainty that is needed will be provided once 'the contractual terrain is covered with a mass of good faith decisions lying around as thick as autumnal leaves in Vallombrosa'. In the United States, for example, the good faith provisions of the Uniform Commercial Code and the Restatement (Second) of Contracts, have generated a sufficient volume of decisions (in some contexts at least) from which scholars have been able to attempt to formulate lists of criteria for identifying specific forms of bad faith. In the more difficult situation, where a judge is faced with a novel case, so that he or she is essentially without the guidance required by the values of predictability and uniformity demanded by the rule of law, Summers has himself addressed his critics. In his view, such a judge is far from lacking meaningful guidance where a good-faith issue arises under § 205 of the Restatement (Second) of Contracts. First, Summers suggests, the judge should start with the language of the section. Second, he or she should

109 Summers himself suggests that his approach allows judges ‘to do justice and do it according to law’: (1968), op. cit., 196.

110 Cf. Bridge, op. cit., at 398.

111 See text, supra, pp. 87 et seq.


address the purposes of § 205 given mainly in Comment (a). Third, he or she should then reason by analogy from past cases and the various illustrations set forth in the Commentary to § 205. Fourth, having determined the purposes of § 205 and made any general analogies, the judge can analyse the facts to see what reasons there are for and against characterising the acts or omissions in question as bad-faith behaviour. Finally, by adhering to the excluder analysis, the judge remains faithful to the ‘reality’ of judicial decision-making. Rather than focusing on some presumed positive and unitary bundle of elements called “good faith”, the judge instead focuses on whether the alleged bad-faith behaviour really is, when considered in light of § 205’s purposes and in all the circumstances of the case, ruled out by that provision.

Despite potentially more serious philosophical objections to Summers’s application of good faith as an excluder, the Ellinghaus-Summers negative-meaning approaches to defining good faith are expedient on a number of levels. They also appear to correspond with Anglo-Australian courts’ approaches to scrutinising aberrant behaviour in the

114 For a criticism of Summers’s analogical reasoning see Patterson (1988), op. cit., 350-2 and accompanying footnotes.

115 In a reply to Professor Summers’s article, Professor Burton argues that to consider ‘all things’ in a case, as Summers advocates, is of limited practical utility. Rather, our attention needs to be drawn to facts that legitimately establish significant similarities with or significant differences from the precedents—that our language should “call the relevant facts to the foreground of the totality of the circumstances,” leaving the rest in the background.” See, Burton (1984), op. cit., 509.

116 It is not necessary to examine these in this thesis. Such objections have been well canvassed by Professor Patterson (1988) and (1990) (esp. Chaps. 3 and 4), op. cit. Patterson’s criticisms are directed at the very conceptual level from which Summers derives his analysis. He argues that Summers confuses the conception of the ‘excluder’ because he proceeds from an incomplete picture of Austin’s analysis of excluder terms; it is from Austin that Summers draws his own analysis. Summers not only treats excluders as involving differences but claims that an excluder term is the opposite of that to which it is tied (Patterson, 1988, 347, n. 39). According to Patterson, who has a Ph.D. in philosophy, Austin’s main argument is not concerned with opposition but rather ‘with linguistic curiosities that produce conceptual confusion’, and Summers’s analysis obscures this point (id, 348). Austin labelled all excluders as ‘substantive hungry’ (Sense and Sensibilia (1962), 68-9), and in employing the excluder analysis as he does, Summers fails to separate the need for clarification of a vague concept from concepts that are totally parasitic on other notions. According to Patterson, it makes about as much sense to suggest that ‘good faith’ is the opposite of ‘bad faith’ as it does to say that a ‘decoy’ is the ‘opposite’ of a ‘real duck’ (id, 350).
negotiation and formation stages of the contractual process.\textsuperscript{117} Priestly J.A., for example, recently confirmed this point in his judgment in the New South Wales Court of Appeal decision in \textit{Renard Constructions (ME) v. Minister for Public Works:}\textsuperscript{118}

\[\text{T}he\ expression\ "good\ faith"\ as\ commonly\ (and\ sometimes\ vaguely)\ used\ by\ judges\ is\ best\ understood\ as\ an\ "excluder";\ ….\ Although\ this\ approach\ is\ open\ to\ powerful\ logical\ criticism,\ it\ has\ the\ great\ merit\ of\ being\ workable,\ without\ involving\ the\ use\ of\ fictions\ often\ resorted\ to\ by\ courts\ where\ the\ good\ faith\ obligation\ is\ not\ available,\ and\ reflects\ what\ actually\ happens\ in\ decision\ making.\]

In a society that still seems to preserve and maintain a healthy respect for freedom of contract philosophy, the excluder approach appears to be desirable because it permits flexibility in the contractual relationship by ruling out unacceptable behaviour without creating rigid rules to regulate conduct.\textsuperscript{119}

While the excluder analysis seems appropriate in the contexts of contract performance and enforcement, and given that context provides meaning, it will become this writer's thesis that a more sharply constructed approach can be made in the context of contract formation. As "good faith and fair dealing" appears to manifest itself in the formation context, it is possible to state a more precise theory; that is, one that assumes a more concrete form. Whilst the law in this context still essentially remains concerned with excluding bad-faith behaviour in the bringing about of contractual outcomes, it seems that the content or meaning of "good faith and fair dealing" can be contrived against a sharper, less heterogeneous, set of norms or points of focus: the duty to protect the vulnerable, and, in particular, the concomitant duty not oneself to exploit those who are or who have become especially vulnerable to one's own choices and actions in bargaining.\textsuperscript{120}

\textsuperscript{117} See text, infra, at 128.

\textsuperscript{118} (1992) 26 N.S.W.L.R. 234, at 266.

\textsuperscript{119} See, also, Chapter Three.

\textsuperscript{120} See Section 4.2, supra.
3. **The Scope of Good Faith and Fair Dealing in Contract Law**

There is some debate as to the application of good faith in contract law, and about how much of the contractual process is affected by it. The writer’s conclusion is that good faith is pervasive in contract, but its standards are variable. However, for the purposes of this thesis, the writer will focus on one phase of the contractual process only: formation.

3.1. **The Application of Good Faith: Kinds of Contracts and Contracting Parties**

The precise nature and extent of the duty imposed by the implied promise of good faith and fair dealing in any particular contract, ... depends upon the expectations of the parties and the purposes of the contract.... While the extent of the duty varies from contract to contract, the duty itself inheres in every contract.¹²¹

In the writer's view, there is no reason, in principle or in policy, for a selective insistence upon the existence of particular kinds of contracts or contracting parties as a necessary condition to the application of the notion good faith and fair dealing. Lord Kenyon seems largely to have confirmed this long ago in *Mellish v. Motteaux*:\n
*In contracts of all kinds*, it is of the highest importance that courts of law should compel the observance of honesty and good faith.¹²³

---


¹²² (1792) Peake 156; 170 E.R. 113.

¹²³ Id, 157; 113-4 (emphasis added).
Somewhat surprisingly, however, there appears to be no general consensus of opinion in this view. One feature that has been noted of the United States' *Uniform Commercial Code*, for example, is that it apparently contains a scheme which is to vary the meaning of good faith according to the status of the party involved in the transaction, requiring both 'honesty in fact' and 'the observance of reasonable commercial standards of fair dealing in the trade' for merchants, yet only 'honesty in fact' for non-merchants. This well illustrates the possible dual function or operation of good faith: good faith as general “notion” (“concept”, “idea”, “principle”) and good faith as “standard”. As a general notion, “good faith and fair dealing” is generally applicable in all cases, or classes of case. In its other function, however, “good faith and fair dealing” appears to comprises a graduated (differentiated or tiered) scheme of standards—a sliding continuum of behavioural norms—such that legal judgments must be determined according to context, and a balancing of factors and considerations is required. One is naturally to expect, for instance, that where there is some form of special relationship existing between the parties (such as a fiduciary relationship), or where the nature of the contract itself is one that characteristically exacts higher standards of dealing between the parties thereto (such as a contract *uberrimae fidei*), good faith and fair dealing will expect or require, or possibly will “mean”, something different from what it would in, say, the case of an *ad hoc*, arm’s-length dealing between strangers in a commercial context.

---


125 U.C.C. § 2-103 (1)(b); see the discussion in Section 2.1.1.1., *supra*.

126 U.C.C. § 1-201 (19); see the discussion in Section 2.1.1.1., *supra*.

127 By way of particular illustration, one can readily appreciate how considerations relating to insurance contracts might vary from those relating to contracts generally. For example, Bird C.J. in *Seaman’s Direct Buying Service, Inc. v. Standard Oil Co. of California*, 36 Cal 3d 752, 777; 686 P 2d 1158, 1172 (1984), a bad-faith tort case, made the following comments in relation to contracts of insurance:

Insurance contracts have several characteristics not shared by ordinary commercial contracts entered into by corporations. For
Even in the latter context, however, we are naturally to expect that what is behaviourally expected or required of contracting parties will objectively vary according to the "legal status" of the transaction. For example, what is to be expected or required of parties engaging in the sale and purchase of real estate may be more or less than what is expected or required of those selling and buying goods, or negotiating a franchise, long-term supply, employment, manufacturing or financing agreement, or any other particularised type of transaction.

All this means is that, while good faith and fair dealing is generally applicable across the board, to all types of contracts and contracting parties (as a general principle), its actual dictates—its standards or its meaning—will vary (augment or decrease) according to context, and hence it will on this analytically distinct level affect different contracts and contracting parties in different ways. The nature of the contract and the contracting parties are best viewed merely as factors in the resolution of a "good faith" dispute; they do not determine whether the particular case at hand is itself one involving "good faith" considerations.128

---

example, consumers purchase such contracts not to obtain a commercial advantage, but to protect themselves against calamity.... Thus, insurance contracts may create a 'special relationship' between insurer and insured. These characteristics undoubtedly help shape the justified expectations of the contracting parties, and, therefore, help determine the nature and extent of the duty of good faith between them.

(As quoted by Badgery-Parker J. in Gibson v. Parkes District Hospital (1991) 26 N.S.W.L.R. 9, at 19-20).

128 The issue of the applicability of good faith to the various kinds of contract and contracting parties has been relatively uncontroversial in the private sphere, although it has arisen more recently in the public sphere, especially now that a general conception of good faith and fair dealing is becoming more frequently applied both in government contract disputes (see Toomey, et al., "Good Faith and Fair Dealing: the Well-Nigh Irrefragable Need for a New Standard in Public Contract Law" (1990) 20 Pub. Contract L.J. 87) and in the government's relationships and dealings with the individual generally: see Finn and Smith, "The Citizen, the Government and 'Reasonable Expectations'" (1992) 66 A.L.J. 139. In essence, there is a trend in the United States for courts and boards to look more closely at the well-established presumption that governments act in good faith. This appears to be a result of a growing recognition that such a presumption should be tempered with reality—that government today is organised and motivated to behave in much the same way as a private individual in a contractual situation, in order to gain an advantage and/or minimize costs. Governments' contractual responsibilities are thus increasingly being likened to, and equated with, those of a private party: cf. Toomey, et al., id, at 88; Malone v. United States, 849 F.2d 1441 (1988);
3.2. Good Faith and the Contractual Continuum

Whilst the writer proposes the general view that notions of good faith and fair dealing are broadly applicable in every contract without regard to either the nature of the contract or the contracting parties, in order to analyse more fully the scope and application of good faith and fair dealing, it is both useful and necessary to separate our analysis into at least three broad areas of consideration within the contractual and precontractual process: negotiation and formation, performance, and enforcement. For example, good faith performance, it has been said,

should not be equated with requirements of ‘good faith’ at the formation or enforcement stages of the contracting process, where ‘good faith’ serves a different purpose.\textsuperscript{129}

“Good faith”, therefore, may mean or involve something different at the formation stage of contracting from what it does at the performance stage, or at the enforcement stage.\textsuperscript{130} Whether or not it in fact serves, or ought to serve, a different jurisprudential role, however, is an issue not directly addressed in this thesis.

Ideally, the mechanisms of the contractual process should proceed naturally along a continuum from negotiation to formation, and through to executed performance. Where there are problems with contractual performance, innocent parties should readily be able to enforce the primary obligations undertaken in the contract through the courts, at least where damages are not an adequate remedy, or perhaps through secondary obligations surviving under the contract negotiated between the parties.

\textsuperscript{129} A.C. Shaw Construction, Inc. v. Washoe County, 784 P.2d 9 (1989). Such an observation appears also to be true of Australia today, with a move by many governments to run public affairs as if they were a “business”.

\textsuperscript{130} Burton (1980), \textit{op. cit.}, at 372, n. 17.

\textsuperscript{130} See text below at pp. 112 et seq.
themselves. Conceptual difficulties sometimes arise (and are sometimes ignored) because it is not always easy to view each phase of the contractual process as a necessarily distinct "stage". From a normative point of view, all are inextricably interwoven, such that a problem in the negotiation phase can, absolutely or qualifiedly, "taint" the formation of a contract as well. This may, in turn, affect the performance of a contract; either by destroying the relations existing between the parties (especially where a "relational" as opposed to a "discrete" contract is concerned), or by providing one party with normative excuse or justification for denying the other party the fruits of the former's contractual performance. The tainting factor existing at formation may also affect enforcement, either by providing a defence to an in specie remedy such as specific performance, or, where this is possible, by reducing or augmenting a substitutionary remedy, such as damages, in an action for breach of contract. What is more, equity's methodology sometimes involves it extending violations of fair dealing in the enforcement phase of the contractual process back into the negotiations for it. An expedient example is to be found in the cases of contract avoidance for wholly innocent misrepresentation. In those cases, it is traditional for equity to grant rescission on the ground of one party's seeking to retain or enforce a contractual benefit subsequently considered to be wrongful in light of the fact that it was that party himself or herself who introduced an element of misinformation into the bargaining environment, thereby disturbing the balance of the precontractual negotiations.


132 As in the case of "void" contracts.

133 As in the case of "voidable" contracts.

134 This is more fully discussed in Chapter Seven, Section 3.1.1.
This notwithstanding, standards of good faith and fair dealing are widely viewed as being broadly relevant at all levels of the contractual process:135 in the negotiation and formation of contracts,136 in the performance of contracts,137 in the raising or resolution of contractual disputes,138 and, in the enforcement of contracts (taking remedial action).139

As a formally recognised requirement, however, the obligation to negotiate in good faith, is ‘conspicuously absent’ from the principal good faith provision of the Uniform Commercial Code—§1-203—and this seems not merely to have been the result of an oversight.140 The Restatement


140 In his analysis for the New York State Law Revision Commission, Professor Patterson noted:

Good faith in the making of a commercial contract is not required by Section 1-203 and is not required by New York case law. That is, one
(Second) of Contracts, on the other hand, explicitly rejects the application of the good-faith duty to the precontractual stage, apparently leaving parties to their own devices, and the familiar remedies of fraud, duress, promissory estoppel, and the like.\textsuperscript{141} This appears to be a rather surprising omission,\textsuperscript{142} given the role assigned to good faith in contract formation by some of the party to such a contract is not required to disclose to the other a material fact relating to the purchase or value of the bargain, even though the one who knows this fact also is aware that the other party does not know it, and would not make the contract if he did.

See Report of the New York Law Revision Commission, Study of the Uniform Commercial Code (1955), Vol. 1, 315, quoted by Gillette, op. cit., 627, n. 47. As Professor Summers points out, however, if good faith is limited merely to the requirement of "honesty in fact", then the result of requiring good faith in the formation stage of the contractual process also can be achieved through invocation of the general principle of fraud and deceit under § 1-103: Summers (1968), op. cit., 220-1.

\textsuperscript{141} See Comment (b) to § 205, Restatement (Second) of Contracts. Section 90 of the Restatement, for example, may provide protection in respect of precontractual injurious reliance.

\textsuperscript{142} The inclusion of such specific provisions would nevertheless provide adequate protection to victims of bad-faith conduct during the processes of contract negotiation and formation, thereby avoiding the need to rely on good faith in those areas. Professor Summers apparently disagrees with this approach: see Summers (1968), op. cit., at 232-3. Cf. also, Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987), 174. The Uniform Commercial Code is similarly limited to contract performance and enforcement. Nonetheless, the UCC also contains a number of specific provisions requiring good faith notwithstanding its otherwise general prescription: see, e.g., § 1-208 (option to accelerate at will); § 2-508 (right to cure defective delivery of goods); § 2-603 (merchant buyer rejecting goods to effect salvage operations); § 2-614 (substituted performance); § 2-615 (failure of presupposed conditions).

But cf. in regard to the comment in the above text, The Hon. Mr Justice Grange, "Good Faith in Commercial Transactions", in Law Society of Upper Canada Special Lectures, Commercial Law (Toronto, Richard DeBoo, 1985), 69, at 71:

[Good faith] will ..., I think—but here I'm being subjective again—come more readily into the performance or the termination of contracts than into the negotiations for the formation or contracts. The reason is that we expect better behaviour of people once they have entered into a contract. I won't say we expect it—but we are certainly not surprised by it—if the parties get a little underhanded in the negotiation stage.

This may be true. But, as will be argued in the subsequent chapters of this thesis, while advantage-taking is an endemic feature of precontractual negotiations, no one would suggest that there should not be limits to the extent to which parties can take advantage of other parties in the precontractual dealings between them. Good faith and fair dealing is concerned with setting the appropriate limits of advantage-taking in contracting.
commentators,\textsuperscript{143} and especially since many of the \textit{Restatement} provisions dealing with formation issues could be rationalised in terms of a generalised good faith and fair dealing standard.\textsuperscript{144} Accordingly, suggestions have been made that the obligation of good faith and fair dealing should not be limited to contractual performance and enforcement, but should extend to the negotiation and formation of contracts as well.\textsuperscript{145}

Howbeit, results of a number of studies have shown that the courts in most jurisdictions have tended to require good faith at every stage of the contractual process, from preliminary negotiations through to performance and discharge, and in practically all kinds of contracts.\textsuperscript{146} The content of good faith, of course, tends to vary according to the particular context. In the \textit{negotiation and formation of contracts}, for example, the courts have intervened to enforce good-faith requirements in cases including negotiating without serious intent to contract; abusing the privilege to withdraw a proposal or offer;\textsuperscript{147} unfairly departing from reasonably held basic


\textsuperscript{144} See, e.g., § 25: option contracts and irrevocable offers—see \textit{Official Comment (b)}; § 34(3): uncertainty; § 45: option contracts concluded by actual performance; § 69: acceptance by silence; § 87(2): offers inducing reliance; § 90: promises inducing reliance; § 129: part performance and the Statute of Frauds; § 139: reliance and the Statute of Frauds; § 157: mistake and fault; § 161: misrepresentation and nondisclosure; § 172: misrepresentation and fault; and § 208: unconscionability.

\textsuperscript{145} See Ontario Law Reform Commission (1987), \textit{op. cit.}, Chp. 9, s. 4, esp. at 174-5.

\textsuperscript{146} See Summers, \textit{id.}, at 216-52; Reiter, \textit{op. cit.}, at 707-12 (extensively citing Belobaba and Summers); Ontario Law Reform Commission (1987), \textit{op. cit.}, at 167-8; O’Connor, \textit{op. cit.}, Chp. 3.

assumptions underlying the transaction;\textsuperscript{148} nondisclosure of material facts;\textsuperscript{149} and taking advantage of another in driving a bargain.\textsuperscript{150} In the area of contract performance, bad-faith behaviour might include, for example, instances of evading the spirit of the deal;\textsuperscript{151} lack of diligence and ‘slacking off’; wilfully rendering imperfect or merely “substantial” performance; unfairly taking advantage of changed circumstances falling short of frustration;\textsuperscript{152} abusing powers to determine contractual compliance; and interfering with or failing to cooperate in the other party’s contractual performance.\textsuperscript{153} In the area of contract enforcement—the raising or

\textsuperscript{148} Cf. Walton\textsc{\textregistered} S\textsc{\textregistered}es \textsc{\textregistered} v. \textsc{\textregistered} Mah\textsc{\textregistered}er (1988) 62 A.L.J.R. 110: Deane J. stating that the underlying rationale of estoppel is ‘good conscience and fair dealing’ (id, 129). Finn, too, comments how the case ‘provides, perhaps, the most systematic recognition of imposed obligations of fair dealing arising from ... one’s relationship with another’: (1989) 17 Melb. U.L. Rev. 87, at 96.

\textsuperscript{149} Generally, see Chapter Nine.


Further, as a recent study suggests, gender and race discrimination in negotiations may represent an additional form of conduct that the courts may seek to uncover and to eliminate in the future: Ayres, I., “Fair Driving: Gender and Race Discrimination in Retail Car Negotiations” (1991) Harv. L. Rev. 817. The legal response to such conduct, however, is likely to be through an expansion of civil rights (anti-discrimination) and consumer protection laws rather than through any legislative or judicial invocation of a principle of good faith in bargaining.


\textsuperscript{153} See Summers, \textit{op. cit.}, at 234-41. Cf. § 205, \textit{Restatement (Second) of Contracts}, Comment (d); MacKay \textsc{\textregistered} v. Dick (1881) 6 App. Cas. 251: implied duty to cooperate where contract cannot be performed without cooperation; Dynamic Transport Ltd \textsc{\textregistered} v. O.K. Detailing Ltd (1978) 85 D.L.R. (3d) 19, 27; Multi-Malls Inc. \textsc{\textregistered} v. Tex-Mall Properties Ltd (1980) 28 O.R. (2d) 6; Lammle \textsc{\textregistered} v. Hussey [1942] 3 W.W.R. 183; Decompor\textsc{\textregistered} Borough Council \textsc{\textregistered} v. Robbins [1979] 1 N.Z.L.R. 1, 23 per Cook J.A.: ‘each party must take reasonable steps to perform his part if the contract’. Another possibility of bad-faith performance may be found in the circumstance where one party fails to mitigate its position by accepting the other’s repudiation and instead unilaterally goes ahead with its obligations under the contract, providing unwanted services: see, e.g., the facts of
resolving of disputes and the taking of remedial action—instances of bad-faith behaviour might include, for example, conjuring up a dispute; adopting overreaching or 'weaseling' interpretations and construction of contractual language;\textsuperscript{154} taking advantage of another to secure a favourable settlement of a dispute; extortion of an unfair contract modification;\textsuperscript{155} compromising a dispute with no honest belief in one’s claim; abusing the right to adequate security for future performance; vexatious rescission;\textsuperscript{156} wrongfully refusing to accept the other party's performance; seeking to enforce onerous or inequitable terms and penalties;\textsuperscript{157} wilfully failing to mitigate one's losses;\textsuperscript{158} and abusing a power to terminate the contract.\textsuperscript{159} These are all, of course, non-exhaustive catalogues.

Many of these illustrations of judicially imposed or implied good-faith requirements, however, are apparent in more disparate contexts, such as construction and interpretation of contracts,\textsuperscript{160} implication of terms, control of adhesion contracts and fine-print disclaimers, the granting or denying of

\begin{itemize}
\item \textit{Selkirk v. Roman Investments Ltd} [1963] 3 All E.R. 994, 999 per Viscount Radcliffe.
\item \textit{Generally, see Summers (1968), \textit{op. cit.}, at 243-52; Anderson, E., “Good Faith in the Enforcement of Contracts”} (1988) 73 Iowa L. Rev. 299. See, also, \textsection\ 205, Restatement (Second) of Contracts, Comment (e); \textit{Devonport Borough Council v. Robbins} [1979] 1 N.Z.L.R. 1, 23 per Cook J.A.: ‘discretionary powers must be exercised in good faith; \textit{Hurley v. Roy} (1921) 64 D.L.R. 375.
\item \textit{See Hide & Skin Trading Pty. Ltd v. Oceanic Meat Traders Ltd} (1990) 20 N.S.W.L.R. 310.
\end{itemize}
discretionary relief, and the rules governing mitigation of damages. Indeed, arguably they are to be seen in

any aspect of the law that raises possibilities of bad-faith behaviour and requires a judicial decision to reaffirm the traditionally accepted norms of good faith, fair dealing and the protection of reasonable expectations.\textsuperscript{161}

In any event, whilst it is arguable that good faith applies to all stages of the contractual process, as the foregoing might suggest, its meaning or content probably differs from stage to stage. It is not this writer’s intention to exhaustively consider all such stages of the contractual process, however; a matter to which our attention now turns.

3.3. Defining the Parameters: Scrutinising Good Faith and Fair Dealing in Contract Formation

In this thesis, the writer singles out for special consideration the issue of good faith and fair dealing in the context of contract formation alone. This essentially presupposes that the precontractual negotiations, within which bad-faith conduct is alleged to have occurred, have resulted in an apparent agreement which, \textit{prima facie}, is recognised as having legal force under the law of contract. Accordingly, failed negotiations are excluded from consideration. Where precontractual negotiations have failed to result in the consummation of an apparent mutual assent, such as where the bad-faith conduct in question itself obstructs agreement, the rationales given for judicial intervention obviously cannot be regarded as contractual in origin, strictly speaking.\textsuperscript{162} The types of obligations arising from failed negotiations, therefore, are ones for which the traditional common law has difficulty

\textsuperscript{161} Reiter, \textit{op. cit.}, at 712. See, also, examples given by Summers, \textit{id.}, at n. 30.

\textsuperscript{162} Cf. Professor Lücke’s comments with respect to good-faith enforcement, \textit{op. cit.}, 164.
accounting. Nonetheless, the near-contractual classes of case have come under a sustained and pervasive challenge from those who have endeavoured to show that obligations arise, or should arise, not just from promise, consent or exchange, but also from relational factors arising out of general social intercourse. Because traditional contract theory still views contractual obligation as beginning with the consummation of a contract, good-faith obligations arising out of unconsummated contractual negotiations must find their home elsewhere—characteristically in "reliance" theory, and usually in tort doctrine or via equity, particularly through its expansive conception of estoppel. Other alternatives include the so-called law of "restitution" and statute law. The interested reader is referred to other sources (some of them excellent) for a fuller treatment of

163 See Kessler & Fine, op. cit.


165 See, in particular, the writings of Ian Macneil, and see Reiter, op. cit. Macneil, in particular, through his theory of "relational" contracts, offers a jurisprudential view of contract law which highlights the social component of the exchange process. He argues that parties exchange with implicit reference to customary expectations, and that contract law, in turn, reflect these customs and, in part, is determined by them. While the goal of contract law is still to facilitate exchange, the means employed to achieve this end include reinforcing the reasonable expectations of contracting participants and of society itself. Both the parties and the courts, Macneil argues, derive these expectations from the nature of the transaction itself, and from the role accepted by the parties in support of that transaction. See Macneil, I., "The Many Futures of Contract" (1974) 47 So. Calif. L. Rev. 691; "Restatement (Second) of Contracts and Presentation" (1974) 60 Va. L. Rev. 589; "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law" (1978) 72 Nw.U.L.Rev. 545; The New Social Contract (1980); "Values in Contract: Internal and External" (1983) 78 Northwestern U. L. Rev. 340; "Relational Contract: What We Do and Do Not Know" (1985) Wisconsin L. Rev. 483; cf. Barnett, R., "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract" (1992) 78 Virginia L. Rev. 1175.

166 Cf. the supplementation of consideration by reliance theory in § 90 of the Restatement (Second) of Contracts.

the notion of good faith in the analytically distinct context of near-contractual relations.168

4. AN APPROPRIATE JURISPRUDENTIAL ROLE FOR GOOD FAITH AND FAIR DEALING IN ANGLO-AUSTRALIAN LAW

Whilst conceptualisation of good faith by way of a formal and all-embracing definition would surely be ideal for the purposes of this study, for clarity of meaning is surely provided by such a definition, there are obvious dangers inherent is such an approach.169 One problem with all-embracing definitions is that they 'tend sometimes to obscure and occasionally to exclude that which ought to be included'.170 Granted that a suitable method of conceptualising good faith must be one that best serves the purposes to be assigned to the notion, good faith is simply not an idea that is susceptible of being universally and reportively "defined". It is not possible to state the necessary and sufficient factual conditions for a finding of good faith, or, for that matter, of bad faith:


169 As one writer once commented in a different context:

[T]he approach through a formal definition leads to innumerable difficulties and, if taken seriously, unfortunate results.


It is surely erroneous to believe that language is so precise and rigid that we can credit a single conception with a monopolistic possession of a particular verbal formulation.171

Indeed, one might do well in this context to recall Rawls’s advice that ‘definitions cannot settle fundamental questions’.172

The appropriate path to take concerning the meaning of good faith, therefore, may not be one of definition but of description.173 This is a more

---

171 Bridge, op. cit., at 408. Indeed, the approach to discerning the meaning of legal concepts through the specification of necessary and sufficient conditions has been largely discredited by a number of twentieth-century philosophers. As Wittgenstein put it:

The idea that in order to get clear the meaning of a general term one had to find the common element [(necessary and sufficient conditions)] in all its applications has shackled philosophical investigation; for it has not only led to no result, but also made the philosopher dismiss as irrelevant the concrete cases, which alone could have shed light on the usage of the general term.


Summers, too, writes (1968), op. cit., 215:

If an obligation of good faith is to do its job, it must be open-ended rather than sealed off in a definition. Courts should be left free, under the aegis of a statutory green light, to deal with any and all significant forms of contractual bad faith, familiar and unfamiliar. The legislature should grant only power; it should not try to guide through definitions...

Indeed, Australian draftsmen seem to have recognised this fact in other, analogous contexts. See Contracts Review Act 1980 (N.S.W.) (‘unjust contracts’), s. 9, giving guidance to the courts in determining whether a contract is unjust in the circumstances of a case, but not by way of any formal and all-embracing definition; see, however, s 5 (1) of that Act: “unjust” includes unconscionable, harsh or oppressive; and “injustice” shall be construed in a corresponding manner. See, also, s. 51AB Trade Practices Act 1974 (Cth), and the State Fair Trading Act equivalents (‘unconscionable’ conduct in trade or commerce).


173 Compare, for example, the sentiments of Mahoney J.A. in Antonovic v. Volker (1986) 7 N.S.W.L.R. 151 (at 165), who suggested that “unconscionability”, as a principle of equity, was ‘better described than defined’. Indeed, descriptions are valuable in the law because they often provide an alternative approach to meaning where definition is not practicable. In order to describe something well we must ordinarily mention a number of things about it (in the sense
modest approach, of course; although it is one that still begs the question foreshadowed at various junctures in this chapter: why are we bothering to describe good faith and fair dealing in our law of contract at all? What is its function, purpose or role in that context?\^{174} What is its proper application to law?

4.1. Good Faith and Fair Dealing: Good Faith as General Principle and as Variable Standard

... General principles are powerful instruments for the purposes of deductive reasoning in the law.... But legal definitions are in a different class; they are not principles, but are merely convenient verbal expressions which amount to rules of law. It is this fact which it is well to have before us when we evaluate their function in the legal process.\^{175}

that one brush-stroke does not make a picture), and this is normally a complex affair. Unlike a definition, however, a description, as a whole, is neither true nor false, although we may ask whether the individual statements composing a description are true or false. What we require of a description, then, is that it be sufficiently full—that enough information has been given for the purpose in hand. Whilst there is no end to the number of things we might put into a description of anything to make it as full as possible, it is not fatal to the validity of a description that it does not enumerate all the qualities of the thing described. One problem about descriptions, therefore, is that they can be as emotive as one pleases, and are never 'true or false', although they may be 'accurate or inaccurate'. For a philosophical essay on describing, see Toulmin and Baier, in Philosophy and Ordinary Language (Caton, ed) (1963), Chp. 11.

\^{174} It should not necessarily be thought that good faith and fair dealing will (or should) perform merely one function or purpose in our law. Under the Uniform Commercial Code, for instance, "good faith" serves a variety of functions in a number of contexts. For example, it is employed under that legislation to allocate the priorities and risk of loss in good-faith purchase cases (see, e.g., UCC §§ 2-403(1); 2-706(5); 3-302(1); 3-417(1)(c); 7-404), to codify certain aspects of common law fraud (see, e.g., UCC §§ 2-328(4); 2-402(2)), to police contract modifications (see, e.g., §§ 2-209, Comment 2; 9-318 (2)), to codify aspects of the 'duty' to mitigate one's damages (see, e.g., §§ 2-603 (3); 2-713; 2-715 (2), Comment 2, to fill gaps in incomplete contracts (see, e.g., §§ 2-305 (2); 2-306 (1); 2-311(1); 2-615 (a)), to broaden standards of contract interpretation (§ 1-203, Comment), and to serve as a 'principle' underlying some specific rules of contract performance (see, e.g., § 1-203, Comment; also, and more specifically, see §§ 2-508; 2-603; 2-614; 2-615). Generally, see Burton (1981), op. cit., at 18-21. Cf., also, Gillette, op. cit., 622.

\^{175} Cairns, H., "A Note on Legal Definitions" (1936) 36 Colum. L. Rev. 1099, at 1106.

119
A principle is a yardstick of graded qualification. This mode of qualification is not binary but graded, more-or-less.\textsuperscript{176}

Writing his influential piece on good faith in contracts in 1956, Professor Powell observed that the success of a good-faith obligation depended on its independent force.\textsuperscript{177} However, this is precisely where many of the proponents of good faith begin to err.\textsuperscript{178} To formulate good faith in prescriptive (as opposed merely to background, descriptive) terms is to assign too much to the conception.\textsuperscript{179} It is in this connection that most of the charges raised against good faith by its critics are broadly sustainable.\textsuperscript{180} Without wishing to comment on the appropriate jurisprudential role for good faith and fair dealing in the context of contract performance and enforcement, in the context of contract formation, “good faith and fair dealing” does not itself have independent practical power for resolving contract disputes. It is not, as an empirical or as a normative matter, a prescriptive tool. Good faith and fair dealing, whilst clearly deserving open recognition in our law of contract, should remain in the background, as a general ethical standard or principle, and should not be brought forward and doctrinalised as a strict legal rule.\textsuperscript{181} ‘Far from being an independent legal norm, good faith functions as a canvas on which the parties shape their agreement.’\textsuperscript{182} Were it to be otherwise, our courts would surely be entrusted with extremely broad powers—a ‘roving searchlight’\textsuperscript{183} or a ‘loose


\textsuperscript{177} Powell, “Good Faith in Contracts” (1956), Current Legal Problems 16, at 31.

\textsuperscript{178} Cf. especially Belobaba, op. cit.

\textsuperscript{179} Cf. Finn, Fiduciary Obligations (1977), Chp. 15, 78: ‘[Good faith’s] use has generally been descriptive, providing a veil behind which individual rules and principles have been developed’.

\textsuperscript{180} See Section 2.1.2.1., supra.

\textsuperscript{181} This is the tenor of Bridge’s complaints, op. cit. (esp. cf. at 401).

\textsuperscript{182} Patterson (1990), op. cit., 13.

\textsuperscript{183} Gillette, op. cit., 651.
cannon"—which can easily and dangerously be abused, potentially introducing much uncertainty into the law relating to contract formation.

Accordingly, the writer in this thesis forcefully eschews good faith and fair dealing as a "doctrne" or as a "rule". Nor should it additionally be seen as a "duty" or an "obligation", at least of a strict legal kind (a point to which we shall return below). Instead, a more modest but nevertheless important role is here assigned the conception. Within the parameters of this thesis, it is suggested that good faith and fair dealing's role very much occupies backstage. At the theoretical level, "good faith and fair dealing" is conceptualised as a general organising idea—an abstract, unifying and guiding principle—in the law relating to contract formation. As such, it is expressed through centre-stage discrete doctrines, the future shaping of which should be made referable to that idea and its purposes. At the practical


185 See definitions at nn. 39 and 40, supra.

186 See text infra at pp. 133-35. Cast in this role, moreover, we would need to aim at specificity in meaning rather than at generality. The case for specifically defining "good faith" augments significantly in light of the certainty considerations for those in commerce who would be affected by its dictates were it to attain doctrinal status in our law. However, good faith, other than in its most narrow sense, as "honesty in fact", defies precise definition.

187 This is perhaps not as modest as the approach of some who acknowledge and appear to support a "family resemblance" conceptualisation of good faith and fair dealing. This is to say, that good faith will remain closely associated with notions of honesty, fairness and reasonableness which are already well-established in our law. Cf. Lücke, op. cit., 161; Priestley J.A. in Renard Constructions, v. Minister, op. cit., 268. For a philosophical discussion of the idea of family resemblances, see Bambrough, R., "Universals and Family Resemblances", in Pitcher (ed), Wittgenstein: The Philosophical Investigations (1966), 186-204; Khatchadourian, H., "Common Names and 'Family Resemblances'", id, 205-30.

188 In this capacity, good faith’s role might be likened to that of acting ‘as a midwife to the recasting of existing contract rules’: cf. Bridge, op. cit., 404. Indeed, even as ardent a critic as Bridge would acknowledge that while ‘[g]ood faith may be too diffuse to displace, or even supplement in a formal legal way, existing rules ... it could be seen as having a useful background contribution to make’ (id, 426);

[I]t is most certainly desirable for judges to be inspired by ethical values like good faith in the decision-making process for otherwise our law would incur reproach for its amorality: whether such values should attain legislative or rule-based form is, however, quite another matter (id, 401).

121
level, "good faith and fair dealing" denotes, secondarily, a legal standard, and in this analytical role, it is surely a variable one. It does not, therefore, purport to create legal liability as a doctrine or rule does; rather, it establishes a minimum norm of conduct, the failure to observe which has consequences provided for by the law. 189 Again, these consequences are provided principally through familiar and particularised common law and statutory doctrines and rules, which are themselves defensible concretisations of the more abstract general principle 190.

Most importantly, perhaps, by ascribing or assigning the aforementioned jurisprudential roles to good faith and fair dealing, we do not delete the important function and application of the discrete and particularised doctrines, rules and principles which currently operate in their several spheres to regulate objectionable conduct in the formation of contracts. Both for the purpose of imposing civil liability, and for authorising appropriate remedial relief, these specific doctrines, rules and principles must necessarily serve to administer the general and variable standards evoked by the general principle of good faith and fair dealing. The maintenance of the traditional legal boundaries is desirable because if standards of good faith and fair dealing are openly to be recognised in our law of contract, they must continue to be sufficiently certainty-rendering in their operation, and kept within proper bounds. This goal is achievable, it is suggested, by employing specific, traditional doctrines to guide the resolution of specific cases, to provide particularised relief to aggrieved parties, and to channel the discretion and judgment of judges, administrators and legislators, rather than by employing the generalised principle and variable standards themselves. 191 What is more, the administration of the general principles and standards through particularised legal doctrines makes it less

189 Refer n. 34, supra.

190 In providing a remedy for misrepresentation, duress, unconscionable dealing, undue influence, and the like, the law is clearly engaging in the process of setting standards of decent (or, more accurately, indecent) behaviour—i.e., of setting the normative boundaries beyond which a person’s conduct will attract the attention of the law and have legally cognisable effects.

easy for courts to intervene without justification in any particular case, insulating contracting parties and contracts from the danger of too ready an indulgence in ‘chaotic form[s] of palm-tree justice’.192

Now, while there are obvious hazards in generalisations,193 there is often much legal value to be had in them.

Those who rebel at generalizations might well be reminded of the tale of the empire whose exacting map makers produced a map so accurate that it coincided with the empire point by point. Its uselessness was, of course, total.194

192 Cf. Lücke, op. cit., 166.

193 Cf., for example, the sentiments of Frank J. in Guiseppi v. Walling, 144 F 2d. 608 (1944), at 618-9:

But the solution of the problem through the invention of a new generalization is no final solution: The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikeness. Hypnotized by a label which emphasizes identities, we may be led to ignored differences.... For with its stress on uniformity, an abstraction or generalization tends to become totalitarian in its attitude toward uniquenesses.


Cartographical analogies have long been fashionable in legal writing, especially when used to exemplify the utility of a generalised proposition. A notable example of this is Morris Cohen, in his Reason and Law (1950), 63-4:

[I]n any intellectual enterprise ... there must always be a certain difference between theory and practice or experience. A theory must certainly be simpler than the factual complexity or chaos that faces us when we lack the guidance which a general chart of the field affords us. A chart or map would be altogether useless if it did not simplify the actual contours and topography which it describes.... No science offers us an absolutely complete account of its subject matter. It is sufficient if it indicates some general pattern to which the phenomena approximate more or less. For practical purposes any degree of approximation will do if it will lead to a greater control over nature than we should have without our ideal pattern. But for theoretical purposes we need the postulate that all divergences between the ideal and the actual will be progressively minimized by the discovery of subsidiary principles deduced from, or at least consistent with, the principles of our science.

123
During the period of canalisation which progressively took place in the nineteenth and early twentieth centuries, and doubtless also as a simple function of the legal method, the several doctrines that are to fall within the scrutiny of this thesis became ostensibly more discrete and disparate within the legal order.

Whatever the forces which contrived their several births, they have an almost inevitable tendency to develop lives of their own which become self-justifying. 195

There is a natural desire in legal writing to reduce the legal universe to manageable proportions through a process of classification into species and sub-species. This facilitates exposition and it sharpens our appreciation of the issues which need to be addressed in the particular application of the law, but it contains its own hazard. A species or whatever so delineated may become divorced from the sources of its inspiration, may come to be seen quite artificially as an independent entity in the legal order. 196

We seem to have lost sight of the wood for the trees. As was noted in Chapter One, a contemporary challenge in our own law, and one toward which the current High Court membership has demonstrated a considerable level of commitment, is to identify dominant social and legal themes, purposes, values and needs, and to investigate further how these might be turned to new ends in the revitalisation, reformation and rationalisation of existing legal and equitable doctrine, with a view, ultimately, to our re-shaping a distinctive law of and for Australia. 197

In the law of negligence of the British Commonwealth, we needed a Donoghue v. Stevenson to provide a new synthesis capable of matching the law to community needs. We do not yet have here a similar synthesis. 198


197 Cf., too, The Hon. Mr Justice Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: a Hair-Shirt Philosophy?" (1991) The Denning Law Journal 131, at 141: 'it is right that academic lawyers, practitioners and judges should constantly consider whether rules of law under consideration serve the purpose which led to their formation'.

198 Id, 23.
It is the present writer’s thesis that the principle of good faith and fair dealing, at least as it finds its application in the law relating to the formation of contracts (and perhaps beyond), represents that ‘new synthesis’, that ‘source of inspiration’, which links the law of contract formation to prevailing community needs, values and expectations, and which deserves openly to be recognised in that role in contemporary Anglo-Australian law. Good faith and fair dealing, viewed in this light, becomes the moral informant of contract law, or at least the ‘guardian of the community’s morals’ in that context.

Ultimately, in this thesis, the writer will consider a number of legal and equitable doctrines which seem to express a good-faith principle in the context of contract formation. The starting point for this principle, moreover, is taken to be “neighbourhood”: a conception which emerges in the following section.

4.1.1. Good Faith, the Spirit of “Neighbourhood”, and the Duty to Protect the Vulnerable

The quest for narrower, more significant, categories is always a sound first approach to wide categories which are not giving satisfaction-in-use. But of course, once satisfactory narrower categories have been found and tested, the eternal quest recurs, for wider synthesis—but one which will really stand up in use.

This is how English law goes about its job of defining limits on your freedoms. The citizen may do as he likes unless he clashes with some specific restriction on his freedom. The law does not say: ‘You can do that’; it says ‘You

---


200 Cf. Lücke, op. cit., 168, who argues that good faith should be used as a standard and not as a rule, ‘in which role it will not inhibit the evolution of narrow rules but merely help to ensure that those which develop are informed by a spirit of justice’. But cf. Bridge, op. cit., 412, arguing that good faith and fair dealing ‘is an imperfect translation of an ethical standard into legal ideology and legal rules’.

201 Cf. Gillette, op. cit., 646.

202 Llewellyn, K., “Some Realism About Realism—Responding to Dean Pound” (1931) 44 Harv. L. Rev. 1222, 1237.
cannot do this, which means that you can do anything else except that which it says you cannot do. Whenever such a prohibition is made, the reason will be that some other interest is rated more important than that freedom on which it impinges.\textsuperscript{203}

Since everyone is entitled to pursue his self-interest in the most rigorous manner consistent with the free choice of others, no one has a claim on another’s beneficence or candour unless the claim the was paid for.\textsuperscript{204}

The appropriate jurisprudential role of good faith and fair dealing in the law of contract formation thus presents itself in this thesis as a generalised legal principle, which, in turn, produces variable legal standards. The next stage of the enquiry must necessarily be to inform ourselves of the content of that principle, and to determine, also, what the particular sources of that content are to be. The means to that end, however, are necessarily convoluted ones. They lie buried in the universe of doctrine. The appropriate methodology, in the writer’s view, is accordingly as follows. First, one must work backwards, inductively, from concrete legal doctrine to abstract principle, in order to identify the general principle itself. Once identified, the general principle is synoptically “perfected” (as best we can): constructed, adjusted and revised according to some morally appropriate and acceptable methodology and theory, such as through Rawls’s idea of ‘reflective equilibrium’.\textsuperscript{205} From here, one must then begin to work forwards, deductively, using the general principle to identify more specific norms, and to re-shape and rationalise the “imperfect” doctrines\textsuperscript{206} which


\textsuperscript{204} Brudner, A., “Reconstructing Contracts” (1993) 43 U. Tor. L.J. 1, 3.

\textsuperscript{205} The idea of the ‘reflective equilibrium’, at least as it pertains to this thesis, is elaborated in Chapter Three, p. 160, n. 93.

\textsuperscript{206} Given that the general principle of good faith and fair dealing, and the variable standards thereunder, are to be administered through particularised legal doctrines, the general principle, once “perfected”, must then be employed to preserve and maintain the integrity and the intelligibility of the various legal doctrines themselves. This is necessary to assist in aiding exposition, delineating the points at which individual doctrines converge and diverge from one another, and directing our proper attention to the specific criteria and considerations attending one particular doctrine but perhaps not another.
were called inductively in aid of the principle’s identification.207 It is suggested that we begin firstly with extant legal doctrines since these are assumed in their contemporary applications more or less to serve as self-conscious, general public sentiments of the limits of acceptable bargaining activity in the name of community norms of fairness208—as putatively reflecting the various judgments underlying our ordinary moral convictions. (Principles, accordingly, can be held to be justifiable to the extent to which they match and account for these convictions.) Doctrine assumes this analytical structure because it is characterised to a large measure by the law’s focus on certain instances of concrete objectionable behaviour: that in any particular context the law isolates a peculiar type of wrongdoing,


Looking backward, the new paradigm enables us to reconstruct prior theory and phenomena by providing a general explanation for a wide variety of contract concepts that heretofore seemed distinct.... Looking forward, the paradigm must be articulated and extended through the development of more specific norms to guide the resolution of specific cases, provide affirmative relief to ... parties, and channel the discretion of administrators and legislators.

Cf., also, Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed., 1958), 166-7:

Underlying every rule and standard ... is at least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement’s meaning.

O’Connor, op. cit., employs a similar methodology in his book about good faith in English law. Hooley (“Book Review” (1990) 49 Camb. L.J. 515, at 151-6), however, might criticise the present writer (as he criticised O’Connor on the same basis) for applying ‘circular reasoning’—the doctrines identify the principle which in turn identifies the doctrines. But one answer to this criticism is that the first step forward is a priori and provisional. Some doctrines in our law intuitively seem to be concerned with similar forms of objectionable bargaining practice (say, advantage-taking). With the use of instructive epistemological and ideological sources first to inject a proper ‘theory’ into the notion of “advantage-taking”, the provisional general principle (about advantage-taking) can itself be “perfected”, and then, by process of deduction, employed to inform, explain and rationalise the “imperfect” doctrines which were called inductively in aid of the principle’s identification in the first place.

which in turn tends to attract the constabulary function of a peculiar legal or equitable doctrine.

If one first isolates the types of behaviour which can attract the ... doctrines, and then focuses upon the significance of such behaviour in, or in the bringing about of, a relationship between the parties, one can appreciate more clearly when and why that behaviour might author a duty of good faith.\footnote{Finn, "Equity and Contract", \textit{op. cit.}, 108.}

This also lends significant credence to the "excluder" analysis, discussed above. The modern contract doctrines to be considered in this thesis characteristically present themselves as \textit{proscriptive} rather than as prescriptive tools.\footnote{Elements of this approach are demonstrable, for example, in Gaudron J.'s judgment in \textit{Walton Stores v. Maher} (1988) 62 A.L.J.R. 110, at 413.} They focus on the negative repercussions of transactional abuse rather than on the positive requirements of contractual obligation; say, on breach, not performance. The rhetoric of the law, too, is invariably pejorative: our law reports come replete with condemnations of "fraud", "unconscionable", "unjust", "unreasonable", and the like, behaviour, and this is suggestive of the law's principle agenda of designating forms of behaviour which it deems to be unacceptable. It would strike us as being somewhat unusual, for example, to suggest that in our law there is a duty of "due influence", or of "conscionability", or of "just enrichment"; but these are the very ideas (the writer hesitates to refer at this stage to "duties" or "obligations") that their respective operational antitheses ordain.

Now, as was highlighted in Chapter One, classical contract learning did not view the precontractual bargaining relationship as being anything even approximating what one might call a "neighbourly" relation. Each party was generally free in contracting to consult his or her own self-interest, and to do so almost with impunity. However, the progressive heightening of behavioural minima which took place during the latter part of the twentieth century, as revealed in contemporary legal doctrine, has altered this traditional stance. The spirit of "neighbourhood"—the concern to or for others—so long a predominant theme in tort law, is finding its (albeit limited) applications in contract too. Good faith and fair dealing, it is
suggested, is modern contract’s incarnation of the “duty to one’s neighbour” in tort. Arguably, it draws its inspiration from a ‘general public sentiment of moral wrongdoing’, and links this to contemporary legal doctrines and discourse. It has variously been described as inhering in the ideas of ‘altruism’, ‘mutual respect’, ‘loyalty’ (or ‘fidelity’), ‘communitarianism’, ‘solidarity’, ‘sensitivity’, ‘protective


But the morality of contracts is also based on another idea [i.e., other than egoism]; it can be expressed by speaking about altruism and loyalty. One may speak about “a reflective equilibrium” between egoism and altruism. The juristic techniques for delimiting egoism consist mainly in several Roman Law-based legal norms and principles, more or less expressed by legal norms. The Roman bona fides called for a certain loyalty towards the other contracting party, both during negotiations and afterwards. A contracting party is thus under obligation to give information about relevant facts, i.e., about facts that he knows to be relevant to the opposite party. During the negotiations he may learn to know the intentions and expectations of the other contracting party.

214 Reiter, op. cit., 733.

215 Ibid; Lücke, op. cit. 163-4; Fried, Contract as Promise (1981), 85.


217 Roberto Unger: see note accompanying quotation below at 130; Reiter, op. cit., 732-4; Macneil, The New Social Contract (1980).

responsibility',

'duties of affirmative action',

'other-regardingness',

'(Commercial) Good Samaritanism',

"self" and "other",

'a sort of catch-all for the Golden Rule'.

The good faith and fair dealing principle is concerned with relational responsibility, and maintaining that often delicate balance which needs to be struck between concern for self and responsibility to or for others in contractual and near-contractual dealings. 'To act in good faith', says Roberto M. Unger,

is to exercise one's formal entitlements in the spirit of solidarity. The good faith standard requires one to find in each case a mean between the principle that one party may disregard the interests of the other in the exercise of his own rights and the counterprinciple that he must treat those interests exactly as if they were his own.

It would be easy, but it is not necessary, to multiply quotations to the same or to similar effect.

This manifestation of the idea of good faith is pervasive in our society, as it seems to permeate our social relations generally. Contract, itself a


220 Gillette, op. cit., 620; Finn, "Good Faith and Nondisclosure", Chap. 7 in Finn (ed), Essays on Torts (1989), at 152 et seq.


222 Girard, op. cit., 327; Gillette, id, 631 et seq.


225 Cf. Finn, "Commerce, the Common Law and Morality", op. cit., 93:

Relationships, whatever their type, inevitably give to one or both parties the de facto capacity to affect adversely the interests of the other. Expectations can be thwarted, obligations ignored, vulnerability exploited, legitimate interests disregarded, powers exercised harshly, and so on.

226 Unger, R., Law in Modern Society: Toward a Criticism of Social Theory (1976), 210.
special form of social relation, and itself a creature of society, is beginning to reflect this reality. In his book, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, Robert E. Goodin presents a comprehensive and compelling theory of social responsibility based on the concept of 'vulnerability'. According to Goodin, human interdependency, an endemic feature of modern social life, breeds vulnerability. We have all become, generally or more peculiarly, sensitive to the choices and actions of others with whom we share society, and with whom we are compelled to interact. This dependency-vulnerability feature of everyday human existence, Goodin argues, provides the main source of our general social responsibilities. The concomitant of this is that 'our social responsibilities are broader than we might be inclined to suppose'. Specifically, Goodin argues, our

"general social responsibilities"—responsibilities with respect to undifferentiated others, of a sort that we might ordinarily be inclined to shun—are to some extent implicit in the "special responsibilities" which we ordinarily are so anxious to embrace.

In essence, the argument goes, 'we bear special responsibilities for protecting those who are vulnerable to us', and we should protect all those who are particularly vulnerable to our actions and choices, rather than restricting our attention to the narrowly circumscribed subset enshrined in conventional morality.

According to Goodin, his theory translates into two basic prescriptions, which he summarises thus:

---


229 *Id*, 12.

230 *Ibid*.

231 *Id*, 109.

232 *Id*, 206.

233 *Ibid*.
Preventing exploitable vulnerabilities: No one should be forced into a vulnerable or dependent position, insofar as this can be avoided. If people are placed in such a position (either through personal choice or natural or social necessity), vulnerabilities/dependencies should be reciprocal and, ideally, symmetrical among all those who are involved. In no case should they be so severe and asymmetrical that one party has exclusive, discretionary control over resources that the other needs to protect his vital interests.

Protecting the vulnerable: Where people are particularly vulnerable to or dependent upon you, for whatever reasons, you have a special responsibility to protect their interests. Where they are vulnerable to you individually, you must seek to produce this result directly through your own efforts. Where they are vulnerable to a group of you, the group as a whole is responsible for protecting their interests; and you as an individual within that group have a derivative responsibility to help organize and participate in a cooperative scheme among members of that group to produce that result.234

Finally, as Goodin pointedly argues, these responsibilities not to place persons in vulnerable positions vis-à-vis ourselves, and to protect those who are already in positions of vulnerability or dependency vis-à-vis ourselves, do not necessarily stem from paternalistic propositions. Rather,

[i]t most probably reflects the preferences of the people themselves concerned; while it certainly is true that when put in a position of weakness they would rationally choose to succumb to the other’s demands, it is equally true that they would usually prefer not to be put in that position in the first place.235

---

234 Indeed, even as an empirical matter, social psychologists have have found, at least under certain conditions, that people internalise and act upon such norms as Goodin prescribes. Berkowitz and Daniels, for example, conclude:

many people in our society seek to aid others only because they believe that these others are dependent upon them for reward. The perception of the dependency relationship ... arouses feelings of responsibility to those others, and the outcome is a heightened instigation to help them achieve their goals.


235 Id, 39, n. 6.
Properly adjusted to maintain an appropriate balance of respective responsibilities in precontractual bargaining. Goodin’s theory is a forceful one. It offers a theory which is worthwhile for what it can bring to the subject-matter of our present concern. To the lawyer, the “duty to protect the vulnerable” readily presents itself as a generalised version of the Atkinian “duty of care”—or the “duty to one’s neighbour”—which underlies liability for negligence in our law of tort. In the remaining pages of this thesis, it is argued that the principle of “good faith and fair dealing” is itself an exemplification of such a generalised “duty”. In the context of contract formation, as revealed through each of specific “policing” doctrines finding its traditional application therein, the duty to protect the vulnerable is, first and foremost, a duty laid upon all contracting parties not to engage in bargaining practices which would constitute taking unfair advantage of contracting adversaries who are themselves peculiarly sensitive to the first party’s actions and choices. The duty to protect the vulnerable in contractual negotiations gives rise, first and foremost, to a duty not oneself to exploit those who are or have become especially vulnerable to one’s own choices and actions (to help or to hurt).

However, the “duty” which we speak of here is not a duty of the true legal variety, at least in the sense that such characteristically gives rise to a

236 Chapter Three.

237 Cf., also, Seddon’s idea of “the duty of sensitivity” (1974) 48 A.L.J. 126.

238 The resemblance between Goodin’s generalised duty to protect the vulnerable and Lord Atkin’s duty not to injure one’s neighbour, in the seminal case of Donoghue v. Stevenson [1932] A.C. 562, at 580, is strikingly apparent:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (Emphasis added.)

239 Such as misrepresentation, duress, undue influence, unconscionable dealing, unilateral mistake (in equity), and the like.
correlative "right" in some other legal entity.\textsuperscript{240} As used throughout this thesis—in particular, as it is associated with a supposed "duty" or "obligation" to act according to the dictates of good faith and fair dealing in contract formation—"duty" is used in a strictly 'colloquial' sense, as denoting something less than a true, formal legal obligation.\textsuperscript{241} The duties in this context are not other-regarding duties, strictly speaking,\textsuperscript{242} but, like the "duty" to mitigate one's loss upon breach of contract, they are of a self-regarding nature—a duty to oneself—their principal legal function being to prevent potential avoidance of the transaction. To the extent that good faith and fair dealing is concerned with a kind of "altruism", then, it is surely a "rational" kind of altruism.\textsuperscript{243} Thereby, a party who desires fairly to pursue

\textsuperscript{240} That is to say, "duty" here does not refer to something that one party is strictly bound in law to do or refrain from doing vis-à-vis another, such as in the case of "duties" of a fiduciary toward his or her beneficiary.

\textsuperscript{241} Cf. the usage of Spencer Bower, Sutton & Turner, \textit{The Law Relating to Actionable Non-Disclosure} (2nd ed., 1990), paras. 21.22-3, pp. 534-5, and of Kronman, in relation to "disclosure" obligations in the law of contracts:

Although throughout the paper I use the expression "duty to disclose," the duty involved is typically not a true legal obligation. If the party with knowledge fails to disclose the other party's error, his failure to do so will give the mistaken party grounds for avoiding any contract which has been concluded between them. In the absence of such a contract, however, the knowing party had no positive duty to disclose—that is, nondisclosure will not by itself give the mistaken party the right to sue him for damages. Of course, in some cases—for example, where there is a fiduciary relation between the parties—a positive duty of this latter sort may exist. Where it does, a failure to disclose is not simply a defense to the knowing party's suit to enforce the other party's contractual obligations; it also provides the mistaken party with an independent cause of action for damages.


\textsuperscript{242} Such as are many of the "duties" between, say, a fiduciary and his or her beneficiary. Generally, see Finn, "The Fiduciary Principle", \textit{op. cit.}

\textsuperscript{243} That is, the rational altruist, or 'ethical egoist', does acts for the benefit of others, only because the altruist perceives or believes that he or she can get at least an equivalent or a greater benefit in return: e.g., in loving others we strengthen their love for us. Thus, an ethical egoist takes the interests of other persons into account when it suits his or her own interest, and it usually is in our own interest to do so because it promotes our self-interest to treat them well. Compare the moral notion of 'rational egoism': 'We tend to think that when doing something
his or her own chosen course of individual self-interest is required affirmatively to undertake certain acts, or sometimes to refrain from acting, for the benefit of the other party, simply so that he or she can later sustain the resultant transaction, or render it legally indefeasible. Accordingly, while plainly requiring that one must in some measure be "other-regarding" in one's precontractual dealings with others, it is essentially from the personal, self-regarding interest one has in safely retaining the fruits of any contractual benefits one receives that the so-called "duty" of good faith and fair dealing here informally derives.244

The third chapter of this thesis, together with Chapter Four, is intended to bring into sharper focus and expand greatly upon these broad themes, policies and considerations operative in our society and, arguably, exemplified through expanding legal (qua contractual) doctrine.

Chapter Three

THE LAST TWENTY FEET: Setting the Rules of Play in the Bargaining Game

Chapter Contents

1. INTRODUCTION ........................................................................................................... 139
   1.1 On the General Nature of Negotiation (Bargaining) ........................................ 145
       1.1.1. A Note on the Role of Interpersonal Trust in Bargaining ................... 153
       1.1.2. A Note about the Gap between Law and Morality ......................... 158

2. REGULATING THE UNREGULATED: ON LOCATING AND EVALUATING APPROPRIATE NORMS OF CONDUCT IN BARGAINING .......... 166
   2.1. Special Problems Encountered in Attempting to Regulate Bargaining Activity ............................................................... 169
       2.1.1. The Problem with Aspirational Approaches to Bargaining Norms: Deontological and Teleological Perspectives Considered ............................................. 173
           2.1.1.1. Distinctively deontological justifications ..................................... 177
                    2.1.1.1.1. Universalism ................................................................... 179
                    2.1.1.1.2. Pragmatism ................................................................. 180
           2.1.1.2. Distinctively teleological justifications .................................... 184
                    2.1.1.2.1. Economic efficiency ...................................................... 185
                    2.1.1.2.2. Security of business transactions ............................... 188
2.1.1.3. Toward operational bargaining norms: functionalism and the blend of deontology and teleology ................................................................. 190
2.1.1.4. The normative significance of power in bargaining relations ......................................................... 196
2.1.1.5. Where social and moral norms fail ................................. 201

3. CONTRACT AND CONTRACTUAL BARGAINING: FORMAL CONTROL
OVER THE BARGAINING PROCESS ........................................... 204

3.1. Contract Formation as Negotiation-Form .................................. 208
  3.2.1. Identifying the Conditions for Consent .............................. 219
  3.2.2. Regulating Processes or Outcomes? ................................. 221

4. FROM INVOLUNTARINESS TO EXPLOITATION ........................... 224

* * * * *

No man is an island, entire of itself ... [each] is a piece of the continent, a part of the main.¹

Negotiation is a fact of life.²

[S]ociety must address the question of the balance to be struck between contract as an end in itself and contract as a means of achieving more fundamental social goals.³

It's just that the rules of the game of bargaining have not worked in this particular case, and the outcome is therefore outside the otherwise automatic legitimation of the bargain principle.⁴

¹ John Donne, Devotions upon Emergent Occasions, No. xvii.
1. Introduction

The law, like social life, is riddled with antinomies, dualities and seeming illogicalities.\(^5\) But this should not surprise us. Our society is composed of an aggregate of interdependent individuals with mixed motives. As human animals, we are, according to Macneil, prisoners of our 'schizophrenic' condition, constantly alternating between inconsistent behaviours.\(^6\)

Man is both an entirely selfish creature and an entirely social creature, in that man puts the interests of his fellows ahead of his own interests at the same time that he puts his own interests first.... Man is, in the most fundamental sense of the word, irrational, and no amount of reasoning, no matter how sophisticated, will produce a complete and consistent account of human behaviour, customs, or institutions.... Man, being a choosing creature, is easily capable of paralysis of decision when two conflicting desires are in equipoise.... Getting something back for something given neatly releases, or at least reduces, the tension in a creature desiring to be both selfish and social at the same time; and solidarity—a belief in being able to depend on another—permits the projection of reciprocity through time.\(^7\)

These observations bear greater force as society grows in size, density and mobility. Concurrently, society's physical and economic resources become scarce, as personal resources become more specialised. Rawls explains that, unlike other animals, human beings are unable individually to realise all the capacities contained in their species.\(^8\) Such resources as we


\(^7\) Macneil, id, 348-9 (emphasis in original).

\(^8\) Rawls, A Theory of Justice (1971), 520 et seq. As a pure case, Rawls cites a group of musicians. Each of them could have learned to play any instrument as well as the other, but each chooses
can severally bring to bear in order that we may serve our individual needs are frequently inadequate to particular tasks. No one can cultivate all her assets, much less those she lacks and others have. Others are an indispensable means to that end. Still more, there are limits to the degree to which one can develop upon one's own assets, much less those which one lacks and others have.\(^9\) In short, \'[o]ne cannot seesaw alone'.\(^{10}\)

Accordingly, in our complex and ever-expanding world, the need to coordinate our affairs with the affairs of others grows increasingly and progressively stronger. Others' resources, skills and expertise become our wants, desires, needs and necessities. While the world is plagued by the scarcity of its various resources, it is at the same time full of opportunities—opportunities that depend for their realisation upon the integrated and cooperative activities of more than one social member.\(^{11}\) A basic problem of all social organisation, therefore, is how to coordinate the social and economic activities of large numbers of individuals.\(^{12}\) In order effectively to use available resources, all Western societies require extensive division of labour and specialisation of functions. In advanced societies such as our own, the scale on which coordination is needed (to take full advantage of the opportunities offered in modern social life) is immense. What is more, it is often a challenge to reconcile this complex, widespread interdependence with individual freedom.

---

\(^9\) Continuing with musical analogues, no matter how flawlessly a drummer can play alone, some of his or her skills will be tapped only if he or she plays with others: cf. Flemming, A., "Using a Man as a Means" (1977) 88 Ethics 283, 293. The same is true of capacities which are not skills. Much of what we are able to do cannot fully be exploited unless it is complemented by the actions of others. 'We need one another', says Rawls, 'as partners in ways of life that are engaged in for their own sake, and the successes and enjoyments of others are necessary for and complimentary to our own': \textit{id}, 522-3.

\(^{10}\) Heymann, P., "The Problem of Coordination: Bargaining and Rules" (1973) 86 Harv. L. Rev. 797, 798.

\(^{11}\) For examples of such opportunities, see Heymann, \textit{id}, 799.

\(^{12}\) Generally, see Friedman, M., \textit{Capitalism and Freedom} (1962), 8-9, 11-16.
Moreover, ours is a society which employs the technique of the market-place to coordinate the economic activities of millions. In contrast to the modern totalitarian state,\textsuperscript{13} the market-place in liberal-capitalist societies is designed to epitomise the voluntary cooperation of individuals; a possibility which itself rests upon the fundamental proposition that, provided a particular bilateral transaction is voluntary and informed, both parties to an economic exchange benefit from it, and in so doing, are presumed to produce flow-on benefits for society as a whole (of which the parties themselves are several members).\textsuperscript{14} Accordingly, ours is an economy based on competitive capitalism: a ‘free private enterprise exchange economy’.\textsuperscript{15} Underlying most arguments against the free market is a basic lack of belief in freedom itself, or the attainment thereof.\textsuperscript{16}

As a social phenomenon, and a form of interpersonal negotiation, “bargaining”\textsuperscript{17} exemplifies the attempt by social participants individually to

\textsuperscript{13} Which is characterised by its central direction of society, and which essentially employs coercion to effectuate coordination.

\textsuperscript{14} Generally, see Kronman & Posner, The Economics of Contract Law (1979), Chp. 1.

\textsuperscript{15} Most of the technical economic literature is concerned with specifying the institutional arrangements most conducive to such an economy’s maintenance.

\textsuperscript{16} It is commonly understood that the issue of free markets versus regulation is transformed, in the final analysis, into a question of what kind of society we desire and to what kinds of influence and shaping we wish to be subjected. A market economy requires a continuous process of monitoring and control to minimise the more baleful effects of its inherent anomalies and to keep the system apace with continuously changing social mores and economic reality.

\textsuperscript{17} It is common practice among commentators to use the terms “negotiation” and “bargaining” interchangeably: cf., e.g., Norton, op. cit., 526; Rubin & Brown, op. cit., 1-2. As used in this thesis, however, “bargaining” refers to a specific form of negotiation—i.e., one involving interpersonal exchange. That is to say, the negotiations here involve the narrow issue of the manner in which (tangible) resources are to be exchanged or divided between or among the parties thereto, or according to their direction. As Pruitt points out, the basic principle of exchange is that behaviour toward another individual is enacted in return for the other’s behaviour toward oneself: Pruitt, D., Negotiation Behaviour (1981), 7. Eisenberg, op. cit., 742, states that a ‘bargain’ is ‘an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other’. Hence, while negotiation generally cannot be seen as a discrete activity with a defined mission, bargaining has as its object some resultant exchange by agreement. In any event, the writer’s choice to differentiate between “negotiation” and “bargaining” in this thesis stems more from semantic convenience or familiarity and less from substantive difference (cf. Gulliver’s treatment of the distinction, op. cit., 69-73).
realise their opportunities based on the coordination of their private activities and resources. As a legal phenomenon, the law of contract epitomises an institutional attempt to give jural effect to this instrumental social phenomenon. The negotiation stage of the contractual process, however, occupies an indispensable, yet somewhat mysterious position in our law and in our society. Perhaps the oldest of interpersonal, decision-rendering processes, it provides a cardinal illustration of voluntary and

18 According to Pruitt, op. cit., 91: 'Coordination occurs when bargainers work together in search of a mutually acceptable agreement'.


  Bargain is ... the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army) for apportionment of productive energy and of product. Contract in the strict sense is the specifically legal machinery appropriate when such an economy moves into the phase of credit dealings, i.e., of future dealings in general—in which aspect the mutual reliance of two dealers on their respective promises comes of course into major importance. This machinery of contract applies in general to the market for land, goods, services, credit or any combination of these.

In the neoclassical (economists') model, contracts represent rational attempts to maximise individual welfare. Generally, see Farber, D., "Contract Law and Modern Economic Theory" (1983) 78 Northwestern U.L. Rev. 303; Cooter & Ulen, Law and Economics (1988), 227:

  The truth is that contract law's fundamental purpose is to enable people to achieve their private ends. In order to achieve our ends, our actions must have effects. Contract law gives legal effect to our actions. The enforcement of promises helps people to achieve their private ends by enabling them to rely upon each other and thus to coordinate their actions. An aspect of free society is the power of its citizens to enter into voluntary agreements to accomplish their private ends. Contract law provides a framework for private citizens to set the terms of voluntary association with each other. (Emphasis in original.)

20 As a means to facilitating private exchange, particularly in common business dealings, there are few practical alternatives to negotiation. A commonplace contemporary alternative, however, the standard-form contract (and the contract of adhesion), is discussed in Chapter 4, Section 4.1.2.3. Owing to its efficiency, a good deal of business is conducted through the unilateral imposition of standardised terms. Since it is not an interactive decision-making process, however, it cannot be called "negotiation", strictly speaking.
consensual social interaction. It is ubiquitous and accessible to us all. Understandably, then, much has been written on how to negotiate toward a consensus. It is only quite recently, however, that we have begun to witness the emergence of scholarship dealing with the legal and ethical standards governing such relations. One noticeable feature of this

21 As Eisenberg points out, although negotiation is usually seen as a unified process, it comprises two very different strands, found both alone and in combination. Like adjudication, one strand is concerned with settling disputes arising out of past actions. This Eisenberg refers to as ‘dispute-negotiation’. Like legislation, the other strand is directed toward establishing rules to govern future conduct, as through contracts, treaties and protocols. This he refers to as ‘rule-making-negotiation’. We are principally concerned here with the latter strand of negotiation: Eisenberg, M., “Private Ordering through Negotiation: Dispute-Settlement and Rulemaking” (1976) 89 Harv. L. Rev. 637, 638.

22 Indeed, Rubin & Brown, for example, suggest that bargaining is ‘a gateway to the analysis of social interaction’: Rubin & Brown, The Social Psychology of Bargaining and Negotiation (1975), 300.

23 The versatility of bargaining would alone justify this conclusion. Common experience, however, might indicate that most people are averse to the process. For example, in many aspects of life, and under ordinary market conditions, bargaining cannot be seen as a customary activity. As a practical matter, individuals do not engage in stylised and strategic ‘haggling’ over, say, the price of petrol, items in a shop window, or the fare for a bus ride. The best they can hope for, if it is at all possible, is to shop around for better terms. This feature tends to distinguish so-called ‘discrete’ from so-called ‘relational’ contracts.


scholarship, moreover, is that it has tended, first and foremost, to emanate from very diverse interdisciplinary sources; this at least reveals that bargaining is susceptible to conceptual analysis. Until very recently, courts and legal commentators have had much less to say about the normative aspects of this ancient social process. According to most lawyers still, ‘[t]he general rule in bargaining is that anything goes.’


26 The earliest works (appearing mainly in the 1960s) were written by specialists in labour and diplomatic negotiations. In the late 1970s, anthropologists started contributing by way of comparative ethnographies. The 1980s appear to have been dominated by social psychologists and game theorists; although this period also saw a growing contribution from lawyers writing for other lawyers. It is predicted that such a trend will continue into the 1990s, although now with burgeoning competition from economists and applied game theorists; there seems to be growing importance of game-theoretic methodology to applied microeconomics generally: see Ayres, “Playing Games with the Law,” (Book Review) (1990) 42 Stan. L. Rev. 1291, or from those from the law and economics school generally: see Coddington, Theories of the Bargaining Process (1968); Young, Bargaining (1975); Kronman, “Mistake, Disclosure, Information, and the Law of Contracts,” (1978) 7 J. Legal Stud. 1; Baird and Weisberg, “Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207,” (1982) 68 Va. L. Rev. 1217; Ayres and Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,” (1989) 99 Yale L.J. 87 (non-cooperative game theory); Coleman, Heckathorn and Maser, “A Bargaining Theory Approach to Default Provisions and Disclosure. Rules in Contract Law (1989) 12 Harv. J.L. & Pub. Poly. 693 (cooperative game theory); Katz, “The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation,” (1990) 89 Mich. L. Rev. 215, explaining why economically influenced lawyers have hitherto failed to give priority to studying the law governing the bargaining process (id, 219-20), and arguing that ‘contract formation should be seen as logically prior to most if not all of the major issues in law and economics’ (id, 230). For a general collection of interdisciplinary sources, see Lowenthal, op. cit., esp. at nn. 2-5; Weltaufer, op. cit., 1221, n. 3.


28 “Norm” and “normative” are expressions used often in this chapter and throughout this thesis. They are used in different senses, as determined by the particular context in which they are used. “Norm” generally refers to a principle of right action or authoritative standard desired or binding upon an individual and serving to guide, control or regulate proper and acceptable behaviour, and “normative” has a corresponding meaning. “Norm” is also often taken to refer to the “ought” as opposed to the “is”: the value judgment as opposed to empirical or psychological “reality”. Accordingly, “normative” refers to “prescribing”, “judging” or “validity” as opposed to “asserting”, “describing” or “empiricism”. The regulatory status of norms may merely be moral, or ethical, or they may have the coercive force of law. Generally, see Pettit, P., “Virtus Normativa: Rational Choice Perspectives” (1990) 100 Ethics 725; Kelson, H., “On the Pure Theory of Law” (1966) 1 Israel L. Rev. 1.

1.1. On the General Nature of Negotiation (Bargaining)

Negotiation ... is conveniently perceived as a relatively
norm-free process centred on the transmutation of underlying
bargaining strength into agreement by the exercise of power,
horse-trading, threat, and bluff.\(^{30}\)

\[\textit{Negotiation is a bargaining process, with give}
\textit{and take, and with stress upon and use of the}
\textit{strengths of one's own position and the}
\textit{weaknesses of the position of the other}
\textit{party.... It is pure bargaining}....\(^{31}\)

The nature of the negotiation process has been subjected to sustained
analysis by, amongst others, anthropologists,\(^{32}\) social psychologists\(^{33}\) and

\(^{30}\) Eisenberg, M., "Private Ordering through Negotiation: Dispute-Settlement and
Rulemaking" (1976) 89 Harv. L. Rev. 637, at 638.


\(^{32}\) Gulliver, op. cit., xvii, for example, describes the processes of negotiation thus:

Negotiations comprise a set of social processes leading to
interdependent, joint decision-making by the negotiators through their
dynamic interaction with one another. These processes involve the
exchange of information (and its manipulation), which permits and
compels learning by each party about his opponent, about himself, and
about their common situation: that is, about their expectations,
requirements, strengths and strategies. As a result of learning, there is
modification of expectations and requirements such that the
negotiators may shift their demands to some point at which they can
agree. Negotiators continue to exchange information and to explore
possibilities so long as they consider that they may gain an outcome
that is more advantageous than the status quo. Negotiations are thus
a dynamic process of exploration in which exchange is intrinsic:
changes in each party’s assessment of his requirements, in his
expectations of what is possible, preferable, and acceptable, and
changes in his opponent’s assessments and expectations. Analysis of
negotiation is necessarily the analysis of process and change within
the ineluctable interdependence of the negotiating parties.

\(^{33}\) See Rubin & Brown, op. cit.; Druckman (ed), Negotiations: Social Psychological
Perspectives (1977).
game (or rational choice) theorists.\textsuperscript{34} In contrast to adjudication,\textsuperscript{35} negotiation is a process by which the parties thereto make their own decisions. Negotiation, or “bargaining”, characteristically refers to a process comprising voluntary,\textsuperscript{36} formal and reciprocal dealings between two or more parties,\textsuperscript{37} initiated and controlled by those parties, with a view to reaching an “acceptable”\textsuperscript{38} agreement concerning future action.\textsuperscript{39} More specifically,

\textsuperscript{34} “Game theory” is concerned with analysing human interaction by reference to the strategies available to participants. See Katz, \textit{op. cit}; Shubik, M., \textit{Game Theory in the Social Sciences} (1982), 6-7; Schelling, T., \textit{The Strategy of Conflict} (1980).

According to Gulliver, however, \textit{op. cit.}, 50:

Game and bargaining theories almost universally ignore the distribution of power or, what amounts to the same thing, they assume that, like skills and knowledge, power is equally distributed to the parties....

\textsuperscript{35} Gulliver, \textit{op. cit.}, 6-7:

The crucial distinction ... between adjudication and negotiation is that the former is a process leading to unilateral decision-making by an authoritative third party, whereas the latter is a process leading to joint decision-making by the ... parties themselves as the culmination of an interactive process of information exchange and learning.

Cf. also, Eisenberg, \textit{op. cit.}, 653 et seq.

\textsuperscript{36} The fact that parties have few alternatives to bargaining as the principal means to their economic ends should not render the process itself any less “voluntary”.

It is precisely because bargaining is a voluntary relationship that it is also one of mutual dependence, i.e., interdependence. Generally, see Rubin & Brown, \textit{op. cit.}, Chp. 8; Kelly & Thibaut, \textit{Interpersonal Relations: A Theory of Interdependence} (1978), Chp. 10.

\textsuperscript{37} Although bargaining often involves multiple parties, for the sake of both empirical and theoretical accessibility, unless it is stated to the contrary, this writer will focus almost exclusively on dyadic (two-party) bargaining.

\textsuperscript{38} The writer hesitates at this stage to say “valid”. However, because we are ultimately concerned with precontractual bargaining and the consummation of contracts, the concept of “validity” must necessary refer to legal validity. This need not always be the case in general negotiations, however. For example, the parties may intend to negotiate an agreement that is to be binding in honour only. Employed in this way, “validity” might refer to “ethical validity”—i.e., viewed as complying with minimal norms in the eyes of the general moral community; the sanctions for breach, too, obviously being nonlegal ones.

The use of the word “acceptable”, in the text, might refer to moral or legal institutional acceptability, i.e., validity, or it might merely refer to acceptability in the eyes of the
bargaining is generally understood to be a self-regulated \(^{40}\) interpersonal process in which parties with largely divergent interests \(^{41}\) engage in stylised \(^{42}\) parties themselves. An agreement which is acceptable in this latter manner is more likely to be a successful one, carried out precisely according to its terms. According to Fisher & Ury, for example, op. cit., at 4:

> Any method of negotiation may be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. And it should improve or at least not damage the relationship between the parties. (A wise agreement can be defined as one which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.)

\(^{39}\) Many agreements, of course, are discrete and, for all intents and purposes, instantaneous (e.g., newspaper for sixty cents). The paradigmatic agreement concerning this thesis, however, assumes that exchange is protected to some point in the future—i.e., a bilateral executory agreement.

\(^{40}\) While it is true that normative constraints often seem relaxed, or even non-existent in the bargaining context, we will investigate below the extent to which negotiations, and hence agreements, are in fact regulated by various institutional (ethical and/or legal) constraints.

\(^{41}\) Or ‘opposed interests’. Cf. Pruitt, op. cit., 1. According to Pruitt, ‘opposed interests’ refers to the parties’ ‘differing needs,’ which lead them to ‘incompatible preferences’ among negotiable alternatives. Interests are never inherently opposed, but rather an instance-specific joint function of the parties’ needs and alternatives under consideration: id, 4.

The existence of divergent interests relates to the point about the strategic nature of bargaining below. That is to say, the normative significance of strategy, the product of power relations, only has a role to play where the parties interests are not entirely convergent. Obviously, strategy has no value or role to play where the parties’ interests are completely coincident. Cf. Scheppelle, K., Legal Secrets (1988), 47.

Parties’ interests, of course, cannot be entirely divergent, for bargaining would never occur. It is the points of convergence, rather, that make negotiations possible. Cf. Rubin & Brown, op. cit., 10: ‘While [parties’] interests are partly in conflict, there must exist some degree of commonality of interest for bargaining to occur’; Kelly and Thibaut, The Social Psychology of Groups (1959), 44:

> If the interests are totally congruent, there is nothing to bargain for; and if they are totally opposed, there is no basis for bargaining. Thus, the parties’ interests must be sufficiently divergent to warrant interaction, and, at the same time, sufficiently convergent to permit it. If each party’s interests and those the other is perceived to have do not fall within this spectrum, bargaining cannot take place.

\(^{42}\) Cf. Rubin & Brown, op. cit., 259: ‘Through the offers and counteroffers they make and the social postures they display, bargainers shape the outcome of their interaction in a strategic fashion’.
partisan strategic dealings until they reach a mutually acceptable set of terms, or until one of them decides that agreement cannot be reached. Where the individual interests of the parties are not entirely convergent or antagonistic, and each seeks to further its own interests, the particular negotiations are likely to be characterised by a competitive strategic structure. Contrarily, where there is less divergence between the interests of the parties, and neither party is motivated primarily in furtherance of its own interests, the particular negotiations are more likely to be characterised by a cooperative (noncompetitive) strategic structure.

The typical rationally self-seeking motivations of parties to precontractual bargaining will tend to slant our characterisation of such

43 Bargaining is usually understood in its context as a strategic structure—that is, it is seen as a process in which it is possible to specify the possible choices available to parties engaged in that activity, the temporal sequence in which those choices occur, the costs and benefits to each party for adopting a particular sequence of actions as opposed to a difference sequence of actions, and the information available at each step. Proceeding with the assumption of human rationality, and in light of this strategic structure, rational choice (or game) theorists are inclined argue that it is possible to predict how rational or imperfectly rational individuals will behave under a given bargaining regime.


45 Although the present writer is by no means committed to rational-choice models as the only plausible description of human behaviour, the assumption of rationality, in the sense of individual utility maximisation, is viewed as a useful working assumption for any stylised analysis of strategic human interaction. It is quite valid, all things being equal, to suggest that human beings in general, and thus as negotiators, endeavour to obtain outcomes that are, in their opinion, most satisfactory or advantageous to themselves; or at least that one will choose an outcome that is no less advantageous to oneself than any perceived alternative possibility, taking into account one's own interests, values, and concerns as well as others'. That such universal behaviour might be called "rational" is virtually an axiomatic truth, at least in ordinary economic life. Generally, see Hovenkamp, H., "Rationality in Law & Economics" (1992) 60 George Washington L. Rev. 293.

As a practical matter, rational-choice models are attractive to many as serving as a useful device for describing and predicting human conduct.

[Most people, much of the time, do attempt to perceive unusual dangers and opportunities far enough in advance to go through the decisionmaking process of applying, somewhat objectively and somewhat exhaustively, their own beliefs about and evaluations of various actions to a set of possible actions and, then, choosing the actions whose results they predict will be most consistent with their desires or aversions. It is on this basis that, whether through private reactions or social rewards and sanctions, we frequently attempt to

148
negotiations toward being predominantly of a non-cooperative competitive structure. Competitive bargaining is an inherently oppositional exercise. As one commentator had remarked in relation to all bargaining, `however benign or cooperative, the setting is a contest where something of value is at stake'.

Be this as it may, this characterisation of bargaining is apt to be taken to its extreme. Both competitive and cooperative strategies will be evident in

\[
\text{influence others' conduct by adding or subtracting costs to the outcomes they predict for possible choices.}
\]

Heymann, op. cit., 812. The extent to which much of our law, politics and economics appears to proceed, at an absolute minimum, from the validity of the assumptions about the motivations and capacities of the parties inherent in the rational-choice models, this may be representative of little more than a set of institutional assumptions designed to be persuasive to those who must participate in the legal system and, accordingly, which speaks to our own self-conceptions—that we view ourselves as the sort of moral and economic agents who, among other things, behave rationally. Cf. Heymann, id, 805.

The limitations of the rational choice model should be obvious. The assumptions it makes do not necessarily always correspond to the practices we see and follow in real life. Rationality is bounded. People do act altruistically, though usually not in the economic sphere: cf. Etzioni, A., The Moral Dimension: Toward a New Economics (1988), Chp. 4, 51-66. People also act out of habit, routine, obligation, and occasionally through "reflex action", without engaging their reasoning processes. Reasoning capacity is often subordinated to our internal and subconscious drive. Generally, see Heymann, id, 809 et seq.; Elster, J., Nuts and Bolts for the Social Sciences (1989); Solomonic Judgements: Studies in the Limitations of Rationality (1989); The Cement of Society: A Study of Social Order (1989): ‘In my opinion, the social sciences are light years away from the stage at which it will be possible to formulate general-law-like regularities about human behaviour’: id, viii. As one eminent game theorist also comments:

For a long time it has been felt that both game and economic theory assume too much rationality. For example, the hundred-times repeated prisoner's dilemma has some $2^{108}$ pure strategies; all the books in the world are not large enough to write this number even once in decimal notation. There is no practical way in which all these strategies can be considered truly available to the players. On the face of it, this would seem to render statements about the equilibrium points of such games ... less compelling, since it is quite possible that if the sets of strategies were suitably restricted, the equilibria would change drastically.


46 Norton, op. cit., 530.
most, if not all, negotiations.\textsuperscript{47} Bargaining is the paragon of an exercise involving tension—'it is at once a selfish and a cooperative endeavour'.\textsuperscript{48} This is bargaining's 'intrinsic contradiction',\textsuperscript{49} and yet also its driving force.\textsuperscript{50} No matter how adversarial a stance respective parties assume in a particular bargaining interaction, in order to bargain successfully, some measure of cooperation and compromise is necessary. Parties with divergent interests will usually prefer settlement to stalemate: agreement to non-agreement. After all, one assumes that an individual is motivated to bargain because she

\textsuperscript{47} That is to say, the two strategic structures are extremes, and most negotiations will fall somewhere in between. Cf. Lowenthal, \textit{op. cit.}, 75, n. 31; Gifford, \textit{op. cit.}, 58. Parties must, of course, consciously or subconsciously, select a bargaining strategy because it is not easy to be competitive and collaborative at the same time, although both may occur at different times in the course of the same negotiation, as the tactics and behaviour associated with those extremes are largely antithetical: concepts like trust and suspicion, and rigidity and flexibility, are functional opposites. One mode or the other must predominate in every negotiation interaction. Empirical research findings also support this as a fundamental proposition: cf. Pruitt & Lewis, "The Psychology of Integrative Bargaining", in Druckman (ed), \textit{Negotiations: Social Psychological Perspectives} (1977). Gifford and Lowenthal, \textit{op. cit.}, suggest that negotiators need to select strategies depending on situation-specific factors. Lowenthal, in particular, \textit{op. cit.}, 92-112, suggests that the parties' choice between competitive and non-competitive strategies is likely to be influenced strongly by certain characteristics of the particular negotiation. Such characteristics might relate to the subject-matter of the negotiation, normative constraints on the parties, and the personalities and values of the respective parties themselves. For a discussion of the role of individual characteristics, such as the background and personalities of the negotiators, see Rubin & Brown, \textit{op. cit.}, Chp. 7:

As bargainers enter into relationships with one another, they bring with them variations in prior experience, background, and outlook that may affect the manner and effectiveness with which they interact. Individual differences in background (such as a bargainer's sex, race, age, status, etc.), as well as individual differences in personality (such as a bargainer's inherent cooperativeness, authoritarianism, cognitive complexity, risk-taking propensity, etc.), may selectively shape the course of bargaining. \textit{id}, 157.


\textsuperscript{49} Gulliver, \textit{op. cit.}, 181.

\textsuperscript{50} Gulliver, \textit{id}, 186, suggests that the whole negotiation process is 'given persistence and movement by the basic contradiction between the parties' conflict and their need for joint action'. This is the intrinsic, dynamic propulsions contained within negotiation as a process of interaction.

150
perceives that a negotiated outcome is preferable to the *status quo*.\footnote{In order for bargaining to occur, the parties must believe that there is more to lose than to gain by not interacting with each other: Rubin & Brown, *op. cit.*, 7. The motivation for entering into a transaction is to achieve some specifiable benefit: money, a product, services, a forbearance, and the like. Contract law can, at least in part, be viewed as a set of legal principles and rules developed to govern this flow of benefits between the parties to an agreement.}

Assuming relative equality between rational parties,\footnote{That is, we are assuming here that the desires, needs and risk tolerances of the negotiating parties are roughly equivalent: that each of them has approximately the same to gain or to lose by entering into or opting out of the agreement. As these contingencies as between the respective parties to the dealing become more extreme, the case for external, institutional regulation of the bargaining process augments proportionately.} a certain amount of cooperative behaviour, such as compromise, is thus necessary and preferable to deadlock, immobility and failure.\footnote{Cf. Gulliver, *op. cit.*, xiii-xiv:}

\begin{quote}
However filled with a righteous sense of the justice and morality of his own claims in the dispute, a party must fairly soon begin to take account of the opponent’s preferences and demands, however unjust or extreme they may seem. To refuse to do so is to threaten a breakdown of the negotiations if the opponent has any strength at all in his position. So long, therefore, as a party continues to think that a breakdown and an acceptance of the *status quo* are less preferable than the possible terms of a negotiated outcome, he will, and indeed must be prepared to, temper his own preferences by taking account of those of his opponent.
\end{quote}

David Gauthier has argued for the universal appeal of a principle of ‘minimax relative concession’: Gauthier, *Morals by Agreement* (1986), 133-46. According to Gauthier’s model, each bargainer begins by claiming the entire bargaining surplus (i.e., absolute selfishness), conceding a portion of it in order to reach an agreement: *id.*, 133-4.

\footnote{Norton, *op. cit.*, 531.}

Adversarial relations intensify the respective parties’ desire to “win”, thereby increasing the temptation for each party to engage in potentially dubious bargaining practices, the opportunities for which in bargaining are many. The free-form, largely unregulated nature of the market bargaining process means that opportunities frequently occur for the parties to exercise power, lie, cheat, conceal, shade the truth, or withhold important items of information. A party may be prepared to prevail by any means, including acting deceptively and exploitatively.

151
minimum, this feature of bargaining tends to ordain the maintenance of some balance between the parties' competing interests and values, thereby reconciling the tensions that bargaining naturally engenders, and serving to curb excessive self-interest and to encourage regard for others.\(^{56}\)

Notwithstanding the need for some degree of compromise, bargaining almost invariably remains a paradox. While individuals negotiate because they feel that coordinating their goals with the goals of others will produce better results than acting unilaterally, they are in the same moment motivated to maximise their own gains from such interactions.\(^{57}\) This produces much tension, often leaving parties, and particularly business actors, with mixed incentives that may make coordination and cooperation extremely difficult.\(^{58}\) Simultaneously, negotiating parties want to receive the benefit of cooperation but minimise their exposure to the risk of exploitation or manipulation at the hands of the other party.\(^{59}\) The irony is, however, that both parties arguably benefit by being able to coordinate their activities and cooperate, but each party potentially suffers if the processes by which parties cooperate are abused.\(^{60}\)

\(^{56}\) Cf., Norton, \textit{op. cit.}, 531.

\(^{57}\) Lachs points out that bargaining reveals the individual and his or her values better than virtually anything else: Lachs, \textit{Responsibility and the Individual in Modern Society} (1981).

\(^{58}\) Cf. Rubin & Brown, \textit{op. cit.}, 10; Raiffa, \textit{op. cit.}, 33.

\(^{59}\) The minimisation of such risks often increases transaction costs where parties must invest resources to insulate themselves from such practices—for example, by employing more skilful third parties (such as lawyers) to negotiate for them, or by expending resources to acquire any information that they may be lacking.

\(^{60}\) This tension, in particular, perhaps best illustrates the "paradox of negotiation". Because bargaining parties necessarily benefit by trusting each other, but each suffers if its trust is abused, the situation faced by parties wanting to build a trusting relationship is essentially a "prisoner’s dilemma." The prisoner’s dilemma has become a major analytic tool among social scientists who investigate problems of human cooperation. In short, it describes the paradoxical situation faced by two prisoners who, faced with the same charge, agree not to testify against each other. Whilst they are held in separate cells, the authorities approach each prisoner and invite him to give evidence against the other. The authorities need the evidence of each prisoner in order to convict the other, and promise each a reduced sentence in return for testifying. If both remain silent, neither prisoner will be convicted. If both give testimony, then both will receive reduced sentences. However, if one prisoner testifies while the other remains silent, then one will go free while the other will get a harsh sentence. A dilemma arises because neither prisoner knows what choice the other will make: to testify or
1.1.1. A Note on the Role of Interpersonal Trust in Bargaining

Consider what is thought of as a higher or more elusive value ... trust among people. Now trust has very important paradigmatic value, if nothing else. Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people's word. The cost of dishonesty ... lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of business.

remain silent. The irony lies in the fact that both will be better off if they can trust each other and remain silent, although the safest choice is for both to testify and receive reduced sentences (and they are likely to do so out of fear that the other will). See Axelrod, The Evolution of Cooperation (1984), 28, remarking that 'the iterated Prisoner's Dilemma has become the E. Coli of social psychology'; Rubin & Brown, op. cit., 20 et seq.; Gifford, op. cit., 60, n. 149. Negotiating parties, of course, face a similar dilemma. While it is in the parties' mutual interests to engage in cooperative, trusting behaviour, it is at the same time in each party's several interests to distort information and to exploit perceived vulnerabilities.

Many economists use this paradox of bargaining to develop normative theories. The most famous of these in this regard is the Normative Hobbes Theorem. Disagreements and failure to cooperate are costly and should thus be minimised. According to the Normative Hobbes Theorem, the law should be structured to minimise the harm caused by failures in private agreements. According to this principle, the law should be designed to prevent coercive threats and to eliminate the destructiveness of disagreement. Generally, see Cooter, R., "The Cost of Coase" (1982) 11 J. Legal Studies 1.

61 Arrow, K., The Limits of Organization (1974), 23. The quotation continues thus:

Unfortunately, this is not a commodity which can be bought very easily. If you have to buy it, you already have some doubts about what you've bought. Trust and similar values ... have real, practical, economic value; they increase the efficiency of the system, enable you to produce more goods or more of whatever values you hold in high esteem. But they are not commodities for which trade on the open market is technically possible or even meaningful.

It follows from these remarks that from the point of view of efficiency as well as from the point of view of distributive justice, something more than the market is called for... The government may indeed perform somewhat better than the private sector in realizing social feelings, trust, and empathy, but within limits...

There are varied means for parties to solve the problems of mixed incentives in bargaining, yet doubtless the least awkward and inexpensive alternative is based on one of the ‘most fragile, yet powerful human dispositions’—interpersonal trust. Interpersonal trust is generally considered to be essential to all relationships, because it encourages coordinative and cooperative behaviour, and reduces the likelihood of a stalemate. It also signals to one’s opponent, and perhaps more importantly, one’s future bargaining partners, that post-contractual relationships can be based on the same trust and mutually beneficial understandings, rather than on inflexible adherence to strict contractual rights and obligations. What is more, the development of mutual trust lowers the transaction costs inherent in the alternative of bargaining based on mutual suspicion.

In essence, trust entails ‘reliance on [the] disposition of another person’. In bargaining, more particularly, it connotes a belief in one party that the other can be depended on and that the latter will not act prejudicially towards the former when the chance presents itself. A contracting party’s

63 Parties may attempt to seek protection through various devices, such as insisting upon an appropriately drafted agreement to negotiate in good faith: cf. Coal Cliff Collieries Pty. Ltd v. Sijehama Pty. Ltd (1991) 24 N.S.W.L.R. 1 (esp. per Kirby P.); Channel Home Centres v. Grossman, 795 F.2d. 291 (1986); and generally, see Farnsworth, “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations” (1987) 87 Colum. L. Rev. 217. Such agreements, however, may increase transaction costs and decrease other important exchange-facilitating devices, such as interpersonal trust.

64 Cf. Shell, op. cit., 255.

65 See Macaulay, “Non-Contractual Relations in Business: A Preliminary Study,” (1963) 28 Am. Soc. Rev. 55. The ability to make amicable resolutions to differences after contractual performance has begun arguably is related to the trust parties establish in the negotiation stage of their relationship. Shell, id, 255-6, for example, comments that while business dealings grounded entirely on trust are rare, perhaps more unusual are successful business dealings that lack trust as a foundation of the relationship. While establishing trust may be costly, the costs arising from a lack of trust are potentially greater. In Shell’s view, therefore, ‘[i]t becomes vitally important ... for parties to signal their willingness and ability to foster trust’: id, 256.

66 Cf. Shell, op. cit., 255.


68 One writer’s view of trust is expressed as follows:
goal then, should be to overcome the obstacles that force parties to contract with suspicion, allowing both to benefit from mutually trusting and cooperative relationships.\textsuperscript{69} Market economies, however, almost invariably involve large-scale, impersonal transactions between relative strangers, wherein the development of trusting relations is not always possible. In this case, therefore, the state's role in providing some guarantee of, and some incentive to, trustworthiness in commercial dealings becomes more prevalent.\textsuperscript{70}

Specifically created arrangements and general norms of conduct, legally sanctioned, or otherwise, can ameliorate the mutual disadvantages of uncoordinated human activity,\textsuperscript{71} as well as promote the benefits that

\begin{quote}
[T]rusting a person means believing that when offered the chance, he or she is not likely to behave in a way that is damaging to us, and trust will typically be relevant when at least one party is free to disappoint the other, free enough to avoid a risky relationship, and constrained enough to consider the relationship an attractive option. In short, trust is implicated in most human experience, if of course to widely different degrees.
\end{quote}

Gambetta, "Can We Trust Trust?," in Gambetta (ed), Trust, Making and Breaking Cooperative Relations (1988), 213, at 219. Another writer defines trust in these terms:

We define "trust" as follows: \textit{An individual may be said to have trust in the occurrence of an event if he expects its occurrence and his expectation leads to behavior which he perceives to have greater negative motivational consequences if the expectation is not confirmed than positive motivational consequences if it is confirmed.}


\textsuperscript{69} Economists often justify the value in this in terms of the Normative Coase Theorem. According to one version of this theorem, the law should be structured to remove the impediments or obstacles to private agreements. The theorem is suggested by Professor Coase in Coase, R., "The Problem of Social Cost" (1960) 3 J.L. & Econ. 1.

\textsuperscript{70} Cf. Shell, op. cit., 265-81, arguing that the law needs to devise carefully circumscribed mechanisms that deter people who are tempted to violate trust.

\textsuperscript{71} Take for example the coordination in driving that a simple traffic light achieves. It reduces the mutual interference that two aggressively selfish drivers would experience at an intersection, as well as that which might occur from two meek and selfless drivers constantly deferring to each other. The same coordination is achieved by requiring that we each drive on the opposite side of the road, or by the norm "women and children first." Cf. Heymann, "The Problem of Coordination: Bargaining and Rules," (1973) 86 Harv. L. Rev. 797, 798.
coordinated behaviour generally brings. Arguably, the types of lying and deceit (for example) which are condemned by the law are best explicable and justifiable by reference to these considerations. Indeed, as shall be evident throughout this thesis, the law fosters and supports an extended range of relationships of trust within a market-oriented community. Even when we might wish to decry markets as encouraging cut-throat competitive behaviour, we are reminded of the extended range of mutual trust which a market both generates and requires. John Finnis, for example, brings to mind the Aristotelian point that the relationships of mutual utility involved in business dealings are a kind of friendship, albeit in a weak sense.

Section 2 will further consider the special structural features and suppositions of the bargaining process, and investigate how these idiosyncratic criteria might be viewed as giving rise to some unique ethical and legal challenges in our attempt to formulate an appropriate system of external normative constraints applicable to bargaining interaction. The remainder of this chapter is offered as an important first step for a legal analysis of the negotiation process leading to contract formation, the behaviour of individual negotiating parties, and society’s efforts to regulate the process of bargaining. Coleman, Heckathorn and Maser advised:

[W]e look at contract law in light of what we know about bargaining, rather than vice versa... [T]he theory of rational bargaining in the absence of law has a claim to analytic priority.

Although we are, ultimately, concerned here with the effect of strategic bargaining behaviour on the legal (i.e., contractual) validity of a negotiated outcome, it is important to stress that legal rules are not the only

---

72 Very often a scheme of human activity coordinated by a general norm or rule can leave each of the participants better off in terms of his or her own interests than can uncoordinated decisions.


76 Id, 651.
normative regulators of bargaining behaviour and outcomes. In many settings, other intrinsically cultural or institutional factors—e.g., natural constraints (such as mutual dependence), relational imperatives, social norms, customs or conventions, and ethical precepts—provide important guidelines for determining the division of surplus from exchange and reducing the social costs of strategic behaviour, even where these natural and normative constraints are not formally articulated.

77 Cf. Rubin & Brown, op. cit., 259:

A central characteristic of the bargaining relationship is the fact that each party is dependent upon the other for the quality of the outcomes that he himself receives. A division of resources, after all, can be reached only by mutual consent.

78 Cf. Gulliver, op. cit., 18:

Negotiators are themselves parties in their relationship (or representatives of the parties) and therefore have an inherent concern for its future where that is relevant—that is, where it must or can usefully be continued. They are, the arguments runs, unlikely to agree to an outcome that, though immediately satisfactory, threatens the future of their relationship or their relations with others.

79 Cf. Gulliver, op. cit., 10, claiming that virtually all negotiations involve the consideration of norms.

80 Cf. Lowenthal, op. cit., 99:

[The accepted conventions of negotiation operate as informal external rules, placing limits on the extent to which a negotiator may successfully employ competitive or collaborative tactics, and giving each party entering negotiation a fair sense of the rules by which another party will be playing.

81 Generally, see Charny, “Nonlegal Sanctions in Commercial Relationships” (1990) 104 Harv. L. Rev. 373. For example, the desire to foster and maintain goodwill or an on-going relationship will encourage cooperation, for unless a market is highly mobile, an individual who acquires a poor reputation may have difficulty in attracting future contract partners. Similarly, aesthetic social conventions, such as “splitting the difference”, or “choosing a round number”, and market-place normative standards such as the notion of the “going price” (the norm of what other people are paying for similar goods or services at the same time) may offer focal points to which bargaining parties might be drawn. Notably, Gulliver, op. cit., 102, states that ‘negotiating “in good faith” is a widespread norm, often protected in law or well-entrenched custom’. He also states that ‘this includes the understanding that an overt offer will not be revoked for a higher one later’ (ibid).
It should be clear, in the final analysis, that negotiations cannot be treated as if they constitute a more-or-less closed system. Negotiations do not occur in a social vacuum. Accordingly, an enveloping society can have a marked impact upon the processes of bargaining and upon its outcomes. Gulliver thus writes:82

The outside world impinges on and in various ways affects the interaction between the parties and the results they achieve. This impingement can most usefully be perceived and analyzed as augmenting, depleting, and modifying the resources available to the disputing parties—that is, their potential power. On the one hand parties seek to select from the outside those resources that seem advantageous and supportive to them; on the other hand, they may be subject to some unavoidable influences that affect their potential power and so their strengths and weaknesses. Thus one or both parties may be induced, even compelled, to modify behaviour, adjust expectations, and alter demands.... Moreover, there are macrosocietal conditions and trends, such as the state or the economy, political developments, or prevailing ideologies, that create or foster standards and assumptions.... These conditions, or perceptions of them, exert influence through the negotiators' own direct experience of and participation in the society.

1.1.2. A Note about the Gap between Law and Morality

Because the law derives from and mirrors our considered moral judgments ... there is a tendency for the deepest structures in both domains to converge.83

This age is not utterly insalubrious for philosophy. Our problems (in universities) are so great and their sources so deep that to understand them we need philosophy more than ever, if we do not despair of it, and it faces the challenges on which it flourishes.84

82 Gulliver, op. cit., 202-3.


84 Bloom, The Closing of the American Mind (1987), 382. On the role of philosophers, see too, Hare, Essays on Political Morality (1989), Chp. 1. The writer owes both of these authorities,
In many areas, law and morality work in a symbiotic relationship.  

“What is the purpose of life?” is the fundamental question to be answered by legal theory as by philosophy, political theory, ethics [and] religion.

The extent of the division between law and morality is a well-worn theme in jurisprudence. Obviously, the gap separating the two is wider at some points than it is at others. We can, for example, choose to compare and contrast the normative dimensions of law and morality in terms of the similarities and differences existing (for example) between their respective scopes, concepts, criteria, contents, sanctions, validity, function and social impact. In certain dimensions, law and morality are quite exclusive. For


86 Friedmann, F., Legal Theory (5th ed. 1967), 82.

87 Notable debates in the 1950s and 60s include that between H. L. A. Hart and Lon Fuller, and between Hart and Lord Devlin. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593; Fuller, “Positivism and Fidelity to Law” (1958) 71 Harv. L. Rev. 630; Fuller, The Morality of Law (1969); Hart, Law, Liberty, and Morality (1963); Devlin, The Enforcement of Morals (1965). Holmes once commented that ‘Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract’: Holmes, O. W., “The Path of Law” (1897) 10 Harv. L. Rev. 457, at 462.

88 The scope of legal concern is obviously narrower than moral concern. Austin, for example, writes:

But the circle embraced by the law of God, and which may be embraced to advantage by positive morality, is larger than the circle which can be embraced to advantage by positive law. Inasmuch as the two circles have one and the same centre, the whole of the region comprised by the latter is also comprised by the former. But the whole of the region comprised by the former is not comprised by the latter.

Austin, J., Lectures on Jurisprudence or The Philosophy of Positive Law, Campbell, R. (ed) (5th ed., 1885), 199. Cf. also, Mason, K., Constancy and Change: Moral and Religious Values in the Australian Legal System (1990), Chp. 2 (‘Law and Morality: Intersecting or Overlapping Circles?’).

89 The writer is not concerned with the question of whether judicial reasoning is like moral reasoning, though is inclined to suggest that it is. For an ambitious comparison, see Perry, T.,
example, it is well known that 'law in its sanctions is not coextensive with morality'.\textsuperscript{90} And that the law, unlike any other normative system, 'regulates its own creation'.\textsuperscript{91}

But law and morality also share many points of mutual relation. It has previously been noted, for example, how the two share the same antinomies and intellectual categories.\textsuperscript{92} The law almost invariably reflects and often articulates our most basic moral intuitions,\textsuperscript{93} despite the occasional candid judicial indications to the contrary.\textsuperscript{94} The law, Wertheimer argues,


\textsuperscript{90} \textit{Goodwin v. Agassiz}, 186 N.E. 659, 661 (1933). Cf., also, Gergen (1990) 64 Southern Cal. L. Rev. 1, at 19: 'Nor would we want all moral obligations to become legal duties, for acting morally loses much of its appeal if it is mandatory'.


\textsuperscript{92} See Chapter Two, Section 1.1.

\textsuperscript{93} Cf. Finn, "Commerce, the Common Law and Morality" (1989) 17 Melb. U.L. Rev. 87: 'Moral values ... can and manifestly do inform the law'. This explains only how we might expect a positive fit between the general community's ideals of justice and the ideals of justice revealed in the law. It does not, however, explain why we might expect a normative theory of justice to emerge from the law as we find it. For this, we might turn to Rawls, whose technique of 'reflective equilibrium' provides a model for the working of this sort of process: \textit{A Theory of Justice} (1971), 48-51. We start, says Rawls, with our ordinary moral intuitions or convictions from which principles of justice can be uncovered by probing beneath these intuitions to find their underlying structure. Principles are held to be justified insofar as they match and account for these intuitions. But these deeper principles may contradict a specific intuition or set of beliefs, or our intuitions may seem less correct once their deeper logic is exposed. We can take a critical stance toward our institutions once we have a set of principles against which to judge them, and we can then undertake an exercise of revision and adjustment. This is a two-way process, to find the 'best compromise' between theory and convictions. Individual moral convictions are examined in light of various moral principles, and modified if necessary; likewise, moral principles are tested against our ordinary moral intuitions and modified if particular intuitions seem too important to abandon. This theory can be applied where our moral convictions and moral (or legal) principles are inconsistent; indeed, even if we cannot identify our moral convictions at all.

The law is, for all that, a very conservative guide to our settled moral intuitions, imposing fewer and weaker responsibilities than morality might.

\textsuperscript{94} Perhaps this is best reflected in the sentiments of Maugham L.J. in \textit{L'Estrange v. F. Graucob Ltd} [1934] 2 K.B. 395, at 405: 'I regret the decision to which I have come, but I am bound by legal
provides us with a 'lens' through which we can see and analyse moral notions at work.\textsuperscript{95} And while the law tends to reveal its values through the facts highlighted in decided cases, we sometimes must look outside the law to see what values may be at stake; for moral values often permeate our decisions about the facts themselves.

Morality, however, has one significant advantage over law. Unlike the law, morality does not have to produce concrete and practical results.\textsuperscript{96} For the law, unlike other normative systems, is authoritatively normative,\textsuperscript{97} and hence must be operational, functional and intelligible in its application. While moral philosophers and the like are free to worry about what to say about all sorts of normative puzzles and dilemmas, the various law-making agencies are ultimately charged with having to decide what to do about them.\textsuperscript{98} This is an important point. In needing to be functional in its approach to the resolution of particular disputes, the same antinomies which riddle both morality and law are sharply exacerbated in the latter's case. The law must, ultimately, concern itself with the peculiar complex human problems of real-life social entities, and not with the fictitious, omnipresent, paradigmatic abstractions ("rational"\textsuperscript{99} and "reasonable" "men")\textsuperscript{100} who rules and cannot decide the case on other considerations'; and of Williams J. in Riches v. Hogben (1986) 1 Qd. R. 315, at 339: 'The judge's duty in such situations is to apply the law and not allow his feelings with respect to the morality of the conduct to affect his decision'.

\textsuperscript{95} Wertheimer, A., Coercion (1987), 14.

\textsuperscript{96} Cf. Barnett, R., "Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses" (1989) 12 Harv. J.L. & Pub. Pol'y 613, 622: 'Unlike philosophers or economists, however, judges must decide cases even in the absence of an iron-clad moral rights or consequentialist analysis'.

\textsuperscript{97} Cf. the comments by Post, R., "Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel" (1989) 77 Cal. L. Rev. 559-60:

The law, unlike philosophy, is an instrument of governance, a tool for the control of behavior. If the authority of philosophical discourse depends upon the persuasive force of its reasoning, the authority of law rests ultimately upon the power of the state.

\textsuperscript{98} Wertheimer makes a similar point: op. cit., 13.

\textsuperscript{99} Given the context of bargaining, "rationality" may generally be taken to mean that the parties know the nature of the environment in which they operate. Cf. Katz, op. cit., 235. The meaning of "rationality", however, is complex and deeply contested. Cf. Charny, op. cit., 430.
regularly feature in the hypotheticals, factuals and counterfactuals offered by philosophers, and, worse, who are constructed as reality\textsuperscript{101} by economists\textsuperscript{102} and rational choice (or game)\textsuperscript{103} theorists, amongst others.\textsuperscript{104} Lawyers simply

\footnote{n. 174, and citations therein. Whilst parties may not have information about every aspect of the transaction, being “rational” implies that they are at least aware of the extent to which they are ignorant and appreciate the consequences of their imperfect knowledge. Rationality generally assumes that parties are capable of reasoning—that their ‘computational abilities are unlimited’: Katz, \textit{op. cit.}, 235. Although rational parties need not be sophisticated, it is implied that they can at least formulate bargaining strategies that best maximise their returns, and towards this they have planned their response to all relevant contingencies. It also implies that parties can reasonably foresee all the natural consequences of their actions. Generally speaking, then, “rationality” encompasses what is sometimes understood as “judgment” or “prudence”: cf. Charny, \textit{op. cit.}, 430, n. 174.}

Rationality and motivation are, especially in economic and rational choice theory, inextricably intertwined.

\footnote{Defined in the simplest terms, rationality refers to maximization of payoffs: a negotiator is rational if he prefers high payoff to low payoff.... [This makes] good sense substantively, by corresponding to the concept of motivation. To say that a negotiator maximizes his payoffs amounts to saying that he is motivated to do something: he is motivated to strive for \(X\), where \(X\) is a goal with the highest payoff attached to it.}

\footnote{Bartos, O., \textit{Process and the Outcome of Negotiations} (1974), 39, as quoted by Gulliver, \textit{op. cit.}, 45.}

\footnote{For a somewhat light-hearted account of the “reasonable man” concept in law, see Clarke, B., “The Death of the Reasonable Man” (1991) Law Institute Journal 194.}

\footnote{Many important mental and physical capacities and attributes of human beings, such as rationality, reason, reasonableness, free choice, intelligence, and concept of the “self” or “the person”, are readily ascribed to all individuals uniformly.}


\footnote{Cf. Gulliver, \textit{op. cit.}, 43 \textit{et seq.}: ‘Central to the construction of almost all game-type models is the assumption of rational behaviour by all players, defined in terms of maximization of expected outcome’, \textit{id}, 44.}

\footnote{Human rationality is clearly bounded; hence, any theory or institution that proceeds from that assumption is necessarily bounded likewise. In bargaining, in particular, the fact that it}
do not have the same metaphysical luxuries as philosophers and those others do.\textsuperscript{105}

is not possible for most parties to know, understand, or provide for all possible contingencies in their relationships with others necessitates that much of human behaviour will always remain unpredictable, especially from another party’s perspective. This is more so given that rational decision-making seems to depend critically on many relevant factors, including the range of individual characteristics, personalities and preferences, and the extent of each party’s information regarding these and other matters. Whilst the assumption of rationality is a reasonable starting point for laws and institutional arrangements, to assume that parties have full information (as many economists do: see Coase, R., “The Problem of Social Cost” (1960) 3 J. Law & Econ. 1), and are the best judges of their own interests, is simplistic (cf. Gulliver, op. cit., 45 ‘gross oversimplification’), not to mention that to treat it ‘as an infallible empirical proposition ... is an outrage to human experience”: Atiyah, The Liberal Theory of Contract”, in Essays on Contract (1986), 121 et seq., at 148.

Thus, whereas it would appear proper for the law generally to respect individuals as autonomous and rational agents, it must at the same time be vigilant not to take the assumption too far. Though many of our conceptions are necessary accompaniments of modern social relations, the notion of “rationality” must be rejected as a basic human constant. Cf. Hirst & Woolley, Social Relations and Human Attributes (1982), vii. In discussing law-and-economics theorising, for example, Professor Atiyah launches into this vehement assault:

Much of it seems over-simplified to the point of unreality. The empirical assumptions made seem often absurdly unreal or just contradicted by experience. Take for instance, the very fundamental question whether contracting parties are the best judges of their own interests. No doubt this is a reasonable working assumption—indeed, the only possible assumption in a society which is to have any respect for human freedom and dignity; but it is surely to fly in the face of all human experience to treat it as a universal truth.

Atiyah, “Executory Contracts, Expectation Damages, and Economic Analysis of Contract”, in Essays on Contract (1986), 150 et seq., 155. Furthermore,

[W]hy must it be assumed that rational people never do irrational things? Is it not one of the commonest things in the world for perfectly rational normal people to behave in ways that are manifestly contrary to their own interest? Why people behave in this way is a matter for psychologists rather than lawyers to explain.

Id, 156; Atiyah commented, too, that ‘[l]awyers ... have great fun with such people in the witness box, because lawyers often share the economists’ assumption that all behaviour must be rational, but in practice they know perfectly well that people often do things against their own interests for reasons which they are unable to explain’.

\textsuperscript{105} What is more, the law must attend, in ways that ethics, morality and even economics need not, to such matters as the costs of administration, the problems of proof, and our shared interest in the finality of transactions. Cf., generally, Farber, D., “Contract Law and Modern Economic Theory” (1983) 78 Northwestern U.L. Rev. 303: ‘Economic theory cannot provide the final answers to legal problems, if only because economic theory itself has no final answers’, id, 339.
Charles Fried’s perspective on the relationship between law and moral philosophy is instructive. He paints a vivid picture of philosophy proposing an elaborate structure of arguments and considerations that descend from on high but stop some twenty feet above the ground. It is the peculiar task of the law to complete this structure of ideals and values, to bring it down to earth.\footnote{106}

So, to use the words of Lord Radcliffe, ‘it is a lawyer’s plain duty to be pedestrian, to keep his feet on the ground.’\footnote{107} The distinctive task of the law is to bridge that last twenty feet.\footnote{108}

Yet even in managing to reach the ground, one inevitably faces seemingly-insurmountable difficulties; for legal doctrine often presents itself as entangled and indeterminate.\footnote{109} As will become evident in subsequent chapters, each of the several legal doctrines calls for significant normative refinement in its own application. We come full circle, then, when as lawyers we acknowledge that the law is often compelled to refer to extrinsic sources, such as economics\footnote{110} or aspects of moral philosophy, to decide what

\begin{quote}
Now that last twenty feet may not be the most glamorous part of the building—it is the part where the plumbing and utilities are housed. But it is an indispensable part. The lofty philosophical edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation—but no more. The law is really an independent, distinct part of the structure of value. (\textit{Ibid.})
\end{quote}


\footnote{107}{Radcliffe, \textit{The Law and Its Compass} (1960), Preface, vii.}

\footnote{108}{On which, generally see Honoré, T., ”The Dependence of Morality on Law” (1993) 13 Oxf. J.L.S. 1.}

\footnote{109}{Our law’s attempt to cope with, and perhaps to conceal, or even create, this indeterminacy is highlighted by the fact that Fried’s last twenty feet seems to be filled by judicial and legislative resort to such delphic conceptions and rhetoric as “unjust”, “unreasonable”, “unconscionable” (or “unconscientious”), “reasonable (or legitimate) expectations”, and so forth; each requiring elaborate normative refinement in their own application.}

\footnote{110}{Cf. Micheal Pertschuk, former Chairman of the United States Federal Trade Commission, \textit{Revolt Against Regulation: The Rise and Pause of the Consumer Movement} (1982), 139, describing the role of economists at the Commission:}
to do: to provide a ‘motorway midst the maze’. Such is what the so-called “hard cases” are made of.

In bargaining, many troubling social, moral or ethical issues are troubling legal ones as well. To this extent then, any proposed line between law and morality has deliberately been obscured, at least for the purposes of the discussion in Section 2 below.

The economists earned my grudging respect, not so much for their prescriptive counsel, which could be every bit as unworkable, even mad, as some of the lawyers’ schemes, as for their dogged insistence that we think through the reality of what we believed we were achieving with our intervention in the marketplace. Economists are very good indeed at framing questions that lawyers and consumer advocates have not asked. (Though the economists don’t very much like having to deal with the sweaty, humanly imperfect answers to those questions.) They ask, ‘What do you think you are accomplishing with this rule? Who will benefit, who will pay? What else will happen as a result of this rule; who among competitors will be the winners and who the losers? In curtailing this marketplace failure, what others may you inadvertently cause, and what healthy market signals will you distort? Is there a less intrusive, less costly way to remedy the problem?’

And they ask that question most dreaded of all by the entrepreneurial regulator: ‘How secure are you that the world will be a better place for your intervention than if left alone?’


113 Generally, see e.g. Dworkin, R., “Hard Cases” (1975) 88 Harv. L. Rev. 1057. The problem of justifying judicial decisions is particularly acute in “hard cases”. The problem of these cases has traditionally been approached as a dilemma of “creating” versus “discovering” the law by a judge.
2. **Regulating the Unregulated:**

**On Locating and Evaluating Appropriate Norms of Conduct in Bargaining**

A more diligent scrutiny of the real world and a toleration of its obscurities, fragility, and untidiness are well overdue.114

As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The whole field of moral argument is dominated by a great undeclared war over the location of this pointer.115

Three important characteristics of the bargaining process can be distilled from the observations made in Section 1 above. First, as a creature of free market ideology, the process itself has no generally prescribed form or rules. As a starting moral and legal proposition, the parties are generally left free to fix the terms they decide and in any such manner as they decide. Viewed in this way, the process is characterised predominantly as a self-directed, free-form market process that assumes that the parties themselves are responsible for looking after their own interests in dealing *inter se*, and that they will, accordingly, monitor their behaviour within that process. In the absence of objective normative guidance, or some system of monitoring bargaining practices to assure morally or legally acceptable dealings, bargaining parties have little choice but to rely on the resources of the negotiation process itself.116 This highlights the "private" aspect of bargaining, and especially precontractual bargaining.


116 In short, these resources comprise a mixed bag of bargaining techniques that feed and sustain the process, giving it its free-form market characteristics, and the appearance of a "game". The analogy of negotiation to "game" is perhaps best suggested in Raiffa's writings on
A second observable characteristic of bargaining is that since the parties' interests and goals are generally divergent, the process will usually be characterised by adversarial postures. Such postures are necessary to protect and to advance the parties' respective interests, including their interest in being treated fairly by the other party.

Somewhat related to this second processual characteristic of bargaining is the third: bargaining technique. Since the process, and precontractual bargaining in particular, is inherently antagonistic, the parties' respective adversarial postures are expressed through the style, strategies and tactics they each adopt. These techniques are employed to advance the parties' goals, as well as to ensure their respective interests in assuring minimal ethical, and possibly legal, requisites for agreement. This structural feature of bargaining, however—the strategic actions (threats, puffs, bluffs, shading the


In the process of seeking a joint decision, the disputing parties are inherently interdependent if an acceptable outcome is to be obtained. Their primary concern is to influence or coerce each other. The course of negotiation therefore involves the exchange of information: alleged facts and proffered interpretation of them, argument, appeals to rules and values, threat, promise, demand, offer, counteroffer, and so on. The flow of information permits a continuous process of learning by each party about the requirements, preferences, expectations, perceptions, attitudes, feelings, strengths, and weaknesses of both the opponent and himself.... As a result of learning ... there are modifications (maybe including reinforcement) in preferences and demands by each party. This interaction continues. There is, and must be, a gradual willingness to coordinate and collude. Negotiators may never achieve amity, sympathy, or trust but they have to attain sufficient coordination, however reluctantly, so as to work toward and ultimately achieve a joint decision on the issues in dispute. The alternative, always an available option, is to accept the status quo or status quo ante, which is also in effect a joint decision, as preferable to anything else that appears possible.

117 Much has been written on negotiating style, strategy and tactics. See *supra* at nn. 24 and 25. *Style* is usually used to refer to personal negotiation traits, such as aggressive, calm, flexible, or rigid. *Strategy* is best seen as an overall plan of operation; while tactics refers to the specific practices used to carry out that plan. Cf. Norton, *op. cit.*, 532, n. 151. Tactics, of course, are numerous and diverse, and are often resorted to on an *ad hoc* basis without any reference to any overall plan or strategy, e.g., threats, puffs, bluffs, exorbitant opening demands or low opening offers, and splitting the difference. On tactical decisions in negotiation, generally, see Gulliver, *op. cit.*, 109-12.
truth, nondisclosure, and the like) used to achieve the parties’ respective
goals—gives rise to many ethical, and potentially legal, dilemmas. Consider
the following simplistic, yet not atypical, illustration:

S owns a parcel of land which, unknown to him, is rich in a valuable
mineral resource. (Assume also that S could find out this fact by a
simple and inexpensive survey.) B, a prospective purchaser, gives an
evasive answer to S’s direct question designed to discover why B is
interested in purchasing his, S’s, property. While arguably avoiding
deception, B’s response is highly strategic. Suppose B then offers a
price well below market value, and S feels that he is being treated
unfairly. In the hope that B will raise her offer, S threatens to
terminate negotiations, thereby applying pressure upon B to increase
her offer. B is not sure of the seriousness of S’s intentions to
terminate (i.e., whether these are S’s true intentions) but raises her
price so that negotiations proceed.

S’s threat may well have been a bluff (a strategic response falsifying his
true intentions), yet it is strongly arguable that such a departure from highly
idealised standards of truth-telling should be tolerated. This is largely
because the false statement has resulted in an offer that is closer to a fair
market value for the land, and, assuming both parties are rational

---

118 The illustration is itself modelled from a similar hypothetical given by Norton, op. cit.,
526-7.

119 We are assuming that the evasive response did not itself contain any factual
misrepresentations.

120 Results of psychological research suggest that bargainers attain higher and more
satisfactory outcomes when they begin their interactions with extreme rather than more
moderate demands. See Rubin & Brown, op. cit., 266-9. Overall, the authors suggest that
opening moves are critical in shaping the course of subsequent interaction (id, 268).

The bargainer, for example, who sets his opening offers at a low level
below that of the outcome to which he really aspires (perhaps because
he likes the other or because he doesn’t want to appear greedy) may
end up settling for a less than satisfactory agreement than he might
otherwise have obtained by being more “selfish.” And if both
bargainers act in this fashion, they may jointly obtain less than
maximal division of resources. Hence, one of the potential pathologies
of an otherwise beneficial, mutually cooperative relationship is the
possibility that cooperators, in their concern with taking the role of
the other, may develop and act upon incorrect expectations about the
other’s preferences and intentions, and the result may be mutually
detrimental miscoordination. (Id, 271. Emphasis in original.)
individuals, it was the very type of risk \( B \) should reasonably be expected to tolerate through the use of counter-technique. That is to say, it was always open to \( B \) to insulate herself from the risk of \( S \)'s bluffing by testing his (\( S \)'s) sincerity, which she could have done so by calling \( S \)'s bluff, although this would have been contrary to \( B \)'s own interests, that is, wanting to clinch a deal. So raising her offer was the most rational decision to make. Moreover, \( B \)'s offer of an inadequate price, although amounting to "deception" in the form of a bluff, elicited a strategic response from \( S \) (threatening to call off negotiations), which effectively addressed the deception by correcting for \( B \)'s original "deception". Although there is no guarantee that the bargaining process will always elicit such responses, the parties are closer to a result that may be considered "fair".

Thus, to the extent that the bargaining process is itself unsupervised, the responsibility for ensuring minimally decent behaviour rests primarily with the parties themselves. And while an important effect of this self-regulation is to place greater responsibility on the parties to behave appropriately towards one another in precontractual negotiations, this structure itself assumes relative competence to the task of bargaining. As the relative negotiating abilities between the parties become more divergent, the case for external, institutional regulation of the process becomes stronger. This is a point to which we shall return below.\(^1\)

2.1. Special Problems Encountered in Attempting to Regulate Bargaining Activity

As a threshold matter, the evaluation of the moral or legal worth of various bargaining practices and outcomes presents any normative system—be it ethics (morality)\(^2\) or law—with a formidable but interesting challenge.

\(^{1}\) Sections 2.1.1.5, and 3.2.1.

\(^{2}\) Any reference to "ethics" is not in this thesis intended to carry any technical meaning. It is merely intended, for the most part, to refer to a normative system having its basis in morality as opposed to law. One might prefer, however, to have resort to Hazard's somewhat narrower definition of ethics as 'imperatives regarding the welfare of others that are recognized as
Fuelled by the parties' desire for agreement, bargaining is by its nature a process giving rise to many ethical and legal dilemmas. The problems arising from the inherent incentives which exist in that process for parties to selfishly capitalise on their respective bargaining skills and advantages are compounded by a lack of clearly articulated limits on the use of such skills and advantages. The bargaining process itself is too flexible and idiosyncratic to be entirely self-regulating, or to paint a consistent picture of a set of aspirational moral standards. Arguably, in few areas of human endeavour is the distance between commonly used strategic practices—nondisclosure, pressure, persuasion, wilfully supplying false information, etc.—and aspirational moral standards so seemingly great as in bargaining.

The indeterminacies that lie between legitimate and illegitimate bargaining behaviour are augmented by factors unique to bargaining. A frequent assumption made about bargaining is that engaging in tactical practices, such as misrepresentation or applying pressure, is all in the game—that, after all, pressing for advantage is the principal point of the process. Accordingly, many moral and legal issues proceed from this assumption, and the need to differentiate, say, lying from other legitimate forms of deception (such as puffing and bluffing); duress or undue influence from less objectionable forms of "bullying" (mere commercial pressure or persuasion); unfair advantage-taking (exploitation, victimisation, or "preying-upon") from merely making the most of business opportunities. Since commonly encountered forms of bargaining behaviour do not in many cases coincide with the aspirational standards of God's biblical (or Kant's universal) imperatives, the points of departure need to be explicated and justified.

binding upon a person's conduct in some more immediate sense than law and in some more general sense than morals': Hazard, *Ethics in the Practice of Law* (1978), 1.

123 Cf. Finn, "Equity and Contract", in Finn (ed), *Essays on Contract* (1987), 104, at 110: 'Some level of falsity and deception in inducement to contract, some level of exploitation, of mistaken belief, of advantage and oppression, are endemic features of bargaining and of bargains'; Gulliver, *op. cit.*, 5: '[The parties'] primary concern is to influence or coerce each other'.


125 The moral reasoning of the eighteenth-century deontologist Immanuel Kant may be summarised as follows. Since they have the capacity to engage in moral reasoning, human
Lest the writer be seen as ‘indulging in impractical utopian dreams’,\textsuperscript{127} this thesis is not offered in search of an aspirational system of bargaining norms. One must readily acknowledge that ‘[b]argains are not struck in an altruistic environment of mutual enlightenment’.\textsuperscript{128} Indeed, given that any analysis of the norms appropriate to bargaining must invariably take account of an extraordinary variety of behaviours, contexts and objectives, it may seriously be questioned whether some aspirational ethic, beyond, possibly, a base standard excluding fraud, could ever uniformly and universally apply to all bargaining encounters. Bargaining is simply too idiosyncratic an activity—its species too heterogeneous—for that. Rather, what must be sought in these pages is an operational set of bargaining norms—that is, a set of norms that are both functional and ethically and legally sound. \textit{Ad hoc} and inconsistent prescriptions for appropriate bargaining standards, moreover, are carefully to be avoided. As used in this thesis, “operational” bargaining norms comprise so-called “aspirational” bargaining norms (whatever these may be), as the latter are accompanied by justifiable departures and modifications.

In the writer’s view, operational bargaining norms logically begin with the bargaining process itself; for an understanding of an appropriate set of such norms ought only to occur in the context of their fitting this special

\begin{quote}
beings are unique living creatures. Because of their reasoning capacity, they are entitled to distinctive treatment. Accordingly, three rules, of increasing complexity, can be articulated for testing moral alternatives: 1) Persons are not to be used exclusively as a means to our ends; 2) We must act impartially—i.e., as one who both makes and is bound by laws or rules; as one who is both subject and sovereign; and 3) Actions or rules are not moral unless they can be made universal—i.e., they are applicable to everyone, without generating a state that is illogical, self-defeating or inconsistent.

Generally, see Kant, I., \textit{The Metaphysics of Morals} (Bobs-Merill, ed., 1959) (1st ed., 1785). In Kant’s view, acts done from moral duty alone have moral worth.

\textsuperscript{126} Parties’ bargaining interests and goals make it especially tempting for them to deviate from God-given and universal standards of truth-telling and altruism, etc.

\textsuperscript{127} The expression is Philip Pettit’s: Pettit, P., \textit{“Virtus Normativa: Rational Choice Perspectives”} (1990) 100 Ethics 725, 726.

\end{quote}
Bargaining is, after all, an enterprise involving many risks. Parties can never fully be apprised of all the information they require to foresee all material contingencies relating to their respective welfares. Consummated agreement might ultimately fail to materialise, and any preparatory expenditure might be wasted. One party’s bargaining actions and choices might easily be manipulated at the more experienced or less scrupulous hands of the other party. The purpose of any normative system, be it morality or law, ought not be to disturb the allocation of tolerable risks inherent in the process itself. As a free-form and self-directed market process, bargaining largely assumes, in the absence of any specific criteria or normative guidance, that parties themselves will monitor the distribution of risks involved in the process. The function of bargaining norms, however, especially where it is not safe to rely on an internal, process-driven ethic, is to provide some check on the egoism naturally encouraged by the process. The whole idea of “negotiation norms”, for example, serves to temper the untrammelled self-interested behaviour associated with competitive bargaining, and to promote regard for the interests of others.

In attempting to locate and evaluate norms of bargaining conduct, some assumptions must inevitably be made. Generalised assumptions and observations about bargaining are difficult to make; and possibly dangerous. Bargaining is a process that takes place in a myriad of relational contexts, extraordinary in both variety and range. However, three assumptions can safely be made. First, in order for its proper functioning, society regards

---

129 Indeed, it is difficult to articulate limits for a process whose major benefits include its malleability and its freedom from rules.


131 This more or less assumes the rule that cooperation generally fails. Noncooperative states of nature generally call for a regulatory force of some kind. The acceptance of untrammelled selfishness seems invariably to conjure up images of Hobbes’s ‘war of all against all’, wherein human life is ‘solitary, nasty, brutish, and short’. Hobbes, T., Leviathan (1651).

bargaining as an indispensable activity that must continue.\textsuperscript{133} Second, bargaining itself is not necessarily unethical.\textsuperscript{134} Third, deviations from idealistic (aspirational) moral or legal norms can be justified by reference to acceptable criteria.

2.1.1. The Problem with Aspirational Approaches to Bargaining Norms: Deontological and Teleological Perspectives Considered

In contemporary philosophy, ethical theories are commonly divided into two fundamental types: teleology and deontology, more recently referred to as consequentialist and non-consequentialist theories, respectively.\textsuperscript{135} Although these two approaches often provide radically different perspectives on moral life, they might also converge in many respects.\textsuperscript{136} Their essential distinction lies in the difference between what is considered to be “right” and what is considered to be “good”.\textsuperscript{137}

\textsuperscript{133} Bargaining is an indispensable activity, necessary to the functioning of at least all modern Western societies (cf. e.g., Gulliver, \textit{op. cit.}, 2, who describes negotiation as a ‘virtual universal’). From negotiating the prevention of war, to the delicate negotiations that surround personal or family matters, it is difficult to imagine practical substitutes for negotiated transactions and solutions. Cf., also, Farnsworth (1987), \textit{op. cit.}, 218: ‘Ours is an era of ‘deals’...’.

\textsuperscript{134} That bargaining is so universally accepted and pervasively practised suggests that it is not itself unethical. Presumably it could not have survived to this extent, and in its present form, if bargaining itself contradicted commonly understood ethical norms.


\textsuperscript{136} Generally, see Barnett, R., “Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses” (1989) 12 Harv. J.L. & Pub. Pol’y 613: ‘The ability of two completely different methods to reach the same results in most cases suggests that each method is grasping, however imperfectly, something “real” about the world it is seeking to explain’, \textit{id}, 616.

\textsuperscript{137} Cf. Rawls, \textit{A Theory of Justice} (1971), 24:

The two main concepts of ethics are those of the right and the good.... The structure of an ethical theory is, then, largely determined by how it defines and connects these two basic notions.... The simplest way of relating them is taken by teleological theories: the good is defined independently from the right, and the right is defined as that which maximizes the good.
Teleological (or consequentialist) theories hold that the moral worth of conduct is determined solely by the consequences of the conduct. Put (over) simply, if the consequences are good, the conduct in question is judged morally to be good. If the consequences are bad, the conduct in question is judged morally to be bad. Deontological or non-consequentialist theories, in contrast, reject the idea that the moral character of conduct is determined by its consequences. Deontologism essentially maintains that the concept of duty is independent from the concept of good, and that right conduct is thus not determined by the production of good. ‘[T]he important thing is not to produce the goods, but to keep [one’s] hands clean’. To the deontologist, then, acts have inherent attributes of moral rightness or wrongness. Such inherency may derive from features such as personal commitment, the fact of the conduct in question being illegal, or certain conduct being required by religious directive. Truth-telling perhaps presents us with the most vivid illustration of the conflict between teleological and deontological theories of moral reasoning. To the consequentialist, lying is only wrong if it generates bad consequences. To the strict deontologist, lying is always wrong, no matter what consequences it generates. Obviously, this conflict presents

A deontological theory, by contrast, is defined by Rawls as

one that either does not specify the good independently from the right, or does not interpret the right as maximizing the good. (Id, 30).

Generally, see Kymlicka, W., "Rawls on Teleology and Deontology" (1988) 17 Phil. & Pub. Affairs 173.

138 The most widely studied example of a teleological theory is utilitarianism. The essence of utilitarianism is that given a choice, one ought to make one's choice on the basis of that action which would lead to the production of the best consequences for all affected—i.e., such decisions ought to be made on the basis of the "greatest good for the greatest number". Utilitarianism, then, adheres to the view that conduct (say, an action or a practice) is "right", when compared to any alternative action or practice, if it leads to the greatest possible balance of good consequences; and that the concepts of duty and right are subordinated to or determined by that which is good.

139 Pettit, "Consequentialism", op. cit., 233.

itself in a rather stark fashion in bargaining, which generally permits, if not encourages, parties to deceive or to mislead in various ways.\footnote{Cf. Peters, \textit{op. cit.}, 2. Cf., also, the bargaining hypothetical provided in the text, \textit{supra}, at p. 168, and accompanying discussion.}

Contemporary deontology is tempered somewhat by important notions of social justice, based on contractarian reasoning. Most famously, John Rawls's expression of deontology puts forward an 'original position' analysis, and emphasises equality as the basis of how rational people behind a 'veil of ignorance' would choose to be treated by others and by society, especially as regards their access to essential goods.\footnote{Rawls, \textit{A Theory of Justice} (1971). In \textit{A Theory of Justice}, Rawls develops a conception of rational choice by autonomous agents in hypothetical circumstances of fair equality. To Rawls, justice is grounded on consent, i.e., on social contract. In the real world, however, consent to social relations is extremely difficult to verify directly. Thus, because we cannot have direct consent from each individual, we must evaluate rules, practices and principles of justice by a hypothetical test that would be acceptable to all rational persons. Accordingly, Rawls defines an imaginary 'original position', wherein everyone acts in his or her rational self-interest. But in the original position, all individuals are behind a 'veil of ignorance'. They do not know what their status will be on the other side of the veil, in the actual world. Although they have a conception of society, they do not know their preferences; their conception of the good; or whether they would be rich or poor, black or white, weak or strong, male or female, young or old, talented or untalented, and so forth. From this original position people ask what rules or principles would appear rationally just to everyone. The veil permits them to evaluate social arrangements impartially, without regard to their own particular case. Rawls concludes that in the original position, individuals would reject utilitarianism. No one would be willing to accept a loss for oneself in return for a net increase in benefits of the whole group. Rawls \textit{does}, however, conclude that people would agree to two basic principles: first, each person is to have an equal right to the most extensive basic liberty (freedom of thought, speech, assembly, etc.) compatible with similar liberty for others. Second, social and economic inequalities, such as social status and wealth, are to be arranged so that they are both a) reasonably expected to be to everyone's advantage, particularly for the least advantaged members of society; and b) attached to positions or offices open to all under conditions of equal opportunity. The first principle is called the 'liberty principle'. It must be satisfied before the second principle, called the 'difference principle', can be invoked. Contractarian reasoning has been popular both in law and philosophy over recent times. Further reference may be had to some convenient sources: Scheppke, K., \textit{Legal Secrets} (1988) (discussed in Chapter Nine, Section 2.2.); Braucher, J., "Contract versus Contractarianism: The Regulatory Role of Contract Law," (1990) 47 Washington and Lee L. Rev. 697; Brudney, D., "Hypothetical Consent and Moral Force" (1991) 10 Law and Philosophy 235; Barry, B., \textit{Theories of Justice} (A Treatise on Social Justice, Vol. 1) (1989), Chp. 9 ('Original Position Theories'); Vallentyne, P. (ed), \textit{Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement} (1991); Harris, E., "From Social Contract to Hypothetical}
deontologists clearly do not believe that we should maximise goodness by considering individuals in isolation from our peculiar relationships with others.\textsuperscript{143} There are many special non-consequential relations, such as friendship, family relations and business affiliations, that intrinsically enrich the moral life.\textsuperscript{144}

As Professor Hawkins has recently shown, it is possible to apply both deontological and the teleological methods of reasoning to justify conduct in bargaining activity.\textsuperscript{145} A deontological justification considers bargaining conduct in terms of its own inherent morality: whether it is defensible in

---

\textsuperscript{143} Thus, for example, business persons do not treat each customer in abstraction from their previous dealings. If a customer is an old and reliable one, and the merchandise in question is in scarce supply, he or she should be given preferential treatment, for a relationship of trust and commitment has already been established. Further, the very fact that a promise has been given often obligates one to keep one's promise even if it becomes obvious that keeping the promise will not lead to the greatest good. Thus one ground of the business enterprise is the sanctity of contracts. This is a standard deontological notion, although one which can clearly produce good consequences, especially in the context of relational contracts. Generally, see Fried, \textit{Contract as Promise: A Theory of Contractual Obligation} (1981). The law-and-economics conception of "efficient breach", for example, is a teleological contradiction of this idea.

\textsuperscript{144} The fact of being a father, for example, creates special obligations, such that a man should rescue his son first among others in a burning building. This 'duty' arises irrespective of the considerations of society as a whole—that is, even though the world would have been better off if the father had saved someone else. In such a case one's primary duty is to one's son as a result of the special relationship. Similarly, one would expect that the special roles and responsibilities created by being the president of a bank or a journalist or an auditor result in special obligations and responsibilities in the world of business. Beauchamp and Bowie (eds), \textit{Ethical Theory and Business} (1979), 22, capture this aspect of deontological ethics in using the phrase, 'My station and its duties'—i.e., that at least in part, one's station (e.g., profession) itself creates special duties. This notion, they conclude (\textit{ibid}), has long been accepted by the business community. Since the business firm is usually characterised by a sharp hierarchical organisation, ethics tied to the special obligation of one's role is ideally suited for such organisation. Thus, each designated office in the hierarchical structure has duties and obligations appropriate to that office. Generally, see also, Pettit & Goodin, "The Possibility of Special Duties" (1986) 16 Canadian J. of Phil. 651.

itself. A teleological justification, on the other hand, considers bargaining conduct in terms of the ends which it serves, that is, in terms of what ultimate purpose or goal is sought: for example, social, political or economic objectives such as solidarity or preference maximisation through voluntary agreement.\(^{146}\)

2.1.1.1. Distinctively deontological justifications

In deontological terms, every community, by its customs, traditions, philosophies, politics and religion, accepts certain norms as just and fair.\(^{147}\) Indeed, a society preserves its identity and stability through the observance of fundamental moral norms. It is from this perspective that Professor Reiter wrote of the content of good faith bargaining norms:

When I speak of good faith here, I refer to standards of appropriate behaviour relevant in the community. I believe that within any social grouping there exist views and practices concerning standards of conduct in contract relations that are both widely shared and generally adhered to. These views and practices express in a day-to-day and

\(^{146}\) The maximisation of preferences (i.e., free choice) is central to the economists' chief objective: *efficiency*. Generally speaking, to the economist, efficiency means that which maximises wealth for a given input. Wealth, of course, depends on value, which in turn depends on free choice (i.e., willingness to pay). To complete the connection, if one maximises free choice, one maximises wealth.

\(^{147}\) Cf. Gulliver, *op. cit.*, 191:

[S]ome norms have an accepted, intrinsic character in that they tend to be more or less unquestioned. They symbolize moral and cultural values of prime importance. They indicate proper social behavior that is held to be ethically superior to amoral or immoral behavior. Therefore, such norms are likely, though not inevitably, to be constraining, and the party who has conformed to them may have powerful support against his opponent who has contravened them.\(^{148}\)

[H]owever, because norms exist, specifically or ambiguously and vaguely, beyond the immediate context of any particular negotiations, they refer to the society at large that envelops the negotiators, or to some sector of it that may or does impinge on the negotiations. Reference to norms, therefore, is reference to the wider social domain. It is acknowledgment that there are other people out there, ranging from a generalized public (with its "public opinion") to particular groups and individuals, who needs to be assuaged, placated, and perhaps persuaded. Thus, norms refer to, and represent in shorthand form, sets of interests and distributions of power and status in society.

\(^{148}\)
practical sense the manner in which contracts are or are not to be 
negotiated and performed.148

And another commentator remarks:

Even the grossest of sheer interest conflicts are hedged by standardized 
concepts of customary behavior, market price, status and reputation, 
honor, toleration, and the like.149

Social experience demonstrates, for example, that if we are not 
generally decent towards others we cannot expect them to be decent towards 
us.150 We soon learn, for example, that lying and exploitation are generally 
unacceptable forms of behaviour.151 This reciprocity would suggest that the 
acceptable limits of strategic bargaining behaviour are set by the reasonable 
expectations of how each party should act when dealing with the other in 
particular social and bargaining contexts.152

As an aspirational (i.e., non-operational) model of ethics, 
deontologically located and evaluated bargaining norms have two possibly


149 Gulliver, “Negotiations as a Mode of Dispute Settlement: Towards a General Model” (1973) 
7 L. & Soc’y Rev. 671, 684.

150 This conclusion about life is implicitly supported by social psychological research. Cf. 
Rubin & Brown, op. cit., 270-2: ‘... cooperation begets cooperation; and, conversely, 
noncooperation begets noncooperation’ (id, 270).

and Fairness’).

152 These expectations may originate from either, or both, generally held societal expectations 
(objective), or individual expectations held by the parties themselves (subjective). Thus, on a 
fuller investigation of the facts, parties may, for example, have a history of previous dealings 
from which their own expectations have accumulated independently from those set by 
community custom or morality.

Reciprocity is an important normative conception in society. Indeed, Rawls defined “fairness” 
according to its dictates. In particular, he postulates as the ‘principle of fairness’ that when 
people engage in just, mutually advantageous, collective action, voluntarily restricting their 
own liberty, they may insist upon similar acquiescence from all who voluntarily accept the 
benefits of that action or who take advantage of the opportunities it offers: Rawls, A Theory 
of Justice (1971), 112. Rawls, himself justifies promise-keeping by this principle of fairness: id, 
345-7. Cf. also, Buchanan, A., “Justice as Reciprocity versus Subject-Centered Justice” (1990) 19 
Phil. & Public Affairs 227.
independent aspects: a "universal" aspect, based on universal moral imperatives, and a "pragmatic" aspect, based on normative experience as ethical principle. While aspirational deontological ethics are important guides for those who seek to inject higher ethical standards into the marketplace, as the following sections illustrate, they are ultimately prone to placing too little emphasis on the unique operational characteristics of the bargaining process.

2.1.1.1. Universalism

*People must satisfy their ethical feeling by laying down a moral rule, while they actually live on a lower grade of morality.*

Universalism is an aspirational approach to ethics that rests on certain *a priori* truths or precepts, pressing bargaining ethics towards universal ethics. Its focus is on societal rather than on individual interests.

Some degree of universalism, of course, is crucial to bargaining ethics because it introduces social, community or collective considerations into a process that might otherwise be eclipsed by instinctive individualistic interests. It is these societal considerations, in particular, which serve to temper the untrammelled individualism associated with self-interest.

A troubling feature of universalism, however, is that its ideas do not assist in solving ethical dilemmas unique to contract negotiations; for it simply does not accommodate *strategic* avenues to ethical conduct. Universal standards of appropriate behaviour are so comprehensive that

---

153 It may be that a pragmatic ethic, say, a business custom or practice, precisely corresponds to a universal ethic, say, that it is categorically wrong to lie or steal, but there would appear to be no analytically contingent connection, merely an empirical one.

154 The term "universalism" is Norton's, *op. cit*. The writer's discussion of universalism has drawn rather liberally on her work: *id*, 514-5.

155 Page, "Professor Erlich's Czernowitz Seminar of Living Law", Handbook of Ass'n of Am. Law Schools (1914), 46, as quoted by Keeton, W. P., "Fraud—Concealment and Non-disclosure" (1936) 15 Texas L. Rev. 1, 32, at n. 79.

156 Refer to hypothetical bargaining illustration given in text, *supra* at p. 168, and accompanying discussion.
they do not adequately differentiate between unacceptable bargaining behaviour and behaviour that is considered essential to the operational imperatives of the process. Arguably, universalism obscures the point of strategy, tactics and technique, which are the very *modus operandi* of bargaining toward consensus. The credibility of the universalist ethic, for example, falters in its inability to distinguish between *prima-facie* inappropriate behaviour, and behaviour which actually assists the parties, or which promotes collective interests generally (by facilitating exchange).\(^{157}\)

The bargaining process assumes that where possible and practicable, techniques used by the parties, rather than universal ethical norms, will bring out all the relevant information and establish minimal bargaining behaviour. Universalism, then, does not satisfactorily distinguish whether bargaining strategies and tactics are more appropriate than normative rules to regulate parties' behaviour. Whilst bargaining should be answerable to universal ethics, exhortations to behavioural standards which do not adequately take account of the special suppositions and features of the bargaining process do not contribute to the formulation of an operational system of bargaining ethics. Universalism, it seems, imposes a near-conventional ethic that would convert those standards into mandatory principles, displacing much of the role and function of strategy, tactics and technique. Worse, too strict an adherence to universal ethics may operate as a disincentive for bargaining participants to engage in such a socially useful enterprise: an essentially teleological consideration.

2.1.1.1.2. Pragmatism\(^{158}\)

*The opinion of the majority is not the final proof of what is right.*\(^{159}\)

An alternative deontological approach to that of universalism is pragmatism. Unlike universalism, pragmatism does not rest on

---

\(^{157}\) Refer to hypothetical bargaining illustration given in text, *supra* at p. 168, and accompanying discussion.

\(^{158}\) The expression is Norton's, *op. cit.* The writer's discussion of pragmatism draws rather liberally on Norton, *id.*, 522-5.

\(^{159}\) Johann Schiller.
conventional ethical principles but uses information about bargaining experience itself—the practices or customs actually tolerated in a given community or industry—as the basis for establishing appropriate bargaining norms.\textsuperscript{160} Pragmatism considers ‘the range of acceptable agreements for experienced negotiators in the field in question’,\textsuperscript{161} thus rendering the factual context central to ethical decision-making in a particular bargaining scenario. Different ethics thereby apply according to the skill, understanding and expectations of the respective parties. In this way, one party could engage in certain practices with another who uses similar practices, but not with a party who does not.

Pragmatism advances the search for appropriate ethical bargaining conduct because it attempts to solve ethical dilemmas in the context of the bargaining context itself, a context containing so many idiosyncratic features that it does not derive its ethic from classical sources alone. Rather than assume that societal norms can be moulded to fit ethics in bargaining, as universalism does, ‘pragmatism forthrightly embraces prevailing experience’.\textsuperscript{162} Bargaining behaviour is thus restrained by whatever ethical standards are evidenced by customary market practices.

Initially, pragmatism seems attractive because it rejects abstraction in favour of contextual ethical empiricism. Unlike essentially abstract and theoretical exercises, such as universalism, pragmatism concentrates on factual indicators for locating appropriate bargaining norms. It suits the bargaining process because it makes allowance for the flexibility and varied nature of a multi-purposeful and varied-contextual process. Pragmatism is thus more suited to the realities of a self-monitored process in which ethical thresholds may vary greatly.


\textsuperscript{161} Lowenthal, \textit{op. cit.}, 105.

\textsuperscript{162} Norton, \textit{op. cit.}, 523.
Notwithstanding these appealing features of pragmatism, the model’s benefits are, in the writer’s view, ultimately outweighed by its shortcomings. The pragmatic ethic, of course, derives much of its credibility from the unsafe assumption that existing empirical customs and practices are adequate.\(^{163}\) Even if we could use common practice as a vestige of ethical norms, the insurmountable difficulties involved in gathering the evidence required to confirm such practices also render the pragmatic approach of little practical utility.\(^{164}\) In the absence of such evidence,\(^{165}\) it is not possible to verify the extent to which various practices manifest aspirational bargaining behaviour. Embracing existing bargaining norms may in fact be condoning very low ethical standards,\(^{166}\) and presenting inconsistent

\(^{163}\) This problem has also confronted negligence in the law of tort. See e.g., Mercer v. Commissioner for Road Transport and Tramways (NSW) (1936) 56 C.L.R. 580: evidence of a general public practice is not necessarily decisive; the general practice may be shown by evidence itself to be negligent. Cf. also, Rogers v. Whitaker (1992) 67 A.L.J.R. 47.

\(^{164}\) In addition to substantive difficulties, many methodological difficulties arise under pragmatism. For example, how do we obtain the necessary systematic data required to establish normative bargaining practices, and from whom? Assuming we can get over the impracticalities inherent in obtaining the necessary information, how much information is required before a shown deviation from honesty and fairness can be condoned as ethical? Transposing this problem onto the legal system would raise insurmountable difficulties where the testimony of experts from a particular industry is required to establish a very large number of bargaining practices. The variation in practices alone would leave no end to the number of such witnesses respective litigants could call in support of their case. Such a system, then, would be far too onerous and complicated for an ethical system, let alone a legal system, to adopt. Moreover, to what degree must a deviation from universal norms be practised in the bargaining context before it ceases to be acceptable within that context? Must it be a universal practice, or merely a substantial one? Perhaps even a majority practice? What if, notwithstanding the problems of collecting data, those data are inconclusive?

Hence, relying on existing practices raises problems regarding both the identification and evaluation of bargaining norms. Pragmatism arguably sets itself too overwhelming a task to make it valuable as a source for establishing ethical norms and resolving ethical dilemmas.

\(^{165}\) Feinman, for example, asserts that ‘empirical norms’ are indeterminate because ‘there simply does not exist an agreed set of principles and practices of commerce’. Feinman, “Critical Approaches to Contract Law” (1983) 30 U.C.L.A. L. Rev. 829, 837.

\(^{166}\) Cf. Keeton, W. P., “Fraud—Concealment and Non-disclosure” (1936) 15 Texas L. Rev. 1, at 37:

> What the ordinary ethical person would disclose depends not upon the custom in a particular line of business because customary conduct in such
standards where standards may vary within a community or particular industry. In this way then, the general effect of pragmatism is to confirm those practices that generally occur, without in itself offering a credible ethical basis for their adoption.\textsuperscript{167} In short, it too readily turns "is" into "ought".\textsuperscript{168}

* * * *

Although offering some relevant insights between them, neither universalism nor pragmatism is itself adequate for the purpose of identifying and evaluating appropriate bargaining norms. Universalism is not sufficiently focused on the operational features of the bargaining process, and thus will tend to press ethical norms toward universal ones, rendering them too high and generalised, while pragmatism requires so complex an exercise that it does not adequately satisfy the demands of a workable ethic for bargaining. Moreover, even if the task pragmatism sets itself could evidentially be achieved, both resourcefully and methodologically, because it rests on the lowest common denominator of ethical experience, it is likely that the ethical standards it would locate might tend to be too low and specialised. Accordingly, it is argued that any attempt at locating and business may be below the normal conduct of men generally. Just as custom of doctors to delegate certain duties to nurses may not of itself constitute the standard for the purpose of determining existence of negligence, so also, customs of second-hand car dealers to sell worthless cars without disclosure of the defects therein, do not of themselves make the non-disclosure privileged. Such a custom is evidence, but not conclusive evidence, that the privilege of nondisclosure is present.

\textsuperscript{167} Cf. also, Hillman, "The Crisis in Modern Contract Theory" (1988) 67 Tex. L. Rev. 103, 127, arguing that contract law may be suitable in some situations because it actually \textit{resists} commercial reality.

\textsuperscript{168} Cf., also, Wetlaufer, "The Ethics of Lying in Negotiations," (1990) 75 Iowa L. Rev. 1219, 1236:

[I]f ethics is more demanding than self-interest or the law, it is also more demanding than custom.... [T]he fact that everyone behaves in a particular way is merely relevant to, and not dispositive of our inquiry into what is ethically permissible. In the end, ethics generally demands more from us than simple compliance with the behavioural patterns of our community.
evaluating an appropriate set of bargaining norms cannot properly reside in pure, aspirational deontology.

2.1.1.2. Distinctively teleological considerations

In teleological terms, a basis for establishing and testing bargaining norms proceeds from an understanding of the reasons why we bargain. As has previously been observed, ours is a society scarce in its various resources and highly imbued with specialisation of function. Market exchange is one of the principal mechanisms through which resources (property and services) are allocated.\textsuperscript{169} One might thus wish to assess bargaining conduct purely in terms of the extent to which it promotes some collective good, such as distributive justice,\textsuperscript{170} economic efficiency or the maintenance of bargains, even at the expense of an intrinsic respect for the individual and his or her several moral rights. Efficiency and the maintenance of bargains are seen by economists and business participants respectively as independently essential values, actively to be promoted and facilitated in commerce. As with distinctively deontological justifications, however, too rigid an adherence to a teleological bias can serve to be both impractical and potentially destructive of the intrinsic morality of the community. Take for example, the practicality and likely consequences of a single-minded pursuit of the goals of economic efficiency and certainty in business transactions:

\textsuperscript{169} As Hawkins points out (op. cit., n. 19), acceptance of market exchange as our principal mechanism for the distribution of goods and services is subject to two qualifications. First, some things are regarded as inappropriately distributed by preference maximisation and are thus not distributed on an ability-to-pay basis: e.g., the distribution of organs for transplants would fit this category. The market-distribution mechanism is accordingly modified or altogether discarded in such cases. We are not in this study concerned with this kind of interference with market forces, however. Further reference may be had to Singer, P., "Rights and the Market," in Arthur and Shaw (eds), Justice and Economic Distribution (1978), 207-21, discussing, \textit{inter alia}, blood donation and distribution; and generally, see Anderson, E., "The Ethical Limitations of the Market (1990) 6 Economics and Philosophy 179. Hawkins’s second qualification, nevertheless, is particularly salient for present purposes. There are many situations where we feel that preference, as revealed through the market, should properly be the basis of distribution. The problem is that in a number of these cases the market functions poorly to reflect actual preferences. Hence, for example, it would be too costly for every buyer to have to satisfy himself or herself that a technical product is fit for the purpose for which it was intended in terms of safety; he or she should be able to rely on the word of the seller during bargaining. Transaction costs are thereby reduced.

\textsuperscript{170} The issue of distributive justice is dealt with, and dismissed, in n. 249, infra.
2.1.1.2.1. Economic efficiency

Economics is a closed system; internally it is perfectly logical, operating according to a consistent set of principles. Unfortunately, the same could be said of psychosis. 171

At the heart of the law-and-economics approach to legal problems is the fundamental proposition that rules of law, including the rules of contract law, should be fashioned so as to be compatible with and to promote the essentially utilitarian goal of allocatively efficient outcomes. 172 The legal rules should be designed to ensure that valuable resources gravitate to their most valued uses; 174 that losses are discouraged by generally assigning responsibility to those in the best position to prevent losses; and that investment in socially valuable activities is encouraged and not discouraged. 175


172 Law-and-economics critiques focus almost exclusively on allocative efficiency, the concern that consumer demand is satisfied at the lowest possible price, as opposed to the broader notion of distributive efficiency: the concern for how wealth is distributed among members in society. Cf. Cheshire & Fifoot (6th Aust. ed., 1992), para. 039. Allocative efficiency can be measured in numerous ways, the two most notable being pareto efficiency, the idea that an outcome is efficient if no one can be made any better off without making another worse off, and Kaldor-Hicks efficiency: the idea that a result is efficient if the aggregate overall gains exceed the overall losses.


A contract commits scarce resources to particular uses. It, thus, “victimizes” everyone in the society who might have an alternative use for that particular resource.


185
The questionable assumptions upon which economists proceed aside, it may be doubted, at least where a normative system is concerned, whether the attainment of efficient outcomes is a realistic or a desirable goal. It simply is not possible to make the sort of extraordinarily complex calculations required to tell us whether a resource has really finished up at its most valued use; and we do not generally see evidence of any serious attempts at such calculations. Somewhat related to this point, economists do not tend seriously to consider whether the operation of their selected rules is administratively feasible or cost-efficient; nor do they seriously consider whether their regime is what people actually want out of life, what they would choose to consent to as governing their social and economic existence. What is more, the rules arising from the law-and-economics

---

176 Notably, the ideas of the “perfect” market, and the “rational” (self-maximising) economic actor. Fully fleshed out, the economist’s conception of the rational economic agent presumes that individuals have autonomous and stable preferences, that they are motivated to maximise their self-interest or satisfaction, and that they act rationally in so doing, given their preferences. These unrealistic assumptions are addressed at various junctures in the text of this thesis and in accompanying footnotes.


analyses apply even though their operation might actually or potentially harm an individual member of society.\textsuperscript{181} The individual is dispensable, and thus readily sacrificial to the objective of collective efficiency, an inherently utilitarian idea.\textsuperscript{182}

Rawls basically rejected utilitarianism on this latter ground,\textsuperscript{183} arguing that rational individuals behind the 'veil of ignorance' would not choose to be sacrificed to the general interests of collective society, unless such a sacrifice worked to the long-term benefit of the least advantaged social group, especially the one to which that individual belongs.\textsuperscript{184} The law, like morality, then, must 'take seriously the distinction between persons',\textsuperscript{185} and the individual's perception of "self" within society.\textsuperscript{186}

Our self-interested nature is something civilized society quite properly does not choose to flaunt, but to discipline and confine with cultural and legal constraints. Nevertheless, it would be the height of folly to design legal rules that did not take extremely seriously the strong human predisposition toward self-interest.\textsuperscript{187}

\textsuperscript{180} Cf. Hardin, R. "The Morality of Law and Economics" (1992) 11 Law & Philosophy 331. Undoubtedly, contracting parties goals are more immediately important to them than the abstract pursuit of economic efficiency.


\textsuperscript{182} Cf. also Lawson, G., "Efficiency and Individualism" (1992) Duke L.J. 53, arguing that the notion of efficiency may make sense in the context of an individual's plans and preferences, but it does not translate well in its application to groups of individuals (i.e., social efficiency).

\textsuperscript{183} Rawls, A Theory of Justice (1971): 'every person has an equal right not to have his own welfare reduced for the role purpose of increasing someone else's', id, 488.

\textsuperscript{184} Cf. n. 142, supra; and cf. Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472, esp. at 495-7.

\textsuperscript{185} Rawls, A Theory of Justice (1971), 27.


187
There must be limits to what collectives can demand of individuals.\textsuperscript{188} And while Farnsworth may be right in saying that society 'does not regard itself as having an interest in the outcome of ... [precontractual] negotiations' between two private parties,\textsuperscript{189} it certainly does have an interest in their conduct in those negotiations. For as we shall see below, such an interest in contractual conduct at least ensures an indirect means to efficient ends, and ensures and maintains a proper balance between the deontological and teleological justifications for regulating bargaining and bargains.

The economic foundation of bargaining rules is most starkly apparent in the area of precontractual information and nondisclosure. Accordingly, a fuller critical discussion of the economic analysis of law is reserved until Chapter Nine.

2.1.1.2.2. Security of business transactions

As was observed in Chapter One, the historical shaping of contract law took place in a strongly teleological (utilitarian) era. There was a rigid preoccupation with sanctity of contract,\textsuperscript{190} and with its teleological by-products: certainty, predictability and finality of transactions. These

\textsuperscript{188} Cf. Fried, C., \textit{Right and Wrong} (1977), 147-50:

> It would violate the rights of individuals ... to enforce notions of fairness or efficiency in respect to the deployment of what I have called a man's discretionary resources. But should we not at least recognize a moral duty to use these resources for the good of all mankind—fairly and efficiently? Yet if a man may not be compelled but may be blamed (and should blame himself) if he does not use his liberty to maximize the good of all mankind, then we have accomplished very little by affirming that negative rights establish the core of moral personality.... It is not enough that a man cannot be forced to act like a utilitarian maximizer; it should also be the case that he cannot be morally condemned if he does not act that way.


\textsuperscript{190} Arguably, a strongly deontological concern: it being viewed as intrinsically right to perform one's promises toward another, or, in the negative, not to breach the expectations that one's promises naturally create in others.
teleological considerations are today a somewhat weaker influence in contract law than the strongly utilitarian economic efficiency ground, but they still persist to a large degree. The perennial challenge for contract law has always been to strike some balance between formal legal “certainty” on the one hand (the idea that it is “good” that business persons should have protection against arbitrary use of public power and be able to plan their actions), and “fairness” (an inherently deontological consideration) on the other hand—two important values which may often collide.\footnote{The Jew’s under Hitler’s rule could predict that they would be discriminated against.}

While the single-minded quest for legal certainty may well preserve what is captured by the homily that ‘it is more important for the law to be settled than to be settled correctly’,\footnote{Katz, op. cit., 218.} it is readily acknowledged today that we cannot have perfect certainty and perfect fairness in the same moment; that certainty cannot be promoted as an end in itself; that certainty cannot be allowed to prevail at the absolute expense of freedom.\footnote{Cf. Lord Scarman in \textit{Gillick v. West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security} [1986] A.C. 112, at 186: Certainty is always an advantage in the law, and in some branches of the law it is a necessity, but it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law’s development, and stamp upon the law the mark of obsolescence where what is needed is the capacity for development.} For no civilised system of law can accept the implications of absolute sanctity of contractual obligations’.\footnote{Waddams, S., “Unconscionability in Contracts” (1976) Modern L. Rev. 369, at 370.} It is always apposite in this regard to recall Corbin’s admonition that ‘certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it’;\footnote{\textit{Corbin on Contracts} (1960), Vol. 3., § 609, p. 689.} and Lord Atkin’s\footnote{Lord Atkin was a judge renowned for his preparedness not to let formality override considerations of substantive justice.} motto that: ‘finality is a good thing but justice is a better’.\footnote{\textit{Ras Behari Lal v. The King Emperor} (1934) 150 L.T. 3, at 5."}
2.1.1.3. Toward operational bargaining norms: functionalism and the blend of deontology and teleology

*Dichotomies are the curse of intellectual and scholarly discourse.*

Compromising a principle sounds wrong; but compromising between principles sounds right.

While neither of the major ethical theories is free from serious objections, at least in their strongest versions, there are elements of each in business ethics. No one theory provides a nontentative answer to the question, "What conduct is ethical in the transaction concerned?" The blend of traditions within business ethics, for example, appears to support an integrative, 'compatibilist' application of some major aspects of both theories:

Within the competitive framework, business persons tend to be ethical egoists, but they argue that their egoistic behavior is justified on utilitarian grounds. Business persons also recognize the necessity of playing by the rules of the competitive game. Such rules as the sanctity of contracts provide a deontological element to business ethics. Within the corporate hierarchy the notion of "My station and its duties" seems similarly to rest on deontological considerations.

The present writer is disposed to accept, as our own law appears to have done, that bargaining standards are best located and evaluated by way of a deontological, or action-centred, rather than an outcome-centred approach, only to be tempered by contextual and teleological considerations when these

---

198 Etzioni, op. cit., 203.


200 See Pettit, "Consequentialism", op. cit.


202 Beauchamp and Bowie, op. cit., 22.
are also a legitimate concern of the law.\footnote{Restraint of trade cases, for example, exemplify this point. In attempting to determine the reasonableness of a restraint of trade, the law must try to balance one’s freedom to trade and another’s freedom to contract (deontological). In doing this, a court must also take into account the general public’s interest in maintaining reasonable competition (teleological). Contracts void on the ground of so-called “public policy” more broadly, also exemplify teleological (collectivist) constraints, although many can equally be seen as justifiably void in fundamentally deontological terms, such as contracts for sexual services, or contracts to commit a crime.}{203} Nonetheless, the bargaining process itself provides a paradigmatic competitive framework within which a broad-gauged blend of methodologies can and should be supported. As Professor Hawkins explains:\footnote{Op. cit., 69.}{204}

A properly functioning market permits the efficient use of resources, and the avoidance of waste, by encouraging the maximization of preferences through exchange. A market can only achieve this if exchange is voluntary. There must be meaningful options. Compromise must be possible. Bargaining is the process which the market uses to achieve these objectives. Any bargaining conduct which hinders voluntary exchange by preventing the market from reflecting traders’ preferences, or by increasing the cost of matching those preferences, defeats the purpose.\footnote{The economic presumption of enhancing welfare (maximising preferences) is subject to the existence of one or more acknowledged causes of contracting or market failure: the existence of monopoly or coercion, information deficiencies, and externalities. To recapitulate, economists tend to keep analytically distinct the notion of individual rationality and features of the contractual environment, such as the existence of adverse third party effects, the extent to which information is available to both parties, the presence or absence of monopolies, and the extent to which transactional costs are involved. The features of both, however, come together to comprise the economist’s model of “perfect competition”. To the economist, the “rational individual (or decision-maker)” is anyone who (1) has consistent preferences so that she can rank outcomes in order of preference; (2) is constrained, usually by income or budget, to the extent of being able to achieve some, but not all, of her objectives; and (3) maximises her own utility to the extent that the given constraints allow, so that she will always choose the best feasible outcome. It is the maximising assumption which is crucial for economists in their bringing contract law within their mathematical theories of optimisation. See Cooter and Ulen, \textit{Law and Economics} (1988), Chp. 2, esp at 18-22. It is at this point that the present writer becomes unable to comprehend fully the purport and utility of their theories.}{205}

In market bargaining, the deontological and teleological theories largely converge because, first, teleological theories, such as law and economics, begin with the fundamentally deontological idea that the market system, and bargaining within it, are indispensable to the proper functioning

---

191
of society and hence are intrinsically worthy of preservation; \(^{206}\) and, second, the reasonable expectations located by the deontological approach are themselves formed and shaped in the bargaining context itself. Each bargaining participant’s expectations are thus conditioned by the *purpose* of their dealing, which is essentially to make the negotiations work and to achieve consensus, such that practices which threaten the validity of an agreement, both in the eyes of the parties themselves, and, more widely, in society’s eyes, negates the fundamental object of the process.\(^{207}\)

This broadly produces what has been termed a ‘functionalist’ model of bargaining norms.\(^{208}\) Functionalism produces a minimal operational, that is, non-aspirational, standard of decency in bargaining interaction, essentially allowing the bargaining process itself to sort out bad faith and unfair dealing. It does this by incorporating the assumption that bargaining parties will regulate the process except where the agreement itself is jeopardised. This they can do, for example, through the use of bargaining techniques and strategies which assist in arriving at accurate information about facts and


\(^{208}\) Norton, “Bargaining and the Ethic of Process” (1989) 64 N.Y.U.L. Rev. 493. According to Norton, functionalism is a non-aspirational approach to bargaining ethics that produces a minimal, operational set of bargaining norms requisite for a valid agreement. Functionalism is an analytical process model which relies on the structural characteristics and operational imperatives of the process itself, thereby helping to explain how ethical values operate in a private, free-form adversarial market process largely controlled by the parties themselves. In this way, Norton argues, it provides us with an objective rather than a value-specific basis for evaluating prescriptive bargaining norms:

> [F]unctionalism links bargaining ethics to the function they perform without assuming that the ethics that result are sufficiently aspirational in sorting out deception and unfairness.... [Functionalism assists in] understanding the minimal ethical needs of classical bargaining practices but is not a replacement for indispensable ethical standards. (*Id*, 501.)

Revealing a non-aspirational *internal* ethic, functionalism demonstrates how bargaining, as conventionally structured and practised, assumes that adversarial strategic dealings between the parties will promote minimal ethical standards. It describes how the process admits and discriminates ethical values by way of its internal mechanisms—its structural features and the use of bargaining techniques.
intentions, as well as using the same to limit information offered to an opponent.\textsuperscript{209} This type of misleading or deceptive conduct, then, does not threaten the validity of an agreement; indeed, it may often be seen as necessary for some forms of bargaining to occur,\textsuperscript{210} so should not be seen as illegitimate in any moral (\textit{a fortiori}, legal) sense. It is, accordingly, viewed as being all in the nature of the bargaining "game".

In testing bargaining behaviour, therefore, functionalism asks two central questions:

(i) Is the bargaining practice reasonably recognisable as a bargaining technique, so that a party may reasonably be expected to use bargaining resources available to it (i.e., its own counter-techniques) to insulate itself from the practices of an opponent\textsuperscript{211}? (a fundamentally deontological limb); and,

(ii) Notwithstanding the fact that a practice is not usually recognisable as a bargaining technique, is the practice nevertheless necessary for bargaining to occur, or to achieve some broader collectivist goal (such as the promotion of efficiency and the maintenance of bargains)? (a fundamentally teleological limb).

Commonly encountered forms of bargaining practice, such as bluffing, puffing and nondisclosure, thus can be viewed as justifiable departures from universal standards of good faith and fair dealing according to the first limb. Some forms of bargaining practice, however, such as making false factual assertions, or nondisclosure of basic facts, are not usually recognisable as

\textsuperscript{209} Cf. the hypothetical bargaining situation offered in the text, \textit{supra} at p. 168, and accompanying discussion.

\textsuperscript{210} Bargaining, as it is conventionally practised, often cannot take place if parties must reveal their true intentions, preferences, or an undisclosed principal. Bearing in mind the assumption that bargaining is indispensable to the proper functioning of society, deception can often be justified as being necessary for bargaining to occur.

\textsuperscript{211} By ‘insulating itself from the practices of another’ is meant that a party may use countervailing bargaining techniques to elicit more accurate information and fair dealing. This feature of the first test is also deontological, but is today tempered by contractarian reasoning. Bargaining practices will thus be justified where they conform with the standard of conduct considered appropriate in the negotiating community.
bargaining practices, so that they can only justified, if at all, according to the second test: that they are necessary for bargaining to occur,\textsuperscript{212} or to advance some other important collectivist goal. Not to permit these sorts of practice undermines the functionalist assumption that bargaining (and, accordingly, the absence of disincentives for participation therein) is necessary to the proper functioning of collective society.

The two limbs ultimately converge, for minimal levels of truthfulness and fairness are functional necessities in bargaining, because they serve to promote trust in markets and thus to facilitate economically beneficial exchanges through agreement.\textsuperscript{213} Conduct which promotes trust also tends

\textsuperscript{212} Or so as, at least, not to provide disincentives for individuals to participate in bargaining.

\textsuperscript{213} In every non-instantaneous form of negotiation, parties must resolve the "dilemma of trust". As one commentator writes:

To believe everything the other person says is to place one’s fate in his hands and to jeopardize full satisfaction of one’s own interests.... On the other hand, to believe nothing the other says is to eliminate the possibility of accepting any arrangement with him.


Generally, see also, Ostaw, D., Economic Logic of Unconsciousability Adjudication (Ph.D. Thesis, 1990, U.M.I. Dissertation Services). Ostat's central hypothesis is as follows: Contract law displays an economic logic because it facilitates exchange, supports specialisation, and hence promotes economic productivity. Unconsciousability, too, is an institutional structure designed to reduce the costs of conducting private exchanges. Since confidence in others (i.e. trust) is of great economic value, violation of confidence, once it has been invoked, is unconscionable. Cf. also, Ostaw, D., “Predicting Unconsciousability Decisions: An Economic Model and an Empirical Test” (1991) 29 Am. Bus. L.J. 535.

Cf. also, Buckley, F., “Three Theories of Substantive Fairness” (1990) 19 Hofstra L. Rev. 33, at 50, who argues that norms which constrain hard bargaining may serve efficiency goals. In less grasping societies, habits of compromise and cooperation encourage the formation of contracts, thereby enhancing the wealth of such a society. Max Weber notes the relationship between unconstrained greed and poverty:

The universal reign of absolute unscrupulousness in the pursuit of selfish interests by the making of money has been a specific characteristic of precisely those countries whose bourgeois-capitalistic development, measured according to Occidental standards, has remained backward.

194
to further the objects of bargaining by making the process of exchange more voluntary, or less costly.\textsuperscript{214} Such conduct which defeats the promotion of trust, and risks driving legitimate business practices out of the market-place, does not, for reasons previously given,\textsuperscript{215} produce economically valid and beneficial agreements, and hence defeats the purpose of bargaining. Such conduct therefore, is \textit{prima facie} unacceptable, at least in moral terms.

But standards of truthfulness and fair dealing in bargaining remain only \textit{functional} necessities. They do not require a party to abandon the assumptions of the bargaining process itself: namely, that the risks of being treated unfairly (exploited, manipulated) or misled are inherent in all interpersonal bargaining activity, so that bargaining practices should only be considered unethical where one would not reasonably expect the victim of the conduct to insulate herself from the practices of another; such as when the practice is not reasonably to be expected in the context of the negotiation, or where false information is not usually recognised as a bargaining technique.\textsuperscript{216} This immediately opens the way to a \textit{bifocal} analysis of the responsibilities of the respective parties to the negotiations. We only begin to relieve a party from her ordinary bargaining responsibilities and risks

\footnotesize{See Weber, M., \textit{The Protestant Ethic and the Spirit of Capitalism} (1958), 57; cf. also, Gilder, G., \textit{Wealth and Poverty} (1981), 22-7, suggesting that free market economies rely on dispositions of altruism and trust. And as Buckley comments, \textit{op. cit.}, n. 64., ‘If sincerity [in bargaining] is the best pose, there may be no necessary contradiction between deeply-felt cooperative norms and self-interest’.

This theme is also prevalent in Macneil’s “relational contract” literature: See Macneil, I., \textit{The New Social Contract} (1980), 44-7, describing how the norm of “mutuality” in exchange facilitates bargaining; cf. also, Macaulay, S., “Non-contractual Relations in Business: A Preliminary Study” (1963) 28 Am. Soc. Rev. 55, 61, asserting that norms of fair dealing constrain businessmen. Where the efficiency gains are regarded as morally good, the predisposition to cooperate in bargaining acquires a moral force. See also, Gauthier, D., \textit{Morals by Agreement} (1986) 150-151 (suggesting that norms of constrained maximisation promote justice); cf. Sobel, J. “Constrained Maximization” (1991) 21 Can. J. of Philosophy 25. For a discussion of how such norms may be internalised through feelings of distress, see Walster, Berscheid & Walster, “New Directions in Equity Research” (1973) 25 J. Personality & Soc. Psychology 151.

\textsuperscript{214} Cf. Hawkins, \textit{op. cit.}, 71.

\textsuperscript{215} See n. 213, \textit{supra}.

\textsuperscript{216} Such as the outright telling of lies. Generally, see Chapter Seven.
when the opportunity for that party to insulate herself from an opponent’s deception through the use of appropriate retaliatory bargaining techniques, such as by calling an opponent’s bluff, or asking carefully framed questions, is practically closed off. In such a case, the basic purpose of bargaining—to achieve a valid agreement—has been undermined by the use of unfair or deceptive practices.

This leads us to a broader and most important point. While functionalism seems to describe well the maintenance of ethical minima in negotiated exchanges, it largely assumes relative equality of bargaining power and freedom of strategy selection; that the parties’ respective capacities reasonably to insulate themselves from the strategic bargaining practices of others are approximately matched; that each is up to the task of participating in the same bargaining game, and able to recognise and tolerate by counter-technique the strategic practices of others. By definition, such a capacity is also required for negotiation to take place in any meaningful way, on the basis of voluntary and informed preference maximisation under the economic model. The case for regulating the bargaining process by external means is thus augmented as bargaining reality progressively diverges from functionalist assumptions.\textsuperscript{217} The challenge for any external normative system, therefore, is to delineate the conditions under which we are to accept or to tolerate the minimal ethic ensured by functionalism, which is, essentially, to delineate the conditions necessary for freedom itself.

2.1.1.4. The normative significance of power in bargaining relations

\textit{Power is simply a shorthand for describing a certain ‘strategic relation’ in a given society.}\textsuperscript{218}

Conceivably, no other context than bargaining best gives rise to controversial questions of whether, and to what extent, power or position

\textsuperscript{217} In particular, that bargaining is an adversarial market process in which willing opponents use partisan strategic dealings (bargaining techniques) to arrive at accurate information and to obtain fair treatment. Cf. Norton, op. cit., 535.

should be permitted to impinge on consensus-building outcomes. Indeed, negotiation has been conceived of as a ‘power struggle’ with the final result determined by the relative strengths of the parties. If we discount for the moment the protection the law provides for disadvantaged parties in the bargaining process, the disparities between power and position may be exacerbated where that process is regulated by extra-legal norms alone, especially in highly mobile societies, where a wrongdoer can easily keep one step ahead of the normal social consequences of his prior evil deeds. What is more, the problem of redressing the consequences of unacceptable imbalances of power in bargaining is further exacerbated where the relevant norms are themselves indeterminate. Power imbalances are inherent in all “non-regulated” bargaining contexts, and thus one must be cognisant of them when making assumptions which underlie one’s analysis of the process.

Power is usually understood as the capacity to influence another party—‘the ability of one party to cause another to change behaviour in an intended direction’. The ability to exert influence in this way almost


Suppose that two people are in a bargaining situation in which each has something the other wants. Suppose further that there is a great disparity in bargaining power between them: the first is dependent upon the second for his livelihood, let us say, while the second regards what he wants in return as a mere luxury. Suppose, finally, that the stronger party is no altruist: he is prepared to be moved by moral arguments, but he does not automatically internalize the pains and pleasures of the other person. In these circumstances, the outcome of ordinary bargaining is painfully obvious. Even if each party gets more out of the deal than he could have expected acting independently, the benefits will be far from evenly divided: the greater advantage is certain to go to the stronger party. The “Matthew effect” once again prevails: to those that have still more is given.

220 Gulliver, *op. cit.*, 187. Eisenberg, however, would qualify this by drawing a distinction between situations of dependence and situations of non-dependence. Under conditions of non-dependence, as in the negotiation of commercial contracts by previously unrelated parties, basic terms are shaped almost entirely by bargaining power. Under conditions of dependence, however, as in collective bargaining, most contractual outcomes are shaped by both bargaining power and norms. Eisenberg, *op. cit.*, 665-6.

221 Zartman, “The Political Analysis of Negotiations” (1974) 26 World Politics 385, as quoted by Gulliver, *op. cit.*, 188. In the context of bargaining, all this usually means is that there is
invariably depends upon the cumulative impact of several factors—*inter alia*, economic and physical resources such as skill, knowledge, physical strength;\(^{222}\) status; disparity in risk preference;\(^{223}\) the state of the parties’ relationship; one party’s perception of power;\(^{224}\) and so forth.\(^{225}\) It has been argued that the source or the sources of the particular power are not as analytically significant as the presence of power itself,\(^{226}\) although the

---

\(^{222}\) Duncan Kennedy, for example, remarks that in liberal philosophy, it is commonly understood that “weak” and “strong” in terms of bargaining power, ‘are stand-ins for rich and poor, privileged and oppressed, within civil society’: Kennedy, D., “Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power” (1982) 41 Maryland L. Rev. 563, 620.

\(^{223}\) Kritzer, for example, suggests that a party with lower aversion to risk can use it as an advantage over the other, thus in a sense providing a source of power: Kritzer, H., *Let’s Make a Deal: Understanding the Negotiation Process in Ordinary Litigation* (1991), 76. Cf. also, Elster, J., *The Cement of Society: A Study of Social Order* (1989), 80.

\(^{224}\) According to Gifford, *op. cit.*, 62, the critical factor in bargaining is not the power itself but rather the opponent’s perception of power.

\(^{225}\) Sometimes a party’s bargaining power can stem simply from the harm he or she can inflict on the other if an agreement is not reached and from the rewards that that party can confer upon his or her opponent if agreement is reached. In other words, bargaining power can simply turn on how much each party will be harmed by failing to cooperate.

\(^{226}\) Gulliver, *op. cit.*, 202:

Potential power exists in a wide variety of resources, depending in the particular case on the nature and context of the dispute, the relationships of the disputants with each other and with other people and their position in the society. ... [I]t is neither necessary nor useful to make any primary distinction between resources of a nonnormative kind (economic, physical, political, etc.) and those of a normative kind (rules, standards, values). The dividing line between the two is often unclear; in any case, all resources offer potentials for power that combine, or can be combined, in the actual attempt to exercise persuasive strength against the opponent. “Resources” is, in fact, a loose concept intended to cover anything that, in context, offers potential power in the negotiations. Thus resources range over economic and physical assets of many kinds, the relative status of the disputant and his supporters and their skills and experience, the degree of support that a disputant can recruit and the unity in purpose and policy of the party so formed, the support of influential outsiders concerned with their own interests and values, and normative correctness vis-a-vis the society at large, particular sectors or

198
illegitimate introduction of a bargaining advantage into the particular negotiations would putatively suggest that the bargaining power thereby acquired is, by definition, itself illegitimate in its exercise.\textsuperscript{227}

Often, the phenomenon of power is only knowable in the result—the bargaining outcome—rather than in the process itself.\textsuperscript{228} But this conceptualisation of power is not helpful to the explanation of process. One possible escape from the dilemma is to distinguish between the potential and the actual ability to influence another’s behaviour.\textsuperscript{229} Clearly, a potential to do something does not necessarily equate with an ability to do it successfully. For example, the possessor of the potential may not appreciate it, or, if she does, she may nevertheless refrain from attempting to introduce it into the particular negotiations or to use it. In the bargaining context, moreover, the attempt to exercise one’s potential may partly or wholly be countered by the opponent’s exercise of his own potential. In the processes of bargaining, various means are used to exercise strength: threats, promises, lies, and the like; but analytically these themselves are not strength, nor power \textit{per se}; they are merely the ways of attempting to acquire (i.e., introduce it into the bargaining relationship) and to use it. A \textit{successful} use of power always depends on the effects it produces on the actions or motivations of the recipient of its use.

Power, however great, is thus inert in itself. The possession of power may be unavoidable in our natural world of unequals;\textsuperscript{230} and to possess it is

\begin{itemize}
  \item individuals within it and the opposing party in particular. No useful purpose is served by an attempt to enumerate or classify the full range of possible resources, not only because that range varies a good deal cross-culturally but also because available resources depend so heavily on the context of a particular dispute.
\end{itemize}

\textsuperscript{227} See also Chapter Four, Section 3.2.1.1.

\textsuperscript{228} \textit{Cf.} Gulliver, 189-90, \textit{op. cit.}, discussing, \textit{inter alia}, the work of Cross, \textit{The Economics of Bargaining} (1969).

\textsuperscript{229} This point is borne out, in particular, by the “fiduciary” classes of case (discussed in this thesis in the context of “undue influence”: Chapter Six).

\textsuperscript{230} Barriers to self-ownership (as opposed to collective ownership, or “talent-pooling”) of one’s own negotiation skills violate strong moral concerns about individual rights. For this reason, Robert Nozick argues that a justification for personal skills and natural advantages
not necessarily to use it. It is the illegitimate introduction of power into the bargaining relationship, and the exercise of it in wrongful or abusive ways, that needs to be curbed.

The significance of bargaining power and its exercise is a major concern of the following chapter, but it is merely noted at this juncture to draw the reader's attention to its importance in the shaping of bargaining outcomes. The regulation of improper exercises of bargaining power presents a unique challenge for the law of contract which, for the most part, assumes relative equality of such power. In so doing, the law avoids regulation and accommodates the special suppositions and features of the bargaining process. The extent to which the law can legitimately defer to the internal, process-driven functionalist ethic, however, remains a policy point of some contention. It is this writer's thesis that a fundamental task of

need not be given: some qualities are simply possessed: Nozick, *Anarchy, State, and Utopia* (1974), 224-7. Barriers to such ownership also weaken the incentives for talented individuals to profit from their skills.

In his *A Theory of Justice* (1971), Rawls rather rejects the system of natural liberty and free markets, arguing that market outcomes depend on arbitrary and undeserved factors such as natural talents and abilities. The state, therefore, has an obligation to rectify market inequities and redistribute income. This it does effectively through taxes and transfer payments, and not, contrary to Kronman's suggestion, through the specific institution of contract. According to Rawls's, the outcomes of markets are only justified to the extent that they satisfy the second limb of his 'difference principle': that, in the long run, they benefit the least-advantaged group in the relevant society (id, 100-8). Rawls's principles of justice, however, are applicable to social institutions or the basic structure of society, and he draws a distinction between this and 'particular transactions' entered into by 'individuals and associations'. His principles of justice are inapplicable to the rules governing particular market transactions. According to Rawls, even if everyone scrupulously honours norms governing transactions, there may not be background justice. The absence of background justice leaves in doubt the freeness and fairness of exchanges. See Rawls, "Two Concepts of Rules" (1955) 64 Phil. Rev. 1; Rawls, "The Basic Structure as Subject" in Goldman & Kim (eds), *Values and Morals* (1978) 47, esp. at 53-5, 55, 65. To the extent that contract may be viewed as a redistributive (wealth allocative) instrument in society, the results it produces may be considered to be just or unjust accordingly. But this is not equivalent to saying that, even assuming background (social) inequality or unfairness, contract, in its peculiar role as an instrument to that allocative end, is itself unjust or unjustifiable as an appropriate societal instrument.


231 Cf. Wilson, "In One Another's Power" (1977) 88 Ethics 299, 307; Ogilvie, M. H. (1981) 59 Can. B. Rev. 179: 'the mere existence of a superior bargaining position does not guarantee the use or abuse of it'.
contract law is to delineate the point beyond which the parties are no longer free to engage in strategic battles; to demarcate the threshold at which unbridled self-interest must give way to broader fairness-based considerations, as determined by prevailing community standards of decent behaviour in human dealings. Whenever human interests conflict or diverge, self-interest should be pursued, so long as such a pursuit remains within the established rules (and the informal ethos) of the competitive game at hand.

2.1.1.5. Where social and moral norms fail

Countless social activities go on in an orderly fashion without formal rules, 'because participants accept the standards of conduct that are minimally demanded for order to be established and maintained'.

However, where extra-legal norms and sanctions are insufficient to achieve desired coordination, efficiency, respect for private autonomy, and other perceived social objectives, the scope for legal regulation of bargaining widens accordingly. The lessons of nineteenth-century contract theory and practice especially bring home this point. The law is thus a deterministic instrument used by society to regulate human activity, in particular where other means of societal regulation are seen to be ineffective. It has been well argued elsewhere that, as a society becomes increasingly more atomised, divided in its moral outlook, diversely specialised in its resources and in function, competitive, and mobile, its members may be less constrained by

---


233 Chapter One, Section 1.2.

234 The progressive enactment of legislation to control behaviour through recent history (factories legislation, consumer protection and credit legislation, trade practices and antitrust legislation, and so forth) perhaps best signifies that intrinsic controls, such as self-regulation, ethics, personal morality and conscience, are perceived to have failed as guarantors of decent business practices, or as insurers against harm to community interests, and hence must be replaced by extrinsic controls, such as law.

235 "Mobility" here refers to an individual's ability 'to stay one step ahead of a bad reputation': Shell, op. cit., 270. That is to say, a highly mobile society is one that allows a recurrently aberrant market participant to move to a new location each time he or she gets caught cheating.
nonlegal forces. As a result, the state increasingly must serve as a guarantor of interpersonal trust and of the norms governing human conduct generally. In the absence of social constraint, legal rules surrounding the bargaining context play an important, if not a determinative role.

In assuming a more coercive role, however, the law must at the same time be careful not to discourage cooperation, nor to create disincentives for individuals to enter into private arrangements. This is perhaps one of the

236 Pointedly, Liebermann and Syquin remark:

The opposing forces of unrestrained short-run self-interest and adherence to social norms, are in a precarious equilibrium best described as an instance of the prisoner’s dilemma. This is an unstable state. Once a critical minority is observed to violate the principle of abiding by social norms or by formal law, a rapid erosion of the principle will probably fail.


strongest messages of the law-and-economics movement.\(^{239}\) Some studies suggest that legal rules which too readily discourage coordinative activity make it more difficult for nonlegal institutions to perform their facilitative roles in bargaining.\(^{240}\) A proper balance, therefore, must be maintained between the legal and nonlegal institutional constraints applicable to bargaining generally.

Applications of the considerations raised by the two-step functionalist approach proposed earlier are noted in subsequent chapters, which are intended to address some specific equitable and legal doctrines attracted by certain strategic practices and techniques in bargaining: pressure, deception and advantage-taking *simpliciter*. In the remainder of this chapter, however, the writer deviates somewhat from the previous themes to consider contract formation as a special form of negotiation activity, and the unique problems this has produced for lawyers and law-making institutions. While it is maintained in the following sections and throughout the remainder of this thesis that the law essentially preserves the insights of much of the bargaining theory offered above, because it is peculiarly challenged to locate operational bargaining norms, the law in particular has had to resort to fairly concretised methods of controlling bargaining activity when the relative power between the negotiating parties becomes so divergent that it would no longer be safe to defer to the internal functionalist ethic expounded above. In essence, it does this by condemning and controlling the use of strategic bargaining practices in situations where it can be said that such practices

\(^{239}\) This is most strikingly reflected in the well-known “Normative Coase Theorem,” (noted, *supra*, n. 69) which can be interpreted as claiming that so long as the mechanisms of private ordering are frictionless, legal rules will have no effect on the allocation of resources.

constitute an abuse of the power, capacities or opportunities one has to engage in the strategic practices in the first place. In short, one cannot unfairly exploit one’s superior bargaining skills, capacities or position—one’s bargaining power—to procure or receive the manifested contractual assent of another.

3. CONTRACT AND CONTRACTUAL BARGAINING: FORMAL CONTROL OVER THE BARGAINING PROCESS

[The] introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range. Administrators had to be constantly on the watch to ensure the free working of the system.  

Mediating between private ordering and social concerns, contract is a socio-economic institution that requires an array of normative choices. The questions addressed by contract law concern what social norms to use in the enforcement of contracts, not whether social norms should be used at all.

Good faith requires a blurring of any proposed line between the private and the public.

The general borders of contract law broadly encompass what are fundamentally private arrangements. These borders are designed principally to facilitate our disposing of our alienable resources ‘in terms that seem right to us’. Contract is, on this view, concerned with specifying the range of things we can, by our consent, transfer to others, and the conditions under which we are free to do so. A corollary of this is that the state does not

244 Fried, Contract As Promise (1981), 2.
enforce all agreements made between individuals. Determining the scope of permissible agreement is thus an important task for contract law.

A consent theory of contract requires that an enforceable contract satisfy at least two conditions. First, the subject of a contract must be a morally cognizable right possessed by the transferor that is interpersonally transferable, or "alienable." Second, the possessor of the alienable right must manifest his intention to be legally bound to transfer the right—that is, he must consent.


246 Cf. Weber, M., Economy and Society, (1968), 668-71: '[N]o legal order ... would place its guaranty of coercion at the disposal of all and every agreement'.

A fundamental question arising from this conception of contract law, however, is the legitimacy of the state's role in specifying the conditions necessary for enforcing or refusing to enforce what, in the majority view, are fundamentally private arrangements. What, precisely, is the source of the state's claim to authority in the domain of private agreement?

It is not the primary concern of this thesis to debate the nature of and the justifications for the state; it may be that political society, the sovereign state, can itself be justified in terms of a broad and essential form of collective consent, the social contract, given the alternative stressed in Hobbes's, *Leviathan* (1651). Generally, on social contract theories, see Kymlicka, W., "The Social Contract Tradition", Chp. 15 in Singer, P. (ed), *A Companion to Ethics* (1991), 186 et seq. But few today would deny that the state has some interest (if not a legitimate one) in providing contracting parties with access to public power in the event that one party desires to be excused from its contractual undertakings. It should additionally be noted that most parties manage to realise their contractual goals successfully without any affirmative assistance of the state, other than its general aid in protecting pre-existing entitlements. Only when their own (endogenous) transaction resources prove insufficient do parties need to turn to contract law for assistance.

We might argue, as some do, that the roots of the legitimacy of state intervention on private contract rest essentially on teleological or utilitarian grounds; that private arrangements are necessary for the efficient functioning of markets, and hence the wealth of collective society. Contracts contribute to economic efficiency because we assume that each party values the performance it is to receive more than the price it is required to pay. A different view is that the state has a legitimate interest in preserving moral right order, and that it must respect the autonomous wishes of its private members as expressed through their private contractual arrangements. Charles Fried, for example, argues that the law ought to enforce what is morally correct. To Fried, it is right to keep one's promises; wrong to break them: Fried, *Contract as Promise* (1981). For criticisms of Fried's thesis, see Craswell, R., "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 Mich. L. Rev. 489. See also, Patterson, D., "The Value of a Promise" (1992) 11 Law and Philosophy 385.

In truth, the state's role in supervising private arrangements probably incorporates elements of both approaches. For as discussed in the text above (Section 2.1.1.3.), in bargaining, teleological and deontological justifications are not entirely divergent, at least not in their extreme forms. Morally supportable behaviour promotes interpersonal trust, which in turn
Since contractual bargaining and bargains clearly are regulated externally, it is not strictly possible to view them as consisting entirely of self-imposed duties or norms. 247 "Enforceable" contract is a societal institution, as well as an instrument, 248 that sets the limits within which parties may exercise some lesser or greater measure of control over their legal liability towards those with whom they enter into agreements. There is no secret in the fact, then, that contracts are subject to external standards of justice, 249 and facilitates economically beneficial exchanges by rendering them more voluntary and less costly.

247 Braucher, J., "Contract versus Contractarianism: The Regulatory Role of Contract Law," (1990) 47 Washington and Lee L. Rev. 697, arguing that not only does contract law recognize and enforce parties' manifested obligations, it largely defines them as well.

The legal enforcement of contracts, as it involves the use of state power, amounts to regulation of private affairs—even though the state is attempting to facilitate ordering by the parties. See Cohen, "The Basis of Contract," (1933) 46 Harv. L. Rev. 533; Fuller, "Consideration and Form," (1941) 41 Colum. L. Rev. 799, 810, discussing "private agreement" as "regulation". As Cohen explains (id, 562), a contract
cannot be said to be ever generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against another. When that is worthwhile and how that should be done are important questions of public policy.


249 Broadly speaking, "justice" refers to a system of "deserts". The core idea of desert is that persons should enjoy benefits and suffer deterrents according to their autonomous choices: generally, see Sher, G., Desert (1987), esp. Chp. 1. Philosophers characteristically distinguish between retributive, corrective and distributive justice. Principles of corrective justice are clearly enforced by contract law, and require annulling unwarranted or wrongful gains and losses on a one-to-one (injurer-to-victim) basis. Some have argued further, however, that a goal of contract law is to justly distribute resources of an entire community among all its members, and hence contract enforces standards of distributive justice. See most notably, Kronman, A., "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 473 (cf. Kennedy, D., "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Maryland L. Rev. 563). Understandably, Kronman's views, that contract law better redistributes social wealth than do less intrusive means, such as taxes, has been subject to much criticism. Surely his views are implausible if he believes that the goal of securing an equitable or just distribution of the entirety of a community's resources can appropriately and adequately be pursued in contracts; the more so when issues come before courts on a case-by-case basis, and where the courts are
to public policy. Both sets of considerations essentially derive from the collective interest as opposed to the individual's several interests. The existence of the free market and its infrastructure, including the bargaining mechanism, does not of course eliminate the need for external government. On the contrary, the writer assumes that the liberal state is essential both as a forum for determining the "rules of the game" and as an "umpire" in interpreting and enforcing the rules decided upon.

The free market does however serve greatly to reduce the range of issues that must be decided through political means: in particular, those

further constrained to resolve disputes in terms of the interests of the parties themselves rather than in the terms of a specific conception of the collective good. Rightly or wrongly, in the writer's view, contracts are merely instruments which mediate the redistribution of wealth according to existing patterns of advantage. Cf. also, Braucher (1990). *op. cit.*, 714: 'given the extremes of wealth and poverty in our society, contract rules are a small, slow way to achieve redistribution. Taxes and transfer payments are a better way to maintain a pattern of distributive justice'. For discussions and criticisms of Kronman's theory, see Murphy & Coleman, *The Philosophy of Law* (Revised ed., 1990), 165-75; Wang, "Reflections on Contract Law and Distributive Justice: A Reply to Kronman" (1982) 34 Hastings L.J. 513; Alexander & Wang, "Natural Advantages and Contractual Justice" (1984) 3 Law and Philosophy 281; Lucy, "Contract as a Mechanism of Distributive Justice" (1989) 9 Oxf. J.L. Stud. 132; Richardson, M., "Contract Law and Distributive Justice Revisited" (1990) 10 Legal Studies 258. For a good general discussion of contract law and the various concepts of justice, see Mautner, M., "A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements" (1990) 10 Tel Aviv University Studies in Law 239.

250 As is clearly demonstrated by the rules relating to illegal contracts, contracts in restraint of trade, and penalties.

251 Classical liberalism has it that an individual is free to make his or her own life; although if his or her selected course of action violates the like freedom of others, legal responsibility often ensues. The central tenet of Nozick's theory, for example, is that 'no one may impinge across another's boundary without his consent': Nozick, R., *Anarchy, State, and Utopia* (1974), 57-8.

While one person's liberty may well end at the edge of another's, the fact that one person's liberty may interfere with another's does not render the conception of liberty internally contradictory or meaningless. Indeed, some restrictions on human action actually enhance liberty.

Setting the rules of a game opens up a sphere within which individuals may be free to act, a realm of action that, but for the rules restricting choices, would not exist at all.

Scheppel, K., *Legal Secrets* (1988), 305. Albert Hirschman makes a broader point that non-market institutions and values are a necessary part of the background for successful markets, and that markets would undermine themselves if not checked by non-market values: Hirschman, A., *Rival Views of Market Society and Other Recent Essays* (1986) 115, 139.
relating to the diversity of individual choice. In this way, the extent to which
the state need participate directly in the game is reduced.

A major feature of the market is freedom: both economic and political.
But inclusive and beyond a narrow conception of freedom is a more far-
reaching and fundamental freedom: an absence of interference or coercion of
man by his fellow man,\textsuperscript{252} be it in the hands of a political or an economic
power. Hart went so far as to demonstrate that ‘forbearance ... from the use
of coercion or restraint’ is the fundamental background norm against which
all our other rights are set.\textsuperscript{253} In the final analysis, the burden remains on
the state to justify its control, regulation and intervention in and over
contractual dealings.\textsuperscript{254}

\section{3.1. Contract Formation as Negotiation-Form}

As a common form of negotiation in our society, precontractual
bargaining basically reflects the characterisations canvassed in Sections 1 and
2. Like all other forms of negotiation, precontractual bargaining is essentially
a strategic activity in which participants attempt to advance their own

\textsuperscript{252} This sentence would sound awful in a state of political correctness: “people by other
people”? The writer hopes the reader will tolerate the occasional aberration, at least in the
name of poetic licence.

\textsuperscript{253} Hart, H. L. A., “Are There Any Natural Rights?” (1955) 64 Philosophical Rev. 175.

\textsuperscript{254} A major restatement of liberalism by John Rawls, \textit{A Theory of Justice} (1971), rejects the
system of natural liberty and free markets. In Rawls’s view, market outcomes depend on
arbitrary factors such as natural talents and abilities. The state, therefore, has an obligation
to rectify market inequities and redistribute income. The outcomes of markets are only justified
to the extent that they satisfy the second limb of Rawls’s difference principle: that they
benefit the least-advantaged group in the society in the long run (id, 100-8). Additionally,
Studies 1; “Contract Law and Distributive Justice” (1980) 89 Yale L.J. 473) points out that in
setting the ‘rules of the game’ for voluntary economic exchange, it is impossible to avoid
distributional judgments to the extent to which it is legitimate for one person to take
advantage of another. A major example of rules which almost invariably have a significant
distributional impact are those requiring one party with superior knowledge to disclose what
she knows to another (see Chapters Eight and Nine), thereby regulating the exchange of
information between contracting parties (Kronman, \textit{ibid}). Moreover, it is Kronman’s argument
that there is no natural state of \textit{laissez-faire} to be contrasted with state ‘intervention.’ The
free market is itself a creation of the state.
interests from interpersonal interaction given the relevant institutional normative constraints and the likely behaviour of the other participants. Traditional legal rules governing contract formation, however, convey an almost ‘mechanical’, assured image of the bargaining process. These rules broadly view precontractual bargaining as an orderly procedure consisting of an exchange of offers and counter-offers, followed by acceptance or rejection, all objectively interpreted and construed. The main concern of contract doctrine is to determine, in a seemingly mathematical fashion, whether, and when, a contract has been formed and according to what terms. When contract formation is viewed in this broadly stylised way, bargaining becomes characterised as a situation in which parties engage in essentially zero-sum, single issue, ‘positional’ bargaining. The legally binding nature of the negotiated result is said to rest on party consent, voluntarily given, the presence of which seems to operate like some magical on-off switch to civil liability.

As commercial phenomena, however, precontractual negotiations are far from being ‘clock-like mechanism[s]’, and are generally acknowledged today as a complex commercial institution, signifying the important preliminary stage in all business relations, especially those of a “relational” kind. Modern contracts have tendencies toward being complex,
specialised, long-term, open-ended, standardised, adhesive, status-based, relational, behavioural, and commonly multi-partied.\textsuperscript{258} These are both

may call for cooperation and compromise, if the parties are to reach a resilient agreement and achieve a trusting post-contractual relationship. Generally, see the pioneering scholarship of Ian Macneil. Macneil, I., \textit{The New Social Contract} (1980); Macneil, I., “Values In Contract: Internal and External”, \textit{op. cit}.

\textsuperscript{258} Cf., again, Farnsworth (1987), \textit{op. cit.}, 218-9:

But however suited [the classical] rules may have been to the measured cadence of contracting in the nineteenth century, they have little to say about the complex processes that lead to major deals today.

Major contractual commitments are typically set out in a lengthy document, or in a set of documents, signed by the parties in multiple copies and exchanged more or less simultaneously at a closing. The terms are reached by negotiations, usually face-to-face over a considerable period of time and often involving corporate officers, bankers, engineers, accountants, lawyers, and others. The negotiations are a far cry from the simply bargaining envisioned by the classic rules of offer and acceptance, which evoke an image of single-issue, problem-solving, gain-maximizing negotiation.

During the negotiation of such deals there is often no offer or counter-offer for either party to accept, but rather a gradual process in which agreements are reached piecemeal in several “rounds” with a succession of drafts. There may first be an exchange of information and an identification of the parties’ interests and differences, then a series of compromises with tentative agreement on major points, and finally a refining of contract terms. The negotiations may begin with managers, who refrain from making offers because they want the terms of any binding commitment to be worked out by their lawyers. Once these original negotiators decide that they have settled on those matters that they regard as important, they turn things over to their lawyers. The drafts prepared by the lawyers are not offers because the lawyers lack authority to make offers. When the ultimate agreement is reached, it is often expected that it will be embodied in a document or documents that will be exchanged by the parties at a closing.

If the parties sign and exchange documents at the closing, there is no question that they have given their assent to contract. There is little occasion to apply the classic rules of offer and acceptance.

Accordingly, it is not surprising today to find that a contract can be formed without an identifiable sequence of offer and acceptance. Generally, see Schlesinger, “Manifestation of Assent without Identifiable Sequence in Offer and Acceptance”, in Schlesinger, R. (ed), \textit{Formation of Contracts} (1968), Vol. 2, 1583 \textit{et seq.}, dealing with cases of simultaneous exchange of manifested assent, long negotiations making identification of offer and acceptance impossible, and the gradual manifestation of assent; \textit{Gibson v. Manchester City Council} [1978]
cumulative and discrete tendencies. Viewing the process more realistically, and leaving to one side for the moment the important and pervasive issue of standard-form contracts and contracts of adhesion,²⁵⁹

[t]he typical negotiation process is not a positional tug of war over a single issue. Instead, negotiation concerns the development of human relationships, takes considerable time, involves multiple issues, and often includes many parties.²⁶⁰

According to one anthropological commentator,²⁶¹ the negotiation process typically comprises an extended interaction in which individuals accumulate an experience of each other and of the changing situation in which they are operating and interacting. They develop an appreciation (not necessarily objectively accurate, of course) of each other, of themselves, and of the apparent potentialities and impossibilities between them. There is likely to be some development of their immediate relationship as negotiators in terms of ... competitiveness or co-operation, trust or mistrust, cautiousness or candor, respect or disdain.²⁶²

Business negotiations are no less a form of human interaction, and, accordingly, are generally subject to this pattern. Modern bargaining

²⁵⁹ These sorts of contracts are discussed in Chapter Four.


²⁶¹ Gulliver, op. cit.

²⁶² Id, 73.
encounters represent a multi-phased strategic human process whereby parties test and learn of each other’s expectations and preferences that are necessary precursors to a satisfactory outcome. ‘Negotiation is’, says Shell, ‘a laboratory for the construction of relationships between business actors’. The reasons why rational parties behave the way they do in precontractual negotiations lies not in the technical rules governing “mechanical” contract formation, but rather in the social psychology of negotiation and the processes by which individuals build mutually trusting relationships. The law would, accordingly, do well in keeping abreast of these realisations if it is to continue to meet the needs of those it must serve. Necessarily, this involves an acknowledgment of the incentives for rational individuals desiring to contract as well an accommodation of the multifarious motivations for human behaviour itself.

263 Id, Chp. 5, identifying eight potential stages in negotiation.

264 Id, 177.

265 Shell, op. cit., 252-3.

266 The problem would seem to extend to theorising about law generally. Cf. Katz, op. cit., 218-9:

A chief message of law and economics, if not the chief message, is that the effect of legal rules cannot be understood properly without taking account of the incentive for private transactions. This message is most strikingly embodied in the well known “Coase theorem”, which in its strongest version claims that so long as the mechanisms of private ordering are frictionless, legal rules will have no effect on the allocation of resources. One might have expected, therefore, that the set of legal rules that regulate private ordering and determine its frictions would have occupied a more predominant place on the research agenda of law and economics.

Modern courts are compelled, therefore, to transcend the ‘metaphysical controversies and mechanical intricacies’\textsuperscript{268} denoted by classical doctrinal labels, such as traditional offer and acceptance principles,\textsuperscript{269} and to confront head-on the normative aspects of this important first step in contractual relations.\textsuperscript{270} The conventional wisdoms\textsuperscript{271} may well preserve doctrinal purity, but they equally well obscure a more suitable, policy-oriented analysis.\textsuperscript{272} The upshot of this is that the resolution of disputes pertaining to the formation of contracts almost certainly will involve a complexity unassumed by traditional contract theory.

\textsuperscript{268} The expression is Katz’s, \textit{op. cit.}, 216.

\textsuperscript{269} Katz, \textit{id}, 218, remarks,

the law of offer and acceptance serves primarily a coordinating function, in much the same way that traffic ordinances do. And while we need rules to tell the motorists on which side of the road to drive, it may not matter whether motorists are to be instructed to keep left or to keep right, so long as they are all instructed similarly.

\textsuperscript{270} As has been previously observed, the law relating to contract formation has generated relatively little interest in the literature that addresses contract law from a normative perspective. Instead, commentators concerned with the regulation of parties’ behaviour have focused largely on the consequences of contracts after formation: performance, excuse (frustration), breach, and enforcement.

\textsuperscript{271} A representative example of reliance on the conventional wisdom can be excerpted from Fried, \textit{Contract as Promise} (1981), 54-6:

Promises—and therefore contracts—are fundamentally relational; one person must make the promise to another, and the second person must accept it. Acceptance may be assured by any conventional device, such as speaking the words “I accept” with the intention of referring to a conventional device in which the words figure. There are wide latitude and informality in what counts as an intention to accept a promise, just as the promise itself can be made in many ways.

\textsuperscript{272} Whilst the maintenance of legal conventions is clearly important for the parties who rely upon them, from a purely policy-oriented perspective, the long-term costs and benefits, judged in the light of prevailing background needs and understandings, of a widely accepted convention ultimately depends on how it affects individuals’ behaviour once established and accepted. Bargaining rules and institutions, and hence the behaviour of parties affected thereby, are perhaps best understood by a detailed inquiry into the strategic structures of the bargaining process itself.
3.2. "Contract", "Consent", and the "Voluntariness Principle"

It is not intended in this thesis that "contract" necessarily refers to a thing with a fixed and formal definition. The almost universal lack of scholarly consensus in answering the question, "What is 'Contract'?" seems to necessitate such a stance. Few, however, would deny that some form of autonomous legal phenomenon called "contract" exists, if only in reference to all those 'legally enforceable agreements and associated legal obligations'.

Likewise, there is no universal consensus as to the foundations of contractual obligation either: the precise juristic criterion (or criteria)—the normative justification—which renders contractual exchanges "binding" or "indefeasible", and thus subject to state supervision (enforcement). Some have argued, for example, that "enforceable" contract rests in "bargain", in "reliance", in "promise", in the expression of a party's "will", or even in

---

273 Cf. Introductory Note to the Restatement (Second) of Contracts, Chp. 1: 'But it is obviously impossible to capture in a definition an entire complex institution such as "contract"...'.


276 Cf. Braucher, J., "Contract versus Contractarianism: The Regulatory Role of Contract Law," (1990) 47 Washington and Lee L. Rev. 697, 698. The phrase 'associated legal obligations' is included because in many ways contract law does not depend on "agreement" according to the most commonly understood meaning of that term. The parties' "agreement" takes in a number of obligations derived from the common law and statutes. Cf, also, A. W. B. Simpson, A History of the Common Law of Contract (1975), 5-6. Professor Simpson defines contract in terms of consent, although he notes the difficulty of defining contract in a way that does not assume elements of doctrine specific to time and place. For the purpose of his enquiry, Simpson states a 'loose working definition of contract law as the law governing the legal effect of those consensual transactions which have been regarded as giving rise to a relationship of obligation': id, 6. The Restatement (Second) of Contracts, § 1 offers the following definition:

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law is some way recognizes a duty.

At least in terms of Anglo-Australian law, this definition is too wide in the writer's view. For example, as our own law of equitable estoppel would indicate, the law sometimes does give a remedy for a breached promise, but not necessarily through "contract", strictly speaking. See e.g., Waltons Stores v. Maher (1988) 62 A.L.J.R. 110.
broad notions of "mutual benefit, fairness, or efficiency". Contract obligation may indeed comprise many or all of these things, and thus is designed to serve a number of mixed ideals. The writer will assume, however, that whatever its deepest rationale, a fundamental and perennial challenge for contract law is to specify the conditions under which individuals can voluntarily undertake mutual obligations. For like Barnett, this writer would see binding contract as, most significantly, being grounded in consent, which in turn emphasises the more fundamental values of freedom: not be interfered with by others; and autonomy: to be able to plan and control one’s own life. At the heart of


280 It should not be thought that voluntary agreement is the only requisite for obligation-creating agreements, because agreements may also justifiably be restricted for reasons other than involuntariness, such as to avoid violations of public policy, to avoid greater social harms, or to reduce negative externalities on third persons.

Consent, while a necessary condition for contractual liability, is clearly not sufficient. We still require intention to create legal relations (itself a form of consent to state participation), consideration, certainty, sometimes writing, and so forth, which are necessary, but severely insufficient, conditions. This also seems to be at the heart of Peter Linzer’s criticism of consent forming too predominant a part of ‘contract-like’ liability: Linzer, P., “Uncontracts: Context, Contorts and the Relational Approach” (1988) Annual Survey of American Law 139. As Linzer’s title suggests, however, he covers a field much wider than traditional “contract”. Cf. also, Linzer, “Is Consent the Essence of Contract?—Replying to Four Critics”, id, 213-20.


contract is a deep respect for the individual's liberty,\textsuperscript{283} which in itself provides the basis for the guarantee of some measure of contractual "justice".\textsuperscript{284}

If respect for liberty requires that one be permitted to enter into binding agreements, it also demands that binding agreements reflect one's voluntary choices. As Hart points out, it is for the very reason that the civil law exists to render our preferences effective that it also includes 'invalidating conditions' such as mistake, fraud and duress—the sorts of

\begin{footnotesize}
\textsuperscript{283} The writer does not wish to enter the debate as to whether and to what extent our conscious "autonomous" actions, or our "individuality", are constrained by social norms which we both internalise and experience to a large extent as our own, and the social context within which we are participants generally. Reference may be had to Braucher, J., "Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission" (1988) 68 Boston U.L. Rev. 349; Etzioni, A., The Moral Dimensions: Toward a New Economics (1988), esp. at 5 (an 'I & We paradigm'), and 45-8; Braucher (1990) op. cit., 706: individual control is illusory, and can at best be relative to an external source of obligation, such as community standards; Kleinig, J., "The Ethics of Consent" (1982) Canadian J. of Philosophy, Supplementary Volume 8, 91, 111-2: 'Autonomy ... has to be understood not against but in terms of social existence", id, 112; Brudner, A., "Reconstructing Contracts" (1993) 43 U. Tor. L.J. 1 ('dialogic community'). This all seems to beg the critical question of what happens when social controls fail, however. Bargaining is unique in terms of the the self-interestedness it naturally engenders. Norton, op. cit., 540, for example, draws an analogy between negotiations and driving, illustrating how normal ethical standards are sometimes abandoned in negotiations in the same way as they are in driving.

Just as people enclosed in their cars sometimes behave toward strangers on the road as they would not toward the same individuals in a [different] social setting, people do not always bargain the way they live. (\textit{Ibid}.)

The difference between such behaviour cannot entirely be explained by the presence or absence of some external system of normative control.

See also, Tiplady (1982) 99 L.Q.R. 188, arguing that concepts such as "intention", "consent" and "voluntary" are riddled with ambiguity and imprecision. This is not surprising given that "consent" has different meanings in different branches of law. Generally, see Young, P., The Law of Consent (1986), esp. Chp. 13 ('Contracts').

\textsuperscript{284} Cf. e.g., Mautner, M., "A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements" (1990) 10 Tel Aviv University Studies in Law 239, 246-8: 'It follow from this principle that contracting parties should be contractually bound only to the extent that their contracts manifest autonomous choices made by them. Indeed, we may formulate, in terms of desert, many contract law doctrines whose function is to assure that contracting parties are bound only by such choices of theirs...', id, 247-8.
\end{footnotesize}
conditions implied by the voluntariness principle itself. To enforce agreements made by fraud or coercion would nullify the point of allowing binding agreements in the first place.\textsuperscript{286}

To act "voluntarily" is at least to be responsible for the manifestation of one's contractual assent.\textsuperscript{287} Although determining the existence of consent objectively, in judging the quality of one's manifested contractual assent and hence one's responsibility, the law will look at the motivations

\begin{flushleft}

When a student has learnt that ... there are positive conditions required for the existence of a valid contract, i.e., at least two parties, an offer by one, acceptance by the other, a memorandum in writing in some cases and consideration, his understanding of the legal concept of a contract is still incomplete, and remains so even if he has learnt the lawyer' technique for the interpretation of the technical but still vague terms, "offer," "acceptance," "memorandum," "consideration." For these conditions, although necessary, are not always sufficient and he has still to learn what can defeat a claim that there is a valid contract, even though all these conditions are satisfied. That is the student has still to learn what can follow on the word "unless," which should accompany the statement of these conditions.


\textsuperscript{287} "Responsibility" is a notion often referred to in this thesis. Depending on context, it should be read either as referring to 'blame' responsibility or to 'task' responsibility. Blame responsibility has to do with fixing credit or, more commonly, blame for certain actions or states of affairs. Task responsibility has to do with assigning duties, jobs or general tasks. Cf. Goodin, R., "Apportioning Responsibilities" (1987) 6 Law and Philosophy 167, at 167-8. Kleinig argues that consent is 'a form of co-operation with the initiative of an other whereby one shares responsibility for it': Kleinig, J., "The Ethics of Consent" (1982) Canadian J. of Philosophy, Supplementary Volume 8, 91, at 93. Indeed, Kleinig endeavours 'to locate consent squarely within the domain of responsible (v. non-responsible) behaviour': id, 107. For a somewhat different view of the voluntary-responsibility relationship, albeit in the tort and criminal context, see Dan-Cohen, M., "Responsibility and the Boundaries of the Self" (1992) 105 Harv. L. Rev. 959.

Cf. also, \textit{Restatement (Second) of Contracts}, § 19, Comment (c):

A "manifestation" of assent is not a mere appearance; the party must in some way be responsible for the appearance. There must be conduct and a conscious will to engage in that conduct. This is true even though the other party reasonably believes that the assent is genuine.

217
which produced the assent.\textsuperscript{288} This rests on the implicitly normative view that some motivations are consistent with voluntary action while others are not.\textsuperscript{289} Subject to the elaborations and qualifications to be made in subsequent chapters,\textsuperscript{290} it is generally understood that in order to be "voluntary" the motivation which produced a party's consent must have originated in the will (or volition) of that party itself and not in the will of another,\textsuperscript{291} and it should also have been a product of that party's rationality, that is, cognitive, deliberative or judgmental capabilities,\textsuperscript{292} as opposed to fundamental ineptitude, error or ignorance.\textsuperscript{293}

\begin{flushleft}
\textsuperscript{288} In law, the distinction between expressing and merely signifying consent is sometimes marked by a distinction between "consent" and "assent".

\textsuperscript{289} Cf. Cohen, "The Basis of Contract" (1933) 46 Harv. L. Rev. 553, at 578:

A developed system of law ... must draw some distinction between voluntary and involuntary acts.... The whole of the modern law of contract, it may be argued, thus does and should respond to the need of greater or finer discrimination in regard to the intentional character of acts. The law of error, duress and fraud in contract would be unintelligible apart from such a distinction.

See also, Gustafson, D. F., "Voluntary and Involuntary" (1964) 24 Philosophy and Phenomenological Research 493.

\textsuperscript{290} Particularly Chapters Five to Nine, inclusive.

\textsuperscript{291} A person acts freely, says Nozick, when 'no other's motives and intentions are as closely connected to ... [her] ... act' as her own, regardless of the pressures under which she acts: Nozick, R., \textit{Philosophical Explanations} (1981), 49.

\textsuperscript{292} Rationality here simply refers to a process of reason, and does not refer to the more technical meaning ascribed to it by the economists.

\textsuperscript{293} "Freedom" is usually used to refer to "independence of will" or "volition". It is also often used in the sense of freedom from an external agency (in particular, the opposing party), and in this respect it is quite distinguishable from the notion of "deliberation", "cognition" or "judgment", defects in which may be caused from an outside agency, for example, misrepresentation, but usually said to come from within, for example, ignorance.

218
3.2.1. Identifying the Conditions for Consent

In general terms, "consenting" persons must act "voluntarily", "knowingly" and "intentionally", although in law these notions usually run together as part of a general "voluntariness" criterion. It is indeed difficult to identify any positively articulated requisites for valid legal consent; for one can only begin to infer what these might be from the substance of legal statements about what valid consent is not. In concerning itself with the issue of whether responsibility-creating contractual consent is present in any given case, a court is, primarily, concerned to characterise an absence of consent which it chooses to be responsibility-relieving. This inevitably compels us to look at established, specific legal doctrines which are traditionally understood to "police" the genuineness or quality of contractual assent. These doctrines reveal for example that "duress is not consent", that "fraud is not consent", and that "fundamental mistake or ignorance is not consent". By inference, the positive content of consent becomes "the absence of duress" or "free and volitional"; "the absence of fraud" or "free and informed"; "the absence of fundamental error and ignorance" or "informed and deliberative". But even these statements are not particularly helpful; for as subsequent chapters will show, except in the most blatant cases where consent has categorically been jeopardised, such as gun-to-head duress, or outright deceit, each of the peculiar doctrines falling within the ambit of this thesis requires substantial normative refinement in its application.

Yet for all that, "consent" does serve as an expedient rhetorical device in our law; for in contract law, it is at least synonymous with the notion of "responsibility". A suitable framework for analysing problems concerning the quality of contractual consent, and hence responsibility, might usefully be found H. L. A. Hart's conception of the "Responsibility Principle":

---

294 For an excellent philosophical account of the notion of "consent", see Kleinig, J., "The Ethics of Consent" (1982) Canadian J. of Philosophy, Supplementary Volume 8, 91.

295 Ibid.

296 Cf. the discussion of the "excluder" analysis, in Chapter Two, Section 2.1.2.
What is crucial is that those whom we [hold legally responsible] should have had, when they acted, the normal capacities, physical and mental, ... and a fair opportunity to exercise these capacities.297

Translated into the context of bargaining, the Responsibility Principle seems to suggest that in order to hold a party to the normal moral or legal consequences of its manifested contractual assent, that party must have been able truly to participate in the bargaining process itself. Generally speaking, this means that it should be able to exercise a voluntary will and to give a sufficiently informed and deliberative contractual assent. The idea of "participation" in the processes of bargaining itself suggests that at least one of the negotiating parties was not beneath the task of bargaining, as may be the case where it lacks the normal physical and mental capacities assumed to be necessary for playing in games of advantage, strategy and power, or where, despite its possessing those normal capabilities, it was not otherwise denied a fair opportunity so to participate by the other party to the dealing, such as in the case of fraud or duress.298

The foregoing implicitly rests on the affirmative premise that the parties should be able to make legally enforceable agreements on their own terms, freely arrived at by the process of bargaining. This presupposes, too, that the integrity of the bargaining process has not itself been impaired by misrepresentation, duress or undue influence. Indeed, the idea of "participation" seems to suggest that the parties are roughly equivalent in their abilities to play in the same game of advantage, strategy and power (bargaining)—that their respective bargaining abilities, capacities, etc., are roughly equal, or at least effectively opposite. This equivalence implies some sort of power equilibrium existing between the parties to the dealing, such that the hypothetical set of bench-mark bargaining conditions under which


298 This is to say, that that party was not subjected to an improper motive for its action (manifestation of consent). Such practices as fraud or duress are obviously abusive because they determine or influence bargaining outcomes by displacing natural or tolerable contingencies such as market forces, or the relative strength and skill of the parties, thereby robbing the bargain of inherent fairness.
the parties would have been able to “participate” and to act “responsibly” shall for convenience be called equilibrium bargaining conditions or “bargaining equilibria”. Under this set of conditions, each party can reasonably be expected to preserve his or her own interests in a dealing, including interests in bilateral decent behaviour, and to insulate himself or herself through the employment of bargaining strategies, techniques and counter-techniques, in a manner assumed by the “functionalist” model detailed above. Outside equilibrium bargaining conditions, however, one party will invariably be possessed of the capacity or opportunity to exploit the power advantages he or she possesses over the other, so that any consent given by that other should be treated with greater suspicion by the law. This idea of a hypothetical set of bench-mark bargaining conditions, and its significance within the scheme of this thesis, is developed further in Chapter Four.

3.2.2. Regulating Processes or Outcomes?

The discussion in this chapter has clearly been concerned with the processual features of bargaining. However, during the course of this thesis something will have to be said of the role of contractual outcomes in judging the fairness of bargain transactions; for these outcomes are the natural result of the negotiation phenomena with which we are principally concerned. How do bargaining outcomes or the substantive contractual exchange feature in one’s consideration of fair dealing in contract formation? The issue is only flagged at this juncture, and the precise normative and analytical

---

299 This is to say, when courts are called to adjudicate in cases involving involuntariness, they must implicitly resort to some presumptively preferable set of counterfactual alternative bargaining conditions—some default as opposed to the status quo—within which rational parties (perhaps behind a Rawlsian veil of ignorance) would choose as governing their future relations (for the better). These conditions form a (hypothetical) bench-mark against which the voluntariness of all transactions between similarly circumstanced parties can be judged. For the formulation of such an idea in testing exploitation, see Roemer, J., A General Theory of Exploitation and Class (1982) (arguing, in particular, that the putative exploiter must be worse off, and the putative exploiter better off under the counterfactual alternative than under the status quo).

300 Under this equilibrium, we are, of course, assuming that there is some “normal” state of the world. For a use of hypothetical sets of criteria in the context of contract interpretation, see Charny, D., “Hypothetical Bargaining: The Normative Structure of Contract Interpretation” (1991) 89 Mich. L. Rev. 1815.
connection (or interplay) between processes and outcomes will be returned to
at many junctures in this thesis, in particular as we consider the intricate
workings of the several doctrines which are said to "police" the existence and
quality of contractual assent. An important issue which needs to be settled in
our law is whether a court may bar enforcement of a contract solely on the
basis of procedural bargaining improprieties, or whether the exchange itself
must also be substantively objectionable on its face.\footnote{See Chapter Four, esp. Section 4.}

The simple fact of agreement is of course no guarantee of its
fairness.\footnote{Cf. Sandel, M., \textit{Liberalism and the Limits of Justice} (1982), 105, 109.} It is possible to evaluate the fairness an agreement in terms of its
process or its result (content), or both.\footnote{ Cf., for example, the noteworthy passage from Lord Brightman's judgment in \textit{O'Connor v. Hart} [1985] 1 N.Z.L.R. 159, at 166:}

> If a contract is stigmatised as "unfair" it may be unfair in one of two
> ways. It may be unfair by reason of the unfair manner in which it was
> brought into existence; ... [i]t may also, in some contexts, be described
> (accurately or inaccurately) as "unfair" by reason of the fact that the
> terms are more favourable to one party than to the other.... The two
> concepts may overlap. [The latter] may be so extreme as to raise a
> presumption of [the former].


\footnote{Hobbes, \textit{Leviathan}, Chp. 15.}
free to exchange his or her all for a ‘horse, hawk, or robe, etc’,

‘or rubbish of that kind’.  

But the voluntariness principle, like most principles, cannot be taken too far. Just as the voluntary agreement can be unfair on its face, the coerced or the fraudulent one can ostensibly be a fair one, at least with respect to the objective values exchanged. An unfair exchange can equally result from a market imperfection or some opprobrious conduct as from a desire, say, to confer a gift upon the other party. It is difficult categorically to state, therefore, how far we can take the assumption that truly voluntary agreements should be enforced according to their terms, for the grounds for enforcing some agreements simply because they are “voluntary” are sometimes trumped by some other normative criteria, such as vague “public policy”. Hence, in our law, for example, illegal contracts are not enforced, nor are contracts unreasonably in restraint of trade, nor so-called “penalty” clauses, despite the fact that these agreements may strictly have been “voluntarily” entered by the party to be charged by the obligation. This

306 Cf. Pinnel’s Case (1602) 5 Co. Rep. 117a; 77 E.R. 237. The law’s recognition of the freedom of persons to make their own arrangements, including objectively bad ones, is often expressed in the adage that “the law will not enquire into the adequacy of consideration”.

307 Couldery v. Bartrum (1881) 19 Ch. D. 394, at 400 per Jessel M.R. (adding ‘canaries’ and ‘tomtits’ to the list of valuables).

308 Penalty clauses are suspect because they do not reflect a genuine pre-estimate of the non-breaching party’s loss, a purpose for which the clause ought to have been intended. They are also prone to creating the anomalous situation in which one party putatively prefers that the other party breach its agreement, rather than fulfil it. Generally, cf. O’Dea v. Allstates Leasing System (W.A.) Pty Ltd (1983) 152 C.L.R. 359; AMEV-UDC Finance Ltd v. Austin (1986) 162 C.L.R. 170; Esanda Finance Corp Ltd v. Plessnig (1989) 84 A.L.R. 99; AMEV Finance Ltd v. Artes Studios Thoroughbreds Pty Ltd (1989) 15 N.S.W.L.R. 564.

309 It may be, as Barnett’s writings, op. cit., suggest, that some rights are not transferable, or ‘alienable’, despite the presence of free and fully informed consent. That is to say, one of the necessary conditions of Barnett’s consent theory of contractual obligation (the first condition) has not been satisfied: see n. 245, supra. One cannot, presumably, transfer, for example, one’s body parts or sexual services, or contract unduly to confine one’s own freedom: cf. contracts unreasonably in restraint of trade, or contracts of slavery. Dressed in the rhetoric of public policy, these cases may be saying no more than some sorts of resources or rights we possess are indeed “inalienable”.

Even strong supporters of freedom of contract recognise these limits. John Stuart Mill, an ardent defender of freedom of contract, for example, argued against enforcing slavery contracts. Mill
feature notwithstanding, in the absence of any so-called “public policy”
grounds for interfering with fully bargained results, it is arguable that
voluntary agreements do give rise to a very strong presumption in favour of
enforcement. However, an agreement which is clearly objectionable on its
face may in law tend to signal that something was wrong with the bargaining
process as well.\textsuperscript{310} This is an important point which will re-emerge on
several occasions in subsequent chapters.

4. FROM INVOLUNTARINESS TO EXPLOITATION

\textit{Classical doctrine ... incorporates a subjective theory where it
can, and an objective theory where it must.}\textsuperscript{311}

Just, and therefore indefeasible, distributions of private resources
depend \textit{at least} on voluntary behaviour, or consensual transfer. An
agreement into which two parties enter may be defeasible in law (and in
morals) if the agreement is in some sense “involuntary” on the part of at
least one of the parties. In some cases, an individual may seek to be relieved
of her contractual obligations on the grounds that she lacked the rational or
judgmental skills necessary fully to appreciate the consequences of her
manifested contractual assent, and that the promise was not voluntarily
given and thus not binding. Others seeking to be relieved of their
contractual commitments might allege fraud or deceit. Still others may

\textsuperscript{310} Cf. quotation of Lord Brightman at n. 303, \textit{supra}.

claim coercion or ignorance of basic facts as the basis for nullifying or mitigating the normal consequences of her objectively manifested assent.\textsuperscript{312}

Generally speaking, voluntariness-defeating arguments fall into two broad categories. First, where the defects are, generally or instant-specifically, inherent in the promisor itself (i.e., unconnected with the actions of the promisee): ignorance, mistake, incapacity, drunkenness, transactional disadvantage, need, and the like. Second, where the defects in the promisor were themselves introduced or engineered by the promisee itself, such as through fraud or by force. In the writer’s view, these categories can further be unified, because there is something that all involuntary agreements seem to have in common. All involuntary agreements \textit{prima facie} involve objectionable forms of advantage-taking, or \textit{exploitation}.\textsuperscript{313} This is to say, the problem of locating the necessary and sufficient conditions for “involuntariness” is equivalent to determining

which of the many forms of advantage-taking possible in exchange relationships are compatible with the libertarian [and liberal] conception of individual freedom [voluntariness].\textsuperscript{314}

For in each of the cases in which a promisor claims that its promise is not voluntarily given,

the promisee enjoys an advantage of some sort which he has attempted to exploit for his own benefit. The advantage may consist in his superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a

\textsuperscript{312} There may be some substance to the point that contractual consent can be bifurcated into “binary” and “continuing” classifications. Insofar as contractual consent is determined \textit{objectively}, it is clearly a binary conception—that is, consent is either manifested (apparent) or it is not. As a \textit{subjective} conception, however, consent is a variable notion, and it is graduated according to some qualitative measure. “Subjective consent” is not determined at a particular point in the contractual process (at “formation”, like “objective consent”), but rather is \textit{continuing} throughout the entire contractual process. Thus, it must be \textit{subjective} consent, and not objective consent, that is revoked or withdrawn by “rescission”. “Objective” consent in the past is not sufficient to resist rescission.

\textsuperscript{313} For a similar conclusion, see Kronman, A., “Contract Law and Distributive Justice” (1980) 89 Yale L.J. 473.

\textsuperscript{314} \textit{Id}, 480. The insertions are Lucy’s, “Contract as a Mechanism of Distributive Justice” (1989) 9 Oxf. J.L. Studies 132, at 133.
powerful instrument of violence or a gift for deception. In each of these cases, the fundamental question is whether the promisee should be permitted to exploit his advantage to the detriment of the other party, or whether permitting him to do so will deprive that other party of the freedom that is necessary, from a libertarian point of view, to make his promise truly voluntary and therefore binding.\textsuperscript{315}

Thus, in all cases in which one party seeks to be relieved of the normal moral or legal consequences of her manifested contractual assent on the grounds that such assent was produced by motivations that were incompatible with voluntary action, the other party also has an advantage. Essentially this advantage transmits into a form of relative contracting power, which that other party either consciously and affirmatively employs to secure the consent of the less advantaged party, a decidedly active process, or else knowingly, or with reason to know, desists from taking such positive steps for the benefit of the disadvantaged party as would have been necessary to correct the power imbalances existing between them, or to restore bargaining equilibria, a comparatively passive process. It should be obvious that the law’s focus must be directed toward superior party misconduct, and its consequences, rather than on the mere existence of the power imbalance itself, or the mere existence of subjective “involuntariness” on the party of the consent-giving party;\textsuperscript{316} for as has been noted above,\textsuperscript{317} the existence of power is generally inert. In the absence of the superior party itself introducing the unfair bargaining advantages into the particular negotiations, there is usually no way for that party to divest itself of the advantage, and it would not be to the putative advantage of the weaker party, or perhaps a class to which it belongs, to prohibit contracts between the parties altogether. Defences to the enforcement of contractual obligations,\textsuperscript{318}

\textsuperscript{315} Kronman, \textit{ibid}.

\textsuperscript{316} In drawing validity lines, it is thus not merely a question of determining how much wealth, power, knowledge and judgment are necessary for an obligation arising from a contractual relation to be enforced against a now unwilling party, for this is to focus too much on the inferior party, and wealth, knowledge, power, etc., are clearly relational conceptions. Rather, we need to ask, how much wealth, knowledge, power etc. does one party need fairly to compete as a functional equal in bargaining; to insulate itself from the various risks inherent in the bargaining process, including the risk of exploitation and manipulation at the hands of a bargaining opponent.

\textsuperscript{317} Section 2.1.1.4.
therefore, must be dependent on the stronger party unfairly taking advantage of its position, and this prevents the concept of genuine consent from collapsing into voluntariness alone.

The law's focus then should principally be on the conduct of the advantaged party; it should not simply ask whether the disadvantaged party's assent to the transaction was "genuine" in terms of the voluntariness principle. As we shall see in subsequent chapters, relief for fraud and duress is given, not simply because the victim contracted in ignorance or under pressure, but because the ignorance was wrongfully induced or the pressure wrongfully brought to bear by the other party. If the ignorance or pressure themselves vitiated consent then it should not in law matter whether they were caused wrongfully by that other party. Hence, in law, the availability of relief seems more to turn on the legitimacy of the conduct which produced the contractual assent and less on the mere state of mind of the victim who manifested the assent.

Even in looking to the superior party's conduct, however, the law must also enquire whether the consent-giving party also acted reasonably in rendering her assent; for the law should also provide a superior party with some protection from the ignorance or indolence of another. The law's approach thus remains a bifocal one. This, perhaps more than anything else, demonstrates the law's attempt to strike a proper balance between our two convictions: that we should take care of ourselves and that we should look out for others.

Viewed in this light, in selectively enforcing contracts, the courts are, inevitably, imposing a system of social control. For whether an agreement is voluntary is precisely the question of whether it involves objectionable advantage-taking or exploitation, and this, in turn, is a question of the extent to which the law decides a private individual can secure wealth through differential patterns of capacities, skills and resources. Taking an advantage one has enables one to increase one's wealth relative to those with whom one is contracting. In upholding a contract, therefore, the law in effect sanctions or permits the redistribution of wealth between the parties
according to the patterns of advantage already existing between them,\textsuperscript{318} even though many of us might not see these pre-existing patterns themselves as "fair",\textsuperscript{319} an issue not taken up in this thesis.\textsuperscript{320} In avoiding or refusing to enforce a contract, the law objects that a precontractual pattern of advantage ought not be decisive in distributing the resources between the parties. Essentially, in each case, the law is deciding how far a person can exploit his or her advantages, talents, resources, states of affairs, etc., to secure a contractual result, thereby enhancing his or her wealth relative to the other

\textsuperscript{318} Cf. Mautner, M., "A Justice Perspective of Contract Law: How Contract Law Allocates Entitlements" (1990) 10 Tel Aviv University Studies in Law 239, 277:

[Contract as an instrument is employed as a means for the redistribution of resources within the framework of an already existing distribution of resources which is not necessarily a just one, i.e., that contract as an instrument not only reflects but also perpetuates an existing allocation of resources which is not necessarily just... As an instrument, contract not only reflects but also perpetuates a certain distribution of natural endowments and social contingencies of contracting parties which on an overall social scale should effect unjust distribution of resources.

The law thus 'serves as a means for the legitimating of a social order which in itself is not necessarily a just order' (ibid). This, of course, has been the subject of vigorous demonstration by critical legal scholars over the last decade: see Feinman, "Critical Legal Approaches to Contract Law" (1983) 30 U.C.L.A. L. Rev. 829, 852-7; Gabel & Feinman, "Contract Law as Ideology", in Kairys, D. (ed), The Politics of Law (1982), Chp. 8, 172 et seq.; Kelman, M., A Guide to Critical Legal Studies (1987), Chps. 8 and 9. See also, n. 319 immediately below.

\textsuperscript{319} Cf. Braucher (1990), op. cit., 713:

In an imperfect world, where the distribution of entitlements is unjust and where traits and abilities vary dramatically, consent is at best a relative justification for contract enforcement, not an absolute one.

This is to say, unfair starting positions of bargaining parties (background, social inequities) necessarily are transmitted into unfair bargaining outcomes, arguably no matter how unobjectionable the bargaining processes might have been. Milton Friedman's answer to this might be captured by his proclamation, 'Life is not fair': Friedman, Free to Choose (1980), 168. For general discussions, see Kernohan, A., "Rawls and the Collective Ownership of Natural Abilities" (1990) 20 Can. J. of Philosophy 19; Sadurski, W., "Natural and Social Lottery, and Concepts of the Self" (1990) 9 Law and Philosophy 157. Cf., also, the respective Nozick-Rawls positions on self-ownership of natural skills and entitlements, noted at n. 230, supra.

\textsuperscript{320} This is clearly a debate for political philosophers and not lawyers, who must, like everyone else in this unenlightened age, inevitably take the world as they find it.
party. As shall be seen in subsequent chapters, the concomitant of this reasoning is that the principal emphasis of the legal and equitable doctrines to be examined in this thesis begins to reside less in notions of "freedom" or "voluntariness" simpliciter, and more in notions "wrongful conduct" or "unfairness". One party's motivations for action in bargaining are considered "voluntary" or "involuntary" only relative to legitimacy of the conduct of the other party who procures or accepts the contractual benefits produced by motivations known by that other party to be the product of non-equilibrium bargaining conditions.

The difficult task before the court, however, is invariably to delineate between permissible forms of advantage-taking and illegitimate "exploitation". This becomes the immediate concern of the following chapter.

321 This assumes a roughly zero-sum relationship: that one party gains to the extent that the other loses. Only in this trivial sense, then, does the writer view contract law as having anything to do with distributive justice. In contracting, parties inevitably transfer resources they have at their disposal. In so doing, the parties create a "surplus" (gains from the trade), which must be divided between them. In every case, therefore, contracts redistribute wealth—i.e., gains from trade—and to this limited extent necessarily involve distributive justice. The writer would not accept Kronman's arguments that there is a broader societal connection between contract law and distributive justice. Cf. n. 249, supra.
Chapter Four

A GENERAL THEORY OF INTERPERSONAL EXPLOITATION IN CONTRACT FORMATION

Chapter Contents

1. INTRODUCTION ........................................................................................................... 233

2. THE NATURE AND ELEMENTS OF INTERPERSONAL EXPLOITATION ........... 244
   2.1. Defining “Exploitation” ......................................................................................... 245
   2.2. The Elements of Interpersonal Exploitation ....................................................... 252
       2.2.1. Peculiar Asymmetries in Bargaining Power .............................................. 252
       2.2.2. “Unfairness” — of “taking unfair advantage” .............................................. 256
           2.2.2.1. Substantive fairness: the final distribution of burdens and benefits ...... 262
   2.3. Exploitation as a Processual Concept ............................................................... 268
       2.3.1. Exploitation as an Abuse (Misuse) of Contracting Power .......................... 273
           2.3.1.1. Exploitation as knowing violation of generalised duty to protect the vulnerable 276

3. FROM MORAL TO LEGAL EXPLOITATION .......................................................... 282
   3.1. Refining the Analysis ...........................................................................................
       3.1.1. The “Modal” and “Scalar” Aspects of Interpersonal Exploitation .......... 284
         3.1.2. From “Exploitation” to “Unconscionable Conduct” ............................... 287
   3.2. The Forms of Interpersonal Exploitation: The Behavioural, Standards and Doctrinal Spectrums Considered ................................................................. 288
3.2.1. The Behavioural Spectrum ............................................. 288
  3.2.1.1. “Active” and “passive” exploitation
          (victimisation) ..................................................... 293
3.2.2. The Standards Spectrum ............................................. 298
  3.2.2.1. “Neighbourhood” vs. “loyalty” .............................. 299
3.2.3. The Doctrinal Spectrum ............................................. 302

4. EXPLOITATION IN ACTION: UNCONSCIONABLE DEALINGS .......... 305
  4.1. The Elements of Unconscionable Dealings ....................... 310
     4.1.1. Exploitable Circumstances: The “Special
            Disadvantage” Criterion ....................................... 312
     4.1.2. Exploitation: The “Unconscionability” Criterion .......... 319
            4.1.2.1. “Knowledge” of the exploitable circumstances . 320
            4.1.2.2. The element of “unconscientiousness” ............ 323
                   4.1.2.2.1. Independent advice and/or
                           explanation by oneself ................................ 324
                   4.1.2.2.2. Equivalence in exchange: contractual
                           imbalance .................................................. 325
                   4.1.2.2.3. The ‘balance theory’ of
                           unconscionability ........................................ 331
            4.1.2.3. Unconscionable dealing and the standard-
                           form contract? ............................................ 334

* * * * *

There is no clearer ordinance of that supreme reason, often
dark to us, which governs the course of man’s affairs, than
that no body of men should ... be able to strengthen itself at
the cost of other’s weakness.¹

... [W]hen the parties have not met on equal
terms, when the one is so strong in bargaining
power and the other so weak that, as a matter
of common fairness, it is not right that the
strong should be allowed to push the weak to
the wall.²


The duty to protect the vulnerable is, first and foremost, a
duty laid upon each and everyone of us not to do anything
which would constitute taking unfair advantage of those
who are peculiarly sensitive to our actions and choices. That
is to say, the duty to protect the vulnerable gives rise, first
and foremost, to a duty not yourself to exploit those who are
vulnerable.³

1. INTRODUCTION

Theories are important to law;⁴ assuming, that is, that they can
usefully be identified and applied in intelligible ways. When Oliver
Wendell Holmes set out late last century to explain tort’s doctrines by
reference to a single moral principle, he had finally to admit that ‘[t]he law
did not begin with a theory. It has never worked one out’.⁵ Had Holmes

³ Goodin, R., “Exploiting a Situation and Exploiting a Person”, in Reeve, A. (ed), Modern
Theories of Exploitation (1987), 166, at 189. Goodin’s article has been reprinted, in a
substantially similar form, as Chapter 5 in Goodin, R., Reasons For Welfare: The Political
Theory of the Welfare State (1988), 123-52. Unless otherwise stated, references herein are to
Goodin’s 1987 article.

⁴ ‘Theory is important’, writes Hillman, ‘.... [it] helps us to understand our world, stimulates
additional hypotheses, and offers a framework for less theoretical thinking’: Hillman, R.,
“The Crisis in Modern Contract Theory” (1988) 67 Tex. L. Rev. 103, 122. Caution is always
required, however:

Theory is always simpler than reality. Even when it seems terribly complex,
it is still simplistic, as compared to the range of factors, operating as
conditions, as means, or as ends in any actual concrete situation.

Vinter, J., as quoted by Gulliver, P., Disputes and Negotiations: A Cross-Cultural Perspective
(1979), 265. This fact, in the writer’s view, does not however justify the perceived renitence
expressed in Atiyah’s view:

Most English judges are emphatically neither intellectuals nor theorists; few
are ever given to doubting their first principles, at least in public, and most are
deeply sceptical of the value of theory.... Very few have more than the
faintest glimmering of the vast jurisprudential literature concerning the nature
of the judicial process. Most would pride themselves on being pragmatists, and
not theorists.

While these expressed views may reflect the current English legal climate, the various extra-
curricular writings of our present Chief Justice, Sir Anthony Mason, would not suggest a similar
orientation in this country. Cf. also, The Hon. Mr Justice D. N. Angel, “Some Reflections on
Privity, Consideration, Estoppel and Good Faith” (1992) 66 A.L.J. 484; Cheshire & Fifoot (6th

attempted a similar, though less ambitious, mission in relation to the subject-matter of this thesis, he might well have been inclined to draw a contrary conclusion. To be specific, the present chapter aims to develop and define a concept—"exploitation"—and to argue that it lies at the logical core of the traditional heads of relief in contract formation: in particular, those doctrines traditionally considered to "police" the conduct of negotiations, and customarily collected under a broad "unconscionability" rubric.\(^6\)

In terms of objectionable conduct, the formation stage of the contractual process is indeed open to many kinds of abuse. The pages of our law reports are replete with allegations and condemnations of every species of "fraud" and "unfairness" imaginable in relation to contractual and near-contractual dealings.\(^7\) In keeping with functionalist assumptions, however, the law for the most part avoids regulation and accommodates the special suppositions and features of bargaining. And so this should be. By faithfully adhering to the freedom of contract philosophies, firmly enounced in classical liberal doctrine,\(^8\) the common law remains vigilant to avoid influencing the preferences of contracting parties, the distribution of power

---

\(^6\) For a similar thesis in relation to the criminal law, see Fingarette, H., "Victimisation: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape" (1985) 42 Wash. & Lee L. Rev. 65. Cf. also, Waddams, S., Chp. 5, in Hondius (ed), Precontractual Liability (1990), 99; Waddams defines 'unconscionability', in the precontractual setting, as 'taking undue advantage of inequality of bargaining power'.


\(^8\) See Chapter One, especially Section 1.2.
and risk, market forces, and outcomes of the bargaining process. Equity, too, follows the common law in this regard, firmly maintaining the presumption in favour of upholding bargains, not striking them down. 'The Chancery', we are told, 'mends no man's bargain'.

With the courts exercising no general supervisory jurisdiction over contract formation, the law has, characteristically, treated contractual negotiations as a relationship in which both parties are, as a matter of course, expected to look after their own interests in their dealing inter se. Common law and equity generally defer to the structural characteristics and operational imperatives of the bargaining process itself, which, according to functionalist assumptions, ensure, from within, minimally acceptable standards of decent behaviour between contracting parties.

---

9 Subject, of course, to the rules relating to illegality and public policy, such as the restraint of trade doctrine.

In Austotel Pty. Ltd v. Franklins Selfserve Pty. Ltd (1989) 16 N.S.W.L.R. 582, 586, Kirby P. confirmed the point in the text when he observed that courts should ... be wary lest they distort the relationship of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges.

10 Per Lord Nottingham in Maynard v. Mosely (1676) 3 Swanst. 651, at 655. Cf. also, the words of Lord Radcliffe in Bridge v. Campbell Discount Co. Ltd [1962] A.C. 600, 626: "Unconscionability" must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other...; Grieshamer v. Ungerer (1958) 14 D.L.R. (2d) 599, 604-5: '... it is not the function of the courts to protect adults from improvident bargains'; Wilton v. Farnworth (1948) 76 C.L.R. 646, 649 per Latham C.J.: 'Any weakening of these principles would make chaos of every-day business transactions'; Lloyds Bank v. Bundy [1974] 3 All E.R. 757, 763: 'No bargain will be upset which is the result of the ordinary interplay of forces'; Stern v. McArthur (1988) 165 C.L.R. 489 per Brennan J. at 514: 'although the categories of unconscionable conduct are not closed, the concept of unconscionability is not a charter for juridical reformation of contracts'. Generally, see Greig & Davis, The Law of Contract (1987), 22-9; Atiyah, The Rise and Fall of Freedom of Contract (1979), 417-8, 464-79.

11 Generally, see discussion in Chapter Three, Section 2.1.1.3. It is, however, well known, and has been so for some time, that we are a long way from the assumptions that underlie the freedom of contract philosophy. As Lord Reid stated, when discussing exemption clauses, in Suisse Atlantique Société d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, at 406:

In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand them and object to any of them, he would generally be told he could take it or leave
Australian common law, therefore, contains no general prohibition against persons entering into unfair transactions,\(^\text{12}\) nor does it render transactions void or voidable simply on the ground of their ostensible unfairness.\(^\text{13}\)

Occasionally, however, bargaining parties find themselves in a relational environment that takes them outside the set of conditions the law assumes to be necessary for free and informed—i.e., voluntary—consent. (In Chapter Three the writer referred to these bench-mark conditions as equilibrium bargaining conditions.)\(^\text{14}\) The common law, therefore, has developed an amalgam of doctrines which, in one way or another, are directed to particular circumstances or conduct affecting the quality of the consent of one or another of the parties to the contract. The rules governing it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

\(^{12}\) Rather, the Australian law of “unfair” or “unjust” contracts comprises the common law doctrines mentioned in the text above, the equitable doctrines of undue influence, unilateral mistake (in equity as opposed to at common law) and unconscionable dealing, plus a burgeoning assortment of general and specific statutory initiatives, including for example the Contracts Review Act 1980 (N.S.W.); ss. 51 AA and 51AB Trade Practices Act 1974 (Cth) and its State Fair Trading Act equivalents (the later provision formerly s. 52A); the Credit Act 1984 (N.S.W.), Part IX and its counterparts in those States which have adopted the ‘uniform’ credit laws (Vic: Credit Act 1984, Part IX; W.A.: Credit Act 1984, Part IX; A.C.T.: Credit Act 1985, Part IX; Qld: Credit Act 1987, Part IX; cf. also, S.A.: Consumer Credit Act 1972-1983, s. 46); various money-lending legislation (Lending of Money Act 1915 (Tas), s. 2; Money-lenders Act 1903-1970 (N.T.), s. 36); reopening provisions of various hire-purchase Acts (Vic: Hire-Purchase Act 1959, s. 24; Qld: Hire-Purchase Act 1959, s. 28; W.A.: Hire-Purchase Act 1959, s. 24; Tas: Hire-Purchase Act 1959, s. 33; N.T.: Hire-Purchase Act 1961-1965, s. 36), and s. 88F of the Industrial Arbitration Act 1940 (N.S.W.) (contracts of work that are harsh, unconscionable or contrary to the public interest). This thesis does not concern itself with a systematic and detailed discussion of the more specific examples of legislation listed above.

\(^{13}\) Perhaps his orthodoxy is no better stated than by Sir John Salmond in the New Zealand case of Brusewitz v. Brown [1923] N.Z.L.R. 1106, at 1109:

The mere fact that a transaction is based on an inadequate consideration or otherwise improvident, unreasonable, or unjust is not in itself any ground on which this court can set it aside as invalid. Nor is such a circumstance in itself even a sufficient ground for a presumption that the transaction was the result of fraud, misrepresentation, or undue influence, so as to place the burden of supporting the transaction upon the person who profits by it. The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances, such as fraud or undue influence.

\(^{14}\) See text supra, at Section 3.2.1.
fraud, duress, mistake (including non est factum), and incapacity provide the most salient examples.

Additionally, the common-law grounds for intervention are supplemented by a rich source of equitable doctrines and principles: undue influence (actual and presumed), unilateral mistake, unconscionable dealings, and the like. The past decade in Australia, moreover, has witnessed a remarkable extension of these equitable doctrines and principles, both in scope and application. And yet, while equity’s approach to intervention has traditionally been more flexible than the common law’s, this is only a matter of degree. The unifying theme which seems to draw together the varied grounds for intervention, and which comprises a major aim of both bodies of law, though especially equity, is the restraint of "unconscientious" or "unconscionable" conduct. The Hon. Mr Justice Mason, as he then was, managed to capture in a few words this idea when he observed:

Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include


fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. 18

Indeed, the notion of "unconscionable conduct" has become the 'talisman' of Australian courts (among others) 19 in justifying intervention in voluntary or consensual dealings. 20 When used in its customary adjectival sense, it is a powerfully evocative and value-loaded pejorative. However, without clear guidance from the courts as to what terms like "unconscionability" and "unconscionable conduct" are meant to denote, judicial recourse to such rhetorical devices has in truth done little to illuminate our understanding of the judgments.

As a descriptive device, then, "unconscionable conduct" has not been overly helpful in any analytical sense. Rather, it has tended to be used as an encompassing idea—an "umbrella" notion—that can reach any and all procedural abuses across the full behavioural spectrum examined in this study. 21 It is, in this respect, a 'category of meaningless reference'. 22

---


20 It was Sir Anthony Mason who labelled unconscionable conduct the 'universal talisman': "Themes and Prospects", in Finn, P. D. (ed), Essays in Equity (1985), 244.

21 This is a common usage of the unconscionability concept in contemporary writing on abuses of the contractual process. See Waddams, S., "Unconscionability in Contracts" (1976) 39 Mod. L. Rev. 369; Meagher, Gummow & Lehane, Equity: Doctrines and Remedies (2nd ed, 1984), Part 4.
Questions of "unconscionability", moreover, can arise at any stage of the contractual process. And, for fear of omitting in advance some novel schemes of trickery, the courts have made it quite clear that the categories of unconscionable conduct cannot comprehensively be classified, and that they are not closed.

While there has been no shortage of attempts to give substance to the concept of unconscionability, and this is not surprising given its vast, ameliorative potential, few, if any, have achieved an all-embracing, functional conception. This is readily understandable. For like "good faith"


22 The expression is Julius Stone's, *The Province and Function of Law* (1950), 171-4. It would indeed be dangerous if unconscionability were to be taken so broadly that we should risk our judges operating on seemingly differing policies (cf. the respective judgments of Mason C.J. and Gaudron J. in *Stern v. McArthur* (1988) 165 C.L.R. 489). Australian courts would be the first to deny however, that unconscionability principles provide judges with a licence to invoke idiosyncratic notions of justice: see *per* Mason and Deane J. in *Legione v. Hateley* (1983) 152 C.L.R. 406, 431, citing Dixon J. in *Grundt v. Great Boulder Pty. Gold Mines* (1937) 59 C.L.R. 641, at 675-6; and see a more argued disavowal of unconscionability as being a licence for intuitive justice in *Muschinski v. Dodds* (1985) 160 C.L.R. 583, 615-6, *per* Deane J; and *per* Toohey J. in *Louth v. Diprose* (1992) 110 A.L.R. 1, 27. The courts have, therefore, been conscientious in their attempts to elaborate more specific normative criteria through which they administer the notion of unconscionability in discrete doctrines.

23 Questions of "unconscionability", however (especially as they relate to equity's treatment of that notion) more commonly tend to be raised during either the formation stage of the contractual process (as in procuring an unconscionable bargain) or at the enforcement stage (as in exercising harsh and oppressive remedial rights, or by insisting on the retaining the benefit of a bargain induced by innocent misrepresentation, or entered into under a common mistake). Generally, see Getzler, J., "Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention" (1990) 16 Monash U. L. Rev. 283, esp. at 284, classifying unconscionable conduct into four main categories.

24 Sheridan, *Fraud in Equity* (1957), 2.

25 Cf. *Diprose v. Louth* (No. 2) (1990) 54 S.A.S.R. 450, at 453, *per* Jacobs A.C.J. Cf. also, *per* Lord Hardwicke in *Lawley v. Hooper* (1745) 3 Atk. 273, at 279; 26 E.R. 962, at 963; and *per* Lord Macnaghten in *Reddaway v. Banham* [1896] A.C. 199, at 221. It was thought by these judges that any attempt to exhaustively define the basis for equitable intervention would somehow unduly bind the courts of equity in their dealing with those who evaded the spirit and intentions of its sense of conscience.

26 Notable examples include, for example, Waddams, "Unconscionability in Contracts" (1976) Mod. L. Rev. 369; Chen-Wishart, M., *Unconscionable Bargains* (1989); Getzler, *op. cit.*; and see authorities listed at n. 19, *supra*.
itself, unconscionability is perhaps ‘better described than defined’.\(^{27}\) And like
good faith, unconscionability also serves as an organising idea—a guiding
principle—in our law,\(^ {28}\) highlighting the unities, in theme and in purpose,
among various but related grounds for intervention,\(^ {29}\) such grounds being
administered through discrete, “compartmentalised” legal doctrines.\(^ {30}\)
Unconscionability, therefore, is seen in this thesis as a not entirely
successful\(^ {31}\) attempt by the courts to rationalise an important group of
interrelated but independently applied doctrines,\(^ {32}\) each appealing to broad


\(^{28}\) For a discussion of the notion of a “principle” in this context, see Chapter Two, Section 1.2.
(n. 35).

\(^{29}\) The notion of “unjust enrichment” appears to be serving a parallel function in our law. See
*Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221, 256-7 *per* Deane J. (Mason and Wilson
J.J. concurring), suggesting an ‘unjust enrichment’ principle as an important ‘unifying legal
concept’. It is not entirely clear yet, however, whether the so-called unjust enrichment
principle will prove to be anything more than the ‘Siamese twin’ of the unconscionability
principle; see *ANZ Banking Group Ltd v. Westpac Banking Corporation* (1988) 164 C.L.R. 662,
at 673: “[C]ontemporary legal principles of restitution or unjust enrichment can be equated with
the seminal equitable notions of good conscience”. Cf. also, *Muschinski v. Dodds* (1985) 160
C.L.R. 583, 619 *per* Deane J (Mason J concurring). Generally, see Getzler, J., “Unconscionable
Conduct and Unjust Enrichment as Grounds for Judicial Intervention” (1990) 16 Monash U. L.
Rev. 283.

\(^{30}\) “Unconscionability: the principle” is not to be confused with the specific, equitable
“unconscionable dealings” doctrine, which though itself informed in theme and in purpose by
the general unconscionability principle, is nonetheless independently capable of having
legally determinative effects in the resolution of actual cases. The unconscionable dealings
doctrine is considered in Section 4 of this chapter.

\(^{31}\) In particular, the jural separation between unconscionable dealings and undue influence
seems to be giving the courts some difficulty. See C.B.A. v. *Amadio*, op. cit., 461, *per* Mason J;
474, *per* Deane J; *Diprose v. Louth* (No. 1) (1990) 54 S.A.S.R. 438, and *Diprose v. Louth* (No. 2)
5, ascribed a notion of ‘overbearing of the will’ to unconscionable conduct in this context,
although, as is argued in subsequent chapters, such a concept seems inappropriate to undue
influence, let alone unconscionable dealings; a case of the latter and not the former *Diprose*
clearly was: cf. Toohey J.’s approach, *id*, with Brennan J.’s. Cf. also, *Webb v. Australian
Agricultural Machinery Pty. Ltd* (1991) 6 W.A.R. 305; and the judgment of Richardson J. in

\(^{32}\) The unconscionability principle should not of course be viewed as the only attempt to
rationalise related legal categories. Far and away the most famous attempt at rationalising
traditional heads of relief for alleged unfairness in the procurement of bargains was that
of duress to goods, unconscionable transactions, undue influence (actual and presumed), undue
pressure (now largely embraced by the concept of economic duress) and salvage agreements, his
Lordship derived the following unifying ‘principle’ (*sic*):

240
Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on ‘inequality of bargaining power’. By virtue of it, the 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. (ld, 339.)

Taken at face value, Lord Denning’s ‘principle’ seems innocuous enough; indeed, somewhat unremarkable. However, his Lordship did go on to eschew the suggestion that the presence of the word ‘undue’ in his formulation signified that the doctrine (for that is what in substance it is) of inequality of bargaining power depended on proof of some wrongdoing on the part of the stronger party, or even knowledge on his or her part of the ‘distress’ of the other party (ibid). Although there may be some historical sources supporting the proposition (in particular, the so-called ‘expectant heir’ cases: see infra at n. 251), and while the courts are still prepared to infer some generalised wrongdoing on the part of one party to a fiduciary-like relationship (see in particular, Section 3.2.2.1.) merely from the fact that the parties are so circumstanced, one to the other, as to create the danger of such wrongdoing, the many non-fiduciary categories to which Lord Denning refers—unconscionable transactions not involving expectant heirs, actual undue influence, all species of duress, and salvage agreements—characteristically require the aggrieved party to prove a specific act of wrongdoing on the part of the other party to the transaction or dealing in question. Thus, despite his Lordship’s good intentions toward those ill-equipped to preserve their own interests in contractual dealings, it is hardly surprising that the doctrine of inequality of bargaining power has attracted little support. Indeed, it is easy to see why this should be so, especially given one commentator’s precautionary words about the dangers inherent in such a doctrine:

For a general doctrine such as inequality of bargaining power to be an effective instrument in controlling transactional abuses, it needs to be sharp in its focus, conceptually sound and explicit in its policy underpinnings, and operational in terms of both the process of judicial inquiry it envisages and the remedial instruments available to a court to abate objectionable phenomena. A general doctrine bearing on transactional unfairness that cannot meet these criteria will rapidly degenerate, in its applications, into the crassest forms of ad hocery....

notions of “conscience”\textsuperscript{33} but each still maintaining its own “formula” in their several applications.\textsuperscript{34}

As a fundamental premise, the writer takes it as axiomatic that judgments of law tend to be directed toward acts rather than actors or mere circumstances.\textsuperscript{35} Relevant rules of law declare certain acts proper or improper, and define the consequences of specific acts or failures to act. The standards of such judgments are said to be derived through the rules of law which express their essence.\textsuperscript{36} But if the object of the law is action or


Perhaps a more promising treatment of Lord Denning’s formulation in Lloyds Bank v. Bundy was that proffered by Lambert J.A. in the British Columbian decision of Harry v. Kreutziger, op. cit., at 241. His Honour preferred the view that the formulation merely provided a demonstration of the relationship between the various categories of cases listed therein; that it ought not to be treated as a synthesis from which future law might develop. A proper use of his Lordship’s formulation, therefore, might be seen in the fact that it seems to distil from various contract-related doctrines a principle of “fair dealing”. To be sure, inequality of bargaining power simply sets up a situation where the need for fair dealing becomes more apparent. It is also used as a criterion of unfairness in the unconscionability statutes, notably s. 51AB of the Trade Practices Act 1974 (Cth) and Contracts Review Act 1980 (N.S.W.): s. 9.

33 Cf. Meagher, Gumnow & Lehane (2nd ed., 1984), op. cit., para. 1208. “Conscience” does not of course refer here to a party’s personal conscience, nor for that matter an individual judge’s personal conscience. “Conscience” means a judge’s civil, or official, conscience: the court’s conscience. This roughly equates with the common law’s equivalence of “reasonableness”. As Lord Radcliffe said in Davis Contractors Ltd v. Fareham U.D.C. [1956] A.C. 696, at 728, ‘the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself’. Cf. also, the discussion in Cheshire & Fifoot (6th Aust. ed., 1992), paras. 052 and 053.

34 Hence, in the various areas where unconscionability is used as an underlying and guiding principle, the courts have developed more refined guidelines or rules which are specific to a particular instance of unconscionable conduct. Thus mistake has its set of applicable criteria or considerations, as does estoppel, unconscionable dealings, constructive trust, and so forth.

35 Cf. Fuller, L., “Mediation—Its Forms and Functions” (1971) 44 Southern Cal. L. Rev. 305, 328-9. In the present context, the reasons for this are quite obvious. See Chapter Three, Section 2.1.1.5 and Section 4.

36 \textit{Ibid}. Thus, the law is normative. Its object is the behaviour of a being possessed of reason and will—\textit{human} behaviour. Cf. Kelsen, H., \textit{General Theory of Norms} (Trans. Hartney, H.)
inaction, its concern is to prescribe and proscribe particular human behaviour only under certain conditions.\textsuperscript{37} For present purposes, therefore, it seems to be most relevant to attempt to isolate both the behavioural concerns of the law and the conditions under which that behaviour betokens legal condemnation.

In this chapter, we consider in particular an endemic feature of bargaining and of bargains: the notion of "advantage-taking" in contract formation. The various forms of objectionable conduct in the procurement of bargains characteristically find their source or their sequel in some genus of illegitimate advantage-taking. We are concerned here precisely with the point at which mere advantage-taking becomes its pejorative: exploitation, or victimisation: both are species of wrongdoing considered here to be synonymous. In particular, the various related doctrines falling within the ambit of this thesis—misrepresentation, duress, undue influence, unconscionable dealings, unilateral mistake (in equity), and the like—all seem to be concerned with the larger end of constraining manipulative and exploitative behaviour in contract formation, and each doctrine is thus introduced as a specific though distinct manifestation of this general behavioural concern. When and why exploitative practices call for legal redress then, must be revealed through the specific doctrines which are attracted by that sort of behaviour. The notion of interpersonal\textsuperscript{38} exploitation defined and developed in this chapter is intended to form the primary point of focus for discussion in the following chapters.

Finally, the significance of manipulative and exploitative behaviour in the bringing about of a contractual relationship between the parties, and, more importantly, the conditions under which such behaviour, actually or in its tendency, can be said to occur, begins to unearth something about the

\hfill (1991), Chp. 22. As Kelson points out (\textit{id}, 94), it makes no sense to prescribe or prohibit anything other than human behaviour, such as natural events like rain or earthquakes.

\textsuperscript{37} The conditions, of course, may be human behaviour as well as facts other than human behaviour. See Kelson, \textit{id}, 94. An obvious example of where the law is concerned with conditions is deceit. In order to stigmatise an individual's behaviour as "fraudulent" at common law we would require both an act (the conveying of a falsehood to another ...) and two conditions (... with the intention of deceiving that other, who is causally deceived).

\textsuperscript{38} Reference to "interpersonal exploitation" is intended to refer to those cases of exploitation in which both exploiter and exploitee are legal persons.
bargaining relationships which, potentially at least, exact the variable standards of good faith and fair dealing, and which also give one party the right to expect, on the part of the other, compliance with those standards.

2. THE NATURE AND ELEMENTS OF INTERPERSONAL EXPLOITATION

When men are friends they have no need of justice.

In the realm of modern contract law, the interrelationship between law and morality is becoming especially pertinent. For many contractual disputes today will turn upon the extent to which parties were required in their dealing to act towards each other, not as strangers and adversaries, but rather as interconnected individuals with a mutual set of responsibilities and obligations. In this section, therefore, the writer proffers a distinctively moralised version of exploitation. It is considered that only a fully moralised account of that concept provides the reader with the grounding necessary to discover what it is that we find objectionable in cases involving exploitation in the legal context of contract formation. An important consequence of this explicitly moralised account, moreover, invites the reader to appreciate the deeper concerns, reasons and purposes of our law in relation to objectionable—exploitative—behaviour in the procurement of bargain transactions.

In confining for the moment our discussion solely to morality and not the law, the writer should also insert a caveat at this juncture. In the


40 Aristotle, Nichmachean Ethics, 1155a25.

41 In one judge’s view, moreover, ‘the common law system can only survive with a solid philosophical foundation’: The Hon. Mr Justice D. N. Angel, “Some Reflections on Privity, Consideration, Estoppel and Good Faith” (1992) 66 A.L.J. 484, at 484.
following pages, philosophy is relied upon only for what the writer perceives to be its useful (but very general) insights for thinking about the problem of exploitation in the law of contract formation. We are not therefore concerned here with actually making moral judgments about any given instance of alleged exploitation. As will be seen in Section 3, moreover, there is, potentially at least, a significant hiatus between possible moral judgments of exploitation and identifiable legal judgments of the same. This is chiefly owing to the uncertainties existing in the moral analysis in relation to the precise level of consciousness required to give rise to the moral charge of exploitation.

2.1. Defining "Exploitation"

Black's Law Dictionary\textsuperscript{42} usefully defines "exploitation" as, \textit{inter alia}: 'Taking unjust advantage of another for one's own advantage or benefit'. Both ordinary\textsuperscript{43} and philosophical\textsuperscript{44} sources provide similar formulations.

\begin{footnotesize}
\begin{itemize}
\item[42] (5th ed., 1979).
\item[43] Webster's Ninth New Collegiate Dictionary (1984), for example, defines exploitation as, \textit{inter alia}, 'an unjust or improper use of another person for one's own profit or advantage'.
\end{itemize}
\end{footnotesize}

Relatively few philosophical sources, however, deal with exploitation on an interpersonal level in exchange relations. Rather, most contemporary philosophical discussions of "exploitation" tend to focus narrowly on cases of economic exploitation. It is here, in particular, that the emphasis is on the processes of the production and consumption of commodities carrying value. The most common example of this emphasis is the Marxian theories of economic exploitation, which approach exploitation at the political and economic level, in the context of labour markets, and focus predominantly on the distribution (division) of resources (labour and power) and income between classes in a class-based society, and in particular on the relationship between labourers and their capitalist employers. In short, the Marxian notion of exploitation is rather technical, consisting in the unequal exchange of labour for goods. It refers, moreover, to the appropriation by a class of nonworkers of the surplus product of a class of workers. "Appropriation" here would seem to indicate a coercive process by which capitalists hire workers for minimal wages because the workers have no alternative except starvation. References to both Marxian and neoclassical (non-Marxian) accounts of exploitation include: von Weizäcker, C., "Modern Capital Theory and the Concept of
Fundamentally, as this definition denotes, “taking advantage”, in one way or another, is always at the heart of the matter. Put vaguely, all cases of interpersonal exploitation seem to involve one party, the “exploiter”, securing an advantage from his relation to another party, the “exploitee, by somehow “taking advantage” of some characteristic of the exploitee, or some feature of her circumstances in relation to him. In the context of contract formation, specifically, the characteristic or circumstance in the exploitee which is invariably being taken advantage of is her serious inability meaningfully to participate in the processes of bargaining in the instance in


In his article entitled, “New Directions in the Marxist Theory of Exploitation and Class” (1982) 11 Politics & Society 254, John Roemer proposes a ‘general theory’ of exploitation, Marxist exploitation merely being a special case. Other cases of exploitation Roemer considers (id, 275-84) include: feudal exploitation, socialist exploitation, status exploitation, and ‘neoclassical exploitation’: the type of inequality that neoclassical economists consider exploitative: see Miller, *op. cit.* Roemer’s overall approach is Marxian, however; again relating essentially to the study of labour and class.

Whilst Marxians insist that a certain share of the labourer’s work is “unpaid”, and workers are thereby “exploited”, non-Marxians point out that everyone gains from the trade of labour, and therefore workers are not exploited. These sorts of consideration (labour and class), however, are very different from the much broader considerations applying here, so they are largely disregarded. See also Goodin, “Exploitation”, *op. cit.*, at 166; suggesting that such theories of economic exploitation carry too narrow an understanding of exploitation, and Arneson, *id*, 203, who points out that exploitation in the Marxian technical sense ‘does not imply exploitation in the ordinary evaluatively charged sense of the term. (In this ordinary sense, exploitation involves mistreatment)’. In this ordinary, normative understanding of exploitation, the “mistreatment” need not imply any violation of the exploitee’s autonomy: see Kleinig, *op. cit.*, 110.


46 As previously stated, the writer finds it entirely cumbersome to repeat “himself or herself”, and so forth. Fearing that he will nonetheless be charged with sexism, the writer has, unless the circumstances clearly dictate to the contrary, taken the liberty of assuming throughout that the exploiter is male and his victim is female.
question, and thus her serious inability to make an effective (full, free and informed) judgment as to her own best interests in the transaction or dealing between herself and the exploiter; or, perhaps, between herself and some third party at the exploiter’s direction. What always makes exploitation possible here is the relative, peculiarly unequal bargaining positions of the parties.

Built into the conception of exploitation, however, is a notion of “unjustness” or “unfairness”: of “taking unfair advantage”.47 Indeed, this would naturally appear to lie at the very core of our complaints against exploitation;48 for without such a qualifying notion, we are left with a descriptive device, “advantage-taking”, which is not overly helpful in any analytical sense. Depending precisely on how we use that expression, “advantage-taking” may carry either favourable or pejorative connotations49—and “exploitation”, one deeply suspects, always commands at least our moral condemnation.50 Consistent with the writer’s analysis of

47 Cf. Feinberg, op. cit., 202, 204.

48 Cf. Tormey, op. cit., 221, n. 8.

49 This is precisely how Anthony Kronman demonstrates the possible usages of the term “advantage-taking”: Kronman, “Contract Law and Distributive Justice” (1980) 89 Yale L. J. 472. Kronman comments (at 480): ‘In this broad sense [—‘as including even those methods of gain the law allows and morality accepts (or perhaps even approves’)—], there is advantage-taking in every contractual exchange. Indeed, in mutually advantageous exchanges, there is advantage-taking by both parties’. Accordingly, not every act of taking advantage constitutes exploitation. For Kronman, the difficulty is distinguishing between legitimate and illegitimate forms of advantage-taking. In this thesis, illegitimate advantage-taking is synonymous with what we will define to be “exploitation”. Cf. also, Panichas, op. cit., 223-4.

50 As with “advantage-taking”, however, it is strictly possible to refer to “exploitation” in similarly broad, non-pejorative terms. As Feinberg points out (op. cit., 201-2), it is possible to give “exploitation” a wide enough application as to involve no more than one person, such as in the sense of one being told “to exploit one’s own talents or make the most of one’s own opportunities’. This is precisely how Kronman employs the notion of exploitation in its non-pejorative sense, id, 480. Likewise, not “exploiting” something can be seen as corresponding to “wasting” it; and here again may be a broad non-pejorative use of the term: like the man who “exploits” the first fine day in a fortnight to work on his garden. Moreover, Feinberg suggests (id, 202) that ‘[w]hen “exploitation” refers to an interpersonal relationship, it tends almost uniformly to be pejorative’. Whilst the ‘exploiter’ must always be a person (‘diseases, landslides, and tropical storms have never exploited anything’, ibid; cf. Tormey, op. cit., 207, n. 2), as Goodin comments (“Exploitation”, op. cit., 173):

Exploitation in general is morally ambivalent. There is nothing wrong (nothing necessarily wrong, anyway) with exploiting waves or rocks or sunlight. It is only as applied to our treatment of people that “exploitation”
bargaining in Chapter Three, the general rules of that game mandate the use of power to affect vulnerabilities, in particular through the various strategies and techniques available to the parties. The functionalist ethic expounded in that chapter thus provides, within the scope of the working assumptions it makes about bargaining and its role in society, the arena in which individual responsibility is required. If such responsibility is not invoked, or is invoked ineffectively, that is a loss which putatively results from playing the bargaining game according to its rules and ethos, so any advantage-taking will not be considered “unfair”. Exploitation, accordingly, is intended here to demarcate the dividing line between legitimate and objectionable forms of advantage-taking in bargaining.\textsuperscript{51} Unfairness, hence exploitation, begins precisely at the point where the use of power is no longer seen as appropriate to, or legitimate in, the particular instance of bargaining.

In exploring the sense of unfairness in exploitation further, it will be argued that exploitation appears to reside essentially in breaches of a very peculiar moral-possibly-legal duty. Since occasions for exploitation characteristically arise when one party is in an especially superior position vis-à-vis another, the mere existence of such circumstances seems to place at least a strong moral duty on the superior party to respect or preserve the interests of the weaker in a dealing between them. “Exploitation”, Goodin suggests, resides in the ‘flagrant’ violation of this responsibility—‘playing for advantage when morally you are bound not to do so...’\textsuperscript{52} The present writer interprets this to mean that exploitation inheres in a knowing use of one’s superior bargaining position, however that can be said to have arisen, to secure an advantage in circumstances where one is morally duty-bound to

---

acquires inevitably pejorative connotations.... [T]here can be no doubt: an act of exploiting a person always constitutes a wrong.

Since we are only concerned here with certain forms of interpersonal exploitation, we assume that the exploiter will rarely, if ever, be justified in using the exploited the way he did. Interpersonal exploitation, therefore, refers to a way of using another person that is somehow wrongful or unfair.

\textsuperscript{51} “Exploitation”, therefore, here corresponds precisely in meaning to “illegitimate” or “unfair” advantage-taking.

\textsuperscript{52} Goodin, “Exploitation”, \textit{op. cit.}, 167, 188. Thus, Goodin remarks, ‘[just] as the analysis of the notion of “adultery” is parasitic upon an analysis of the duty of marital fidelity, so too is the analysis of exploitation parasitic upon an analysis of the duty to protect the vulnerable’: \textit{id.}, 167. See Section 2.3.1.1. below.

248
refrain from using one’s superior position in such a selfish way. Unlike the legal analysis of exploitation, however, moral analyses seem to have neglected or de-emphasised the precise content of the knowledge criterion: a somewhat surprising omission given its ostensible importance to the concept of exploitation. This is a concern to which we shall return below.

Additionally, exploitation involves taking unfair advantage of another ‘for one’s own advantage or benefit’, or for the advantage or benefit of a third party claiming through you. Exploitative acts ordinarily redound to the benefit of those who perform them: after all, it is to be presumed, from the exploiter’s perspective, that the value of an act of exploitation is contained not in the act itself but in the benefits which follow from his using a strategic position of advantage *vis-à-vis* the exploitee; however, the connection between exploitation and benefit appears to be a contingent rather than an analytic one. In short, what one seizes upon in an act of

53 See Section 2.3.1.1. below.

54 Section 4.1.2.


56 Otherwise, why else would such acts have been performed?

57 Thus, Goodin comments: ‘Taking an advantage is not the same thing as taking a good itself’. (“Exploitation”, op. cit., 168) Ordinarily, where a good is simply taken, we understand this form of wrongdoing to be “theft”, an interpersonal transfer that is quite different to what we understand to be either “exchange” or “donation”. Different theories of exploitation, of course, provide different analyses of “taking unfair advantage”. Neoclassical theorists explicate it as ‘receiving less than the value of one’s marginal product’. Marxists explicate the notion as (roughly) ‘receiving less than the entire product of one’s labour’. Roemer’s theory, on the other hand (1982, op. cit.) explicates it as (roughly) ‘receives less than one would receive under the withdrawal rules of a particular mode of production’. Concentrating on outcomes in explicating “taking unfair advantage”, however, makes it difficult to see how these cases of “exploitation” are any different from what we would understand as a case of “theft”. Steiner (1984), op. cit., goes further in his Liberal analysis, which entails that all cases involving dyadic (two-party) relations must necessarily be cases of theft. For a case to be one of exploitation, Steiner reasons, we must impute at least a third party into a relation, exploitation consisting in the interference with the opportunities of that third party to bid for the “exploited” party’s goods or services. According to Steiner, an unequal exchange of value between exploiter and exploitee is only exploitative if it can be attributed to a prior violation of the (property) rights of some third party, either by the exploiter, or indeed some fourth party. No other theory of exploitation seems to require there being at least a trilateral
exploitation is an advantage or benefit of one type: a *strategic* or *relative* advantage, consisting essentially in the exploiter's superior bargaining position relative to the exploitee in the transaction or dealing in question. This is used in order to obtain yet another—different—kind of advantage or benefit: a *substantive* or *material* advantage—usually the right to the contract itself—and often, though not necessarily accurately, measured in terms of the objective values exchanged between the contracting parties\(^58\). Goodin conveniently refers to these two different senses of "advantage" or "benefit" as 'advantages\(^1\)' and 'advantages\(^2\)', respectively.\(^59\) The advantage or benefit seized upon in an act of exploitation, therefore, is, through the exploiter's eyes, of instrumental value only; and in this light, "taking advantage" is perhaps better understood as "turning to advantage" or "making use of"\(^60\)—as an act of "seizing an opportunity",\(^61\) as opposed

---

\(^58\) The distinction in these measures of substantive advantage will be returned to below.

\(^59\) Goodin, "Exploitation", *op. cit.*, 167-8.

\(^60\) Thus in the context of contract formation, exploitation essentially inheres in the stronger party (the exploiter) using his contractual power *vis-à-vis* the weaker party (the exploitee) as an instrument to his ends, that is, the securing of the exploitee's contractual 'assent' (*sic*). It thus seems possible to see 'taking unfair advantage' in both a strict and a broad sense. In its strict sense it appears to refer to the gains and losses relative to some bench-mark, and it seems crucial on this basis that the exploited party should be made worse off by the exploitation. For example, this is the approach taken by Miller in his discussion on exploitation in the market (*op. cit.*). In its broader sense, however, "taking unfair advantage" refers simply to "using unethically", the sense by which it is used here, and, as will be argued, the sense by which it is, or ought to be, understood in the law relating to contract formation. For this distinction, see Elster, J., "Exploitation, Freedom and Justice", in Pennock and Chapman (eds), *Nomos XXVI: Marxism* (1983), 277-304, at 278.

\(^61\) Cf. Jacobs A.C.J. in *Diprose v. Louth* (No. 2) (1990) 54 S.A.S.R. 450, at 453: 'the [exploiter] seized upon the [exploitee's] blinkered vision to manipulate him to her own advantage' (emphasis added.)

250
merely to seeking it, creating it, or discovering it. What might be said to happen in cases of contractual exploitation, then, is that 'the stronger [party] transforms bargaining power into promissory claims and thereby legitimizes his domination of the weak[er party]'. Goodin describes this as "exploitation" par excellence.

The upshot of this reasoning is that

[the] essence of exploitation must be sought in some characteristic of the process, rather than in some characteristic of the end results.... [The] unfairness must lie in the process rather than the [outcome].

The real difficulties lie, in the final analysis, in identifying precisely what characteristic in the processes of human dealing is to be understood as

---

62 Of course individuals often set up a situation which they can later exploit, for example, through deceiving the exploitee, or by bringing undue pressure to bear upon her, but we cannot properly say that "exploitation" has occurred until the precise moment the exploiter cashes in on the opportunity (the strategic or relative advantage) he first created. This important feature of some forms of exploitation will be returned to in this discussion of the distinction between "active" and "passive" classes of exploitation or victimisation, below. For example, very active cases of exploitation, such as fraud and duress involve both manipulation and exploitation: the creation of exploitable circumstances and, naturally, the turning of those circumstances to one's advantage. See Section 3.2.1.1. below.

63 Cf. Goodin, Exploitation, 168; Feinberg, op. cit., 208, who uses the basis of this distinction to distinguish exploitation from coercion: 'Exploiters are typically opportunists; they extract advantage from situations that are not of their own making. Coercers, on the other hand, are typically makers, rather than mere discoverers and users, of opportunities. (The model coercer is the person with a gun who creates an exploitable situation by using the weapon to back up a threat.)'.

64 Goodin, Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities (1985), 38 (hereafter referred to as Goodin, Protecting the Vulnerable).

65 Ibid. Cf. also, id, 194: 'Taking advantage of that sort of structural weakness of other parties to a bargaining game [i.e., inequality of bargaining power] is, at root, what talk of economic exploitation is all about'.

66 Goodin, "Exploitation", 181 (emphasis added).

Being exploited cannot just be a matter of ending up alienated from something you have created, or of ending up getting less than you gave, or of ending up with less value than you have created. It is not a matter of how things end up at all. It is instead a matter of how you got there. (Ibid.)

Cf. also, Miller, op. cit., 161. Ultimately, if accepted, such a conclusion has very important consequences for our present understanding, and future development, of the law relating to objectionable behaviour in contract formation. See Section 3.2.1.1. below.

251
exploitation. We know that it is *unfairness* of some sort, but how does that unfairness manifest itself, and how are we to explicate it? Before proceeding to address such issues, the writer considers more fully the several elements (necessary and sufficient conditions) of the moral claim of exploitation.

2.2 The Elements of Interpersonal Exploitation

Broadly speaking, there are two necessary and sufficient conditions for interpersonal exploitation in bargaining. These are: (1) peculiarly asymmetric bargaining power existing between the negotiating parties;\(^\text{67}\) and (2) the superior party unfairly taking advantage of the opportunities thereby created. Each element requires further elaboration, however, which is undertaken below.

2.2.1. Peculiar Asymmetries in Bargaining Power

*Any source of power provides a kind of lever with which one person can move another, a means of influencing the other to act or refrain from acting in a certain way, a means neither rational nor straightforwardly coercive.*\(^\text{68}\)

What always makes interpersonal exploitation possible is the presence of exploitable circumstances. Such circumstances ‘can arise from a situation which is caused by the exploited, by accident, by natural law or even by the exploiter [himself].’\(^\text{69}\) In the precontractual bargaining relation, this generally translates into our needing to find relative, seriously unequal bargaining positions as between the parties to the relation, that is, non-equilibrium bargaining conditions. Broadly speaking, these conditions will obtain where one party *especially* lacks the normal capacities, either physical or mental, meaningfully to participate in bargaining activity, or, notwithstanding her

---

\(^{67}\) Power, like the vulnerability that creates it, is a matter of degree. We would naturally expect, therefore, that the law, like morality, would only to be concerned with significant (as opposed merely to ordinary) imbalances in contracting power. This point is discussed, *infra*, at Section 4.1.1.

\(^{68}\) Wilson, *op. cit.*, 304.

\(^{69}\) Carling, A., “Exploitation, Extortion and Oppression” (1987) 35 Political Studies 173, 184. Exploitation thus tends to display “active” or “passive” qualities accordingly. See text, *infra*, at Section 3.2.1.1.
otherwise possessing those ordinary capacities, she has, on account of the
conduct (or, in some cases, the lack of conduct)\textsuperscript{70} of the other party, or
because of the peculiar nature or complexity of the transaction itself,\textsuperscript{71} been
denied a "fair" opportunity so to exercise them.\textsuperscript{72} Most saliently, the
vulnerability must be 'particular' or 'peculiar',\textsuperscript{73} which on the writer's thesis,
seems to presuppose a vulnerability which in the circumstances takes one
out of equilibrium bargaining conditions and beyond the functionalist arena
within which strategic practices and individual responsibility is expected and
required. In any event, the inferior party's interests are or become peculiarly
sensitive to—can be strongly and adversely affected by—the choices and
actions of the other, superior party, and this resultant vulnerability is or
becomes the source of that other party's bargaining power.\textsuperscript{74} Exploitation, on
this analysis, consists in the wrongful exercise of the exploiter's bargaining
power, which in the present context translates into taking unfair advantage
of the exploiter's 'especially strong'\textsuperscript{75} position of strategic bargaining
advantage over the exploitee.

What is more, the power we are especially concerned with here is of a
distinctively interpersonal nature; such that it invariably results from the
personal or situational characteristics of the exploiter or the exploitee, or
both, or from the nature of the relation existing between them.\textsuperscript{76}

\textsuperscript{70} Most notably, as in the case of nondisclosure of basic facts, in particular where there is a
legal duty to speak. Generally, see Chapter Nine.

\textsuperscript{71} Most notably, as in the case of so-called "transactional disadvantage". See Section 4.1.1.
below.

\textsuperscript{72} Cf. H. L. A. Hart's "Responsibility Principle", elaborated in Chapter Three, Section 3.2.1.

\textsuperscript{73} Cf. Goodin, "Exploitation", op. cit., 189.

\textsuperscript{74} That is to say, there is no power if there is no susceptibility to the exercise of power. There
is no power without vulnerability, therefore.

\textsuperscript{75} Cf. Goodin, "Exploitation", op. cit., 167.

\textsuperscript{76} We may distinguish between three types of power: political, economic and personal.
Political power (of the sovereign state) relates to the right to compel by force. Economic power
relates to the idea of private property and inheres in the right to withhold property from
others. Personal power, however, derives from customary expectations in the role integrity of
others. By placing trust, in the broad sense, in others, one inevitably exposes oneself to the risk
that trust may be violated. Cf. Commons, J., Legal Foundations of Capitalism (1924), 34.
Accordingly, we must assess the comparative degree of control enjoyed by both contracting parties. Although one party may be endowed with great wealth, knowledge, judgment and experience, this does not, and should not, preclude a necessary enquiry into the other party’s ability effectively to insulate herself from the exercise of those strengths. Power is thus measured through the relative positions of the parties, such that A and B may each possess it in regard to the other. It may be, after all, that where powers are equal and opposite, as measured by a mutual set of advantages and disadvantages, they end up balancing themselves out.\(^{77}\)

While it would not be profitable, nor doubtless even possible, to list the myriad sources of interpersonal power,\(^ {78}\) it should be pointed out that bargaining parties are vulnerable to the exercise of power in two senses. In one sense, most contracting parties have a general capacity to produce a more specific form of power: interpersonal bargaining power. This they may do by wrongfully introducing an artificial power-enhancing element into the particular dealing inter partes, for example, by employing threats of physical violence, or by telling a lie, thereby upsetting the balance of the negotiations: subverting bargaining equilibria. Most contracting parties are vulnerable in a very broad sense to being subjected to improper motives for their actions in bargaining, but these general sorts of vulnerabilities are, in this context, only relevant to the extent they can be translated into more specific strategic

\[^{77}\text{With regard to} the unconscionable contract, it is not merely inequality of ownership but inequality of personal relations that is looked for if the contract is to be annulled... [It] is perfectly lawful ... to exercise either superior economic power or superior mental and managerial faculties, over others, provided advantage is not taken of recognized special personal relations of confidence, trust, dependence, or the like, which are deemed peculiarly liable to abuse. (Id, 58-9.)\]

Cf. also, Atiyah's distinction between 'large-scale monopolies' and 'micro-monopolies' or "situational" monopolies. He points out that economists are concerned with the former, while lawyers, at least in the context of duress, with the latter. Atiyah, P., An Introduction to the Law of Contract (4th ed., 1989), 289-90.

\[^{78}\text{Cf. Wilson, op. cit., 304, 315; Goodin, Protecting the Vulnerable, op. cit., 196.}\]

\[^{78}\text{A small list is provided in Chapter Three, Section 2.1.1.4. See also, text, infra, at pp. 274-75. For a further detailed philosophical discussion of the various sorts of exploitable traits or circumstances, and hence the various sources of interpersonal power, see Feinberg, op. cit., 205-15; Wilson, op. cit., 304-7. As Feinberg remarks, id, 205-6: 'Virtually any traits or circumstances are in principle exploitable, provided only that they are causally relevant to the exploiter's purposes'.}\]

254
bargaining advantages to others. In a different sense, however, power may exist merely on account of the disparity of bargaining abilities, skills, resources, naturally pre-existing between the parties, such that the superior party does not have to manipulate the bargaining conditions at all: he can exploit them as he finds them. In this case, a party is vulnerable to exploitation solely on account of the fact that she shares a bargaining relationship with the other party. Exploitation thus tends to display "active" or "passive" qualities accordingly, and so each case will take on slightly different normative dimensions of the notion of exploitation. This is a point to which we return below.

For all that, in precontractual relations, one party’s power almost invariably seems to result from a source of special or serious vulnerability, general or specific, pre-existing or created in the other party to the transaction, or arising out of the situation in which she finds herself vis-à-vis her exploiter—a vulnerability, in any event, which, if exploited, essentially forecloses, under functionalist criteria, the opportunity for the vulnerable party effectively to compete with the other party in the dealing between them. In one way or another, one party suffers from serious constraints on her ability to act "voluntarily" (in the broad sense of the term) in the transaction in question; the other party is either responsible for such constraints, or else knows, or, perhaps, merely has reason to know, of their existence. Bargaining power is largely a function of the various roles people play in conducting exchange.

79 According to Goodin, for example, "Exploitation", op. cit., 193, n. 33:

Some people are vulnerable to other people quite generally a large proportion of the time and with respect to a broad range of threats to their well being. Other people are vulnerable only to particular other people, or only in certain passing circumstances, or only with respect to a narrow range of threats. The more vulnerable people are to you, and you alone, in any given situation, the stronger your duty to protect them in that circumstance. But anyone who is vulnerable to you has, to the extent of that vulnerability and by reason of that vulnerability, a claim to your protection under this principle.

80 Section 3.2.1.1.

81 Interpersonal exploitation often amounts to taking advantage of some peculiar features of the situation in which the exploiter and exploitee find themselves. ‘Situation’ here may be defined so as to include a description of both personal characteristics and impersonal circumstances. Cf. Goodin, “Exploitation”, 166-7.
2.2.2. "Unfairness" — of "taking unfair advantage"

It is unfair to exploit the deficiencies of the imbecile, ... just as it would be unfair, and not just ordinarily dishonest, to steal from a blind man.82

[Exploitation] is a question not of interests but of ideals. Such conduct offends against an ideal of human excellence held by many people; that is why they condemn it.83

What brings about the circumstances of exploitation—peculiar asymmetries in bargaining power—is not what brings about exploitative exchanges. The former are necessary but insufficient conditions of such exchanges. They operate, so to speak, to create the mould within which whatever motivates individuals to engage in non-altruistic exchanges issues only in exploitation.84 To get rid of exploitation, then, we need to get rid of, or replace, exploitable circumstances rather than the exploiters themselves; for in view of the human condition, exploiters there will always be.85 No one, especially not the law, can ever hope actually to place every person at arm’s length and on an equal footing. In our inherently unfair world, riddled as it is with undeserved inequalities,86 the only plausibly available solution is an indirect one. Given the human propensity toward self-interestedness, the best society can do is to control the use of the unfair circumstances, or, more particularly, the use, in wrongful ways, of the power advantages that those circumstance give to one social member and not to


83 Hare, R., Freedom and Reason (1963), 147.

84 Cf. Steiner (1984), op. cit., 228.

85 An explanation of the occurrence of exploitable circumstances, moreover, would need to include certain generalisations about social relations, such as to imply that some kinds of societies contain exploitative circumstances while others do not. Cf. id, 229.

86 Generally, see Rawls, A Theory of Justice (1971); Sadurski, W., “Natural and Social Lottery, and Concepts of the Self” (1990) 9 Law and Philosophy 157. Cf. also, the comments in this regard made in Chapter Three, Section 4.
another.\textsuperscript{87} This we might do by requiring that a party desist from using its power in harmful or exploitative ways, or requiring it affirmatively to assist another party in a specific dealing between them, so as to create a \textit{de facto} relation of equality between them. Obviously, we must focus primarily on the \textit{abuse} of the power arising from vulnerability, rather than on the vulnerability or the inequality of power itself;\textsuperscript{88} for in the real world, there is usually no way for a superior party to divest itself of its power, and it would not be to the putative advantage of inferior members of society to prohibit contracts between the weak and the strong altogether.\textsuperscript{89} Moral or legal condemnation, therefore, must be dependent on the stronger party taking unfair advantage of its superior position. Moral or legal complaint must depend precisely upon the presence of exploitation.

What, then, is the difference between merely “utilising” another person for gain and “exploiting” that person? There is an element of \textit{wrongfulness} in exploitation that distinguishes it from other, legitimate forms of utilisation (advantage-taking). Exploitation is commonly considered unjust. A minimal characterisation of injustice is that it involves denying a person what is due to her: something to which she is entitled, something to which she has a right. An aim of a substantial part of this chapter, therefore, is to characterise more closely the precise nature of the wrongfulness—the injustice—involving in the act of exploitation.

\textsuperscript{87} What is more, people’s motivations are independent of the presence or absence of exploitable circumstances, so they cannot form part of our generalisations about the circumstances themselves.

\textsuperscript{88} Here, of course, lies the real complaint with Lord Denning’s so-called doctrine of inequality of bargaining power.

\textsuperscript{89} What is more, a party may have the capacity to exploit another, but treat that other fairly nonetheless.
Presumably, the wrongfulness of exploiting is connected, somehow, to its unfairness;\(^ {90}\) for as has previously been noted,\(^ {91}\) there is a notion of "unjustness" or "unfairness" built into the species of advantage-taking known as "exploitation". To be sure, many expressions of unfairness have been read into the act of exploitation. These include, for example: the use of independently wrongful acts, such as the use of threats or deception, antecedent to the act of exploitation;\(^ {92}\) the lack of reciprocity or selfishness\(^ {93}\)

\(^{90}\) Cf. Goodin, "Exploitation", 174. Some accounts of Marx's treatment of exploitation have suggested that what primarily makes exploitation evil is neither its unfairness nor its unjustness; that in many ways exploitation is an evil whether or not it is fair or unjust; see Holmstrom, N. (1977) 7 Canadian Journal of Philosophy 353. There seems, however, to be much confusion precisely as to what Marx's conception of exploitation is. For an explanation, see Buchanan, A., "Exploitation, Alienation, and Injustice" (1979) 9 Canadian Journal of Philosophy 121.

\(^{91}\) Section 2.1.

\(^{92}\) In many cases of exploitation, the exploiter engages in some independent form of moral or legal wrongdoing, such as the use of threats or deception, antecedent to his subsequent act of exploitation. Invariably, the benefit in this is that it often sets up a situation which he can later exploit. Later in the text, the term "active exploitation" is used to describe this form of exploitation. The term is to used, in particular, in contrast to "passive" cases of exploitation (see Section 3.2.1.1. below). Whilst it may be true that any notion of moral or legal wrongdoing is going to be particularly distinctive where coercive or fraudulent exploitation is concerned, and it is perhaps going to be a less distinctive feature where more passive forms of exploitation are in issue, the unfairness residing in those independent wrongful acts which make exploitation possible (that they deny their victim a "fair" opportunity truly otherwise to exercise her ordinary capabilities in bargaining, or subject her to an improper motive for action) is not the same thing as, and hence does not necessarily provide for, our source of moral or legal objection to the practice of exploitation. As Goodin reminds us:

\[
\text{Exploitation ... consists in wrongful behaviour, but not just any wrongful behaviour will merit that description. You do not (necessarily) exploit people whenever you lie to them, mug them or break a contract with them, even if that act redounds to your advantage. Exploitation does not consist of wrongful behaviour simpliciter. It consists instead of wrongful behaviour of a particular sort, the violation of some particular norm in some particular way.}
\]


Indeed, where the introduction of bargaining power antecedent to the act of exploitation involves independent moral wrongdoing, legal censure may come about through the rules and principles of criminal law, tort law, or perhaps the so-called law of restitution, but the rules
inherent in acts of exploitation; the fact that exploitation almost invariably involves "using" other people, either with or without their consent; the

and principles which typically apply once a contract has resulted are never concerned with such wrongful behaviour simpliciter. In the contractual realm, it seems that a legal claim does not crystallise until the precise moment the antecedent wrongful behaviour causes another to enter contractual relations with the wrongdoer. The doctrines we are concerned with here are attracted by, and attach to, successful acts of exploitation only.

Selfishness and self-interestedness, while overlapping, are not synonymous terms. As Tormey points out, op. cit., 209-10, selfish behaviour is behaviour that ignores, disregards, or fails to take proper account of the interests of others in circumstances where such interests ought not to be ignored, disregarded, etc. Characteristically, perhaps, exploitation thus tends to involve a particular form of self-interestedness: the pejorative, "selfishness".

Whilst power over another may be exercised for one's own benefit, for the benefit of the other, for the shared benefit of them both, or for the benefit of some third party or larger group, when we think of interpersonal exploitation we almost always tend to think of a self-interested exercise of power (Wilson, op. cit., 307). Tormey, too, connects exploitation with selfishness (op. cit., 209). After all, as our initial definition suggests, exploitation involves taking unfair advantage for one's own advantage or benefit; or perhaps for the advantage or benefit of a third party claiming through oneself.

A second way of reading the unfairness which lies at the heart of exploitation, therefore, is in terms of a certain form of asymmetry—that the unfairness involved in interpersonal exploitation might be seen as 'a certain kind of lack of reciprocity': Cohen, G., "The Labor Theory of Value and the Concept of Exploitation" (1978) 8 Phil. & Pub. Affairs 338, 343; cf. also, Goodin, "Exploitation", op. cit., 175-7; Feinberg, op. cit., 223-4; Wilson, op. cit., 301. Indeed, exploiters typically do good things for themselves at the expense of their victim's vulnerabilities, even if the particular expelitee cannot be said to have been in any sense "harmed" through the transaction. Many central cases of exploitation, therefore—economic exploitation especially—display precisely this form of 'moral parasitism'. Exploiters characteristically take more in a relationship than they give: Tormey, for example, op. cit., 207-8, suggests as one of her four conditions to exploitation, that exploitation resembles a zero-sum game—what the exploiter gains, the expelitee loses; or, minimally, for the exploiter to gain, the expelitee must lose; and exploiters are, in this sense, 'cheaters' or 'free-loaders' (cf. Feinberg, op. cit., 223).

As Goodin points out, however, the reciprocity analysis does not offer a wholly adequate account of the unfairness residing in exploitation. He argues ("Exploitation", op. cit., 175) that it is surely wrong to suggest that every time someone receives less out of a bargaining relationship than what she put in, she has, by virtue of that fact alone, been exploited. There may be any number of reasons for someone driving a bad bargain: perhaps that person was simply not prepared to shop around for a better price; perhaps the exchange concealed a gift. What is more, there appear to be many human transactions, though outside the realm of economic relationships, which, despite the lack of reciprocity, remain inherently non-exploitative. Again, the free and simple giving of a gift between those in an affectionate relationship perhaps provides the most salient example. And to push the point one step further, the simple fact that we can have such a thing as "reciprocal" or "mutual" exploitation [see note below]—so that A exploits B relative to x; and B exploits A relative to y—causes one to suspect that non-reciprocity is not even a necessary, let alone a sufficient, condition of exploitation. To take Goodin's examples of the relations between a monopolist and a monopsonist, or between the dowager and the gigolo: 'Such relationships are undeniably

259

Note: According to Tormey, *op. cit.*, 212, in cases of mutual exploitation, ‘each gets more than a fair share of some burdens (or benefits) and less than a fair share of others’. Where there is exploitation of two people by one another, the fact that such exploitation is mutual or reciprocal does not cancel our objections to the practice, rather it doubles them! (*ibid*). This is a clear application of the maxim that two wrongs do not make a right.

According to Tormey, one of the reasons why mutual exploitation does not collapse into fair exchange is that the parties’ interests are not adequately acknowledged from the start—the parties do not begin in the Rawlsian “original position” of equality. Hence, a distinguishing feature of exploitation and fair exchange may be seen in the Tormey’s conviction that ‘fair exchange’ indicates that another person’s interests have been sufficiently taken into account; whereas exploitation suggests quite the contrary: ‘The difference between mutual exploitation and fair exchange, then, is directly related to everyone’s interests receiving, from the very beginning, the recognition they deserve’ (*id.*, 212-3).

A final point Tormey makes, to avoid possible confusion about the relationship between mutual exploitation and fair exchange, is that mutual exploitation by no means signifies equal exploitation. It is unlikely that in most cases of mutual exploitation the parties would be willing to exchange roles on the part of those whose excuse for exploitation is that they too are exploited (*id.*, 213).

95 This is a standard deontological objection, for “using” people denies a fundamental respect for them. Cf. Tormey, *op. cit.*, 221, n. 1: ‘One cannot use persons with the same moral impunity with which one may use mere things’. Fried, too, conveys a similar, though fleshed-out, message in strongly deontological terms:

The substantive contents of the norms of right and wrong express the value of persons, of respect for personality. What we may not do to each other, the things which are wrong, are precisely those forms of personal interaction which deny to our victim the status of a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality. To lie or do intentional, grievous harm to the body of another represents a denial of the personal status of that other.... If we use harming another as the means to our end, then we assert that another person may indeed be our means.....

Fried, C., *Right and Wrong* (1978), 28-9. Despite the fact that such a belief is well entrenched and widely shared in our moral thinking, no one would, of course, baldly assert that “using” people is always wrong. Consequentialism, for example, such as utilitarianism, would permit using a person where the result of such use produces what is “good”. Even the strict Kantian non-consequentialists, moreover, would not deny that people may be used as means; but they object to people being treated merely as means. A proper assertion, therefore, is likely to go along these lines: whilst it is generally true that morality imposes severe constraints on our treatment of others, it does not prohibit all forms of using. It then becomes a task for the moral philosopher, whatever his or her angle, to account for particular prescriptions and proscriptions.

It has been questioned, however, whether our commonsense views about using persons can play an important role in this inquiry. They tend to be too variable and inconclusive to provide us with a clear, neutral or authoritative basis for sounding out guidelines on the permissible limits to using others: Davis, N., “Using Persons and Common Sense” (1984) 94 Ethics 387.
fact that exploitation involves using people in ways that are harmful to
them, and the fact that acts of exploitation involve a measure of inequality

For our beliefs in these matters are ones that shape and are shaped by our
views about what role morality should play in the conduct of our interpersonal
transactions and relationships and what significance these interactions are to
be accorded from the moral point of view. These are some of the most
important questions that confront us as serious moral agents, but they are not
ones that can be answered—or even seriously addressed—without recourse to
moral theory. (Id., 405.)

Accordingly, such an interpretation of the unfairness residing in exploitation proves to be less
than wholly satisfactory. While using another person seems to be a necessary condition of
exploiting her, it surely cannot be treated as a sufficient condition. Indeed, in a world where
all of us depend on the specialized functions of others, we need to use others—“using” people is
(1977) 88 Ethics 283, 293; and the writer’s own discussion in Chapter Three, Section 1. It
naturally follows that there must be many ways of “using” another person without necessarily
doing her a wrong. Lawyers, for example, use auto mechanics to get their cars repaired, and
auto mechanics use lawyers to get legal advice and services. It would not seem correct to speak
of the above case of “using” as necessarily “exploitative”; there appears to be nothing “wrong”

96 The relation between lawyers and auto mechanics, however, may lose its exploitative
flavour for the very reason that the “using” between them is consensual. Hence, it may be
claimed that ‘consent qualifies the wrongness of using people’: Goodin, ibid; cf. Feinberg, op.
cit.; Kleinig, op. cit.; Tormey, op. cit., 214-5. In such a case, people are—as Kant would say
(Kant, I., Foundations of the Metaphysical of Morals (1959, ed.), 46-8)—being treated as ends
in themselves, and not merely as means. According to this formulation, therefore,
exploitation—the wrongful use of another person—consists not just in using that other person,
but in using her without her own consent: cf. Feinberg, op. cit.; Kleinig, op. cit.

But even here we do not find a wholly satisfactory account of the unfairness (wrongness)
inhering in exploitation. For as Goodin points out, it is strongly arguable that there are some
uses to which people should not be put, even with their full, informed, and genuine consent, for
example, selling or renting body parts: cornea, womb, kidney, etc.: Goodin, “Exploitation”, op.
cit., 179; cf. also, note on “alienability” in Chapter Three, n. 309. And conversely, too, it is
also possible to use people without their consent and still not exploit them; ‘I do not wrong, nor
hence exploit, an enormously large spectator at a race meeting when standing in his shadow to
block the blinding sun’: Goodin, ibid. There would, accordingly, appear to be no essential
analytic connection between consent and exploitation. Importantly, however, consensual
exploitation seems often not subject to legal correction. But this is not to qualify our moral
judgment about the nature of the conduct in question. Cf. Section 3.1.1.

97 To take the wrongful-use analysis one step further: using a person is wrong when that person
is harmed thereby [see note below]. According to this reasoning, exploitation consists in the
Panichas, op. cit., 231; Miller, op. cit., 164, n. 5; This issue is highly contentious, however,
both in law and in morals: cf. Goodin, “Exploitation”, 173, n. 9. However, whilst it may be
contingently true that victims of another’s “using” almost invariably suffer a loss in their
alienable resources, such a condition is neither a necessary nor sufficient condition for
stigmatising the offending behaviour as exploitative. There appears to be no analytic link
between exploiting a person and materially harming her (cf. Blum, L., “Deceiving, Hurting

261
in the final distribution of contractual burdens and benefits (profits and losses). And while all of these things may capture a distinctive normative dimension of many acts of exploitation, none of them appears to provide a wholly adequate account of the unfairness, and hence the wrongfulness, residing in that act.\footnote{See discussion in nn. 92-97, supra.} In the present context, the question of unequal distribution in the resultant exchanges deserves to be highlighted in particular; for exchange is what contract is fundamentally concerned with.

2.2.2.1. Substantive fairness: the final distribution of burdens and benefits

The particular wrongfulness that inheres in exploitation can be measured in at least two different ways. First, it may be viewed as being identical with unfair treatment of the exploitee, and hence residing in the processes of the dealing in question. Second, it may be viewed in an incidental or contingent fashion, as measured through the consequences of

and Using,” in Montefiore (ed), Philosophy and Personal Relations: An Anglo-French Study (1973), 34-61); but if in fact there is one, it is a strong empirical connection only. Goodin (“Exploitation”, op. cit., 193, n. 8), does however point out that while there need not be material losses to the victim of exploitation, as Goodin’s analysis is concerned with showing, it is necessarily the case that the exploitee suffer losses compared to some ‘moralized baseline’, which Goodin generically characterised as a ‘norm of fairness’ (ibid).

Greater difficulties arise, however, for the adherents to the “harmful use” test of exploitation: namely, it must be settled whether we appeal to objective or subjective standards of harm in such cases, or to a mixture of both. It is quite possible that a situation may arise where a relationship exists which is, objectively, indisputably exploitative and harmful, but which is nonetheless subjectively valued by the exploited party. Many relationships between friends or lovers, for example, display precisely this quality: cf. Wilson, op. cit., 308-9. The converse might also obtain. For a more detailed discussion of the possible relationship between hurting and using, see Blum, op. cit.

Note: It may be pertinent to refer to the distinction Feinberg makes between the two senses of ‘harm’ (op. cit., 225). In one sense, the exploiter “harms” the exploitee when his behaviour ‘invades and sets back one of [the exploitee’s interests]’—the exploitee is left worse off than she was before her dealing with the exploiter. In another sense, the exploiter may “harm” the exploitee merely by wrongdoing the exploitee—in this sense he ‘treats [her] unjustly, and violates [her] rights or deserts’. Nearly all cases of harm in the second sense (wrongs) will also be cases of harm in the first sense (invaded or set-back interests), but as Feinberg points out (ibid), the converse need not necessarily obtain: the harm may have been incurred in the context of fair competition, or through the exploitee’s consent of the risk of such harm occurring, or indeed at her request.
the exploitative act: say, from the unfairness evident in the subsequent gains or losses.\textsuperscript{99}

Since the chief focus here is on interpersonal exploitation in exchange relations, one might be excused for thinking that it would be easiest, and most appropriate, to define the unfairness residing in exploitation in terms of "substantive" unfairness: in terms of the resultant transaction's outcomes, in particular as these are measured primarily through the ultimate division of benefits and burdens flowing from the relationship.\textsuperscript{100}

One might equally be excused for assuming that it would be relatively straightforward to measure "fairness" in the final distribution of benefits and burdens in the typical market exchange transaction between relative strangers. Since both parties are creating and exchanging valuable commodities, it might be most appropriate to apply some objective measure to their dealing, as determined, for example, through the "going price".\textsuperscript{101} Hence, according to Marxian analyses, for example, exploitation consists in a more-or-less one-way, heavily one-sided, transfer of value: of receiving

\textsuperscript{99} Cf. Feinberg, \textit{op. cit.}, 219-20:

It is more difficult to characterize the nature of the wrongfulness involved in exploitation.... In some cases, the wrongness appears to be identical with unfair treatment of the exploited party, or treatment that would have been unfair but for the exploited party's consent. In other cases, unfairness may be incidentally involved as one of the consequences of the exploitation, although the wrongdoing that renders the treatment exploitative is ... a distinctive and irreducibly independent kind of wrongdoing, quite separate from the unfairness of the subsequent gains or losses.

\textsuperscript{100} Such an approach is especially characteristic of those who focus narrowly on a concept of economic exploitation—notably the mainstream Marxian analysts. To them, exploitation consists in an unfair distribution of profits and losses between the parties to the transaction or dealing in question. According to this analysis, exploitation inheres in the end-state; the processes leading up to it are seen as causing exploitation rather than constituting it.

\textsuperscript{101} Many Civilian Codes, for example, incorporate a concept of "just price". Article 1674 of the French Civil Code, for example, effectively provides that the vendor of reality can avoid a contract if she receives less than 5/12 of its value. Cf. also, Eisenberg, "The Bargain Principle and its Limits" (1982) 95 Harv. L. Rev. 741, 748-9, n. 17. Eisenberg also suggests, id, 746, that the contract price is normally the most efficient price, in the economic sense, because allowing the price of a commodity to be determined by the interaction of buyers and sellers will normally move the commodity to its highest-valued uses, as expressed by the amounts competing buyers are willing to pay, and will best allocate the factors necessary for the commodity's production.

263
commodities objectively less valuable than the ones you yourself created and exchanged.\textsuperscript{102}

But an objective measure is not always meaningful in contract, even in the case of discrete market exchanges, because the value of the performance is that which the parties assign to it:\textsuperscript{103} The value of all things contracted for is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give.\textsuperscript{104}

This idea, for example, is fundamentally reflected in the contract rule that the courts will not enquire into the adequacy of consideration.\textsuperscript{105} There can thus be no independently authoritative standard for comparing the value of objects, except the voluntary and mutual wills of the exchanging parties themselves;\textsuperscript{106} although we might like to raise suspicions of wrongdoing from an unfair exchange, in turn requiring that the most enriched party further explain the apparent lack of equivalence.\textsuperscript{107}

As David Miller has argued, however, value-transfer approaches to exploitation can be widened beyond particular Marxian limitations, applying.

\textsuperscript{102} Cf. n. 44, supra. The commodities created and exchanged that Marx was focusing on, of course, were capital and labour. The measure of value was the labour time socially necessary to produce each commodity. This feature of Marxian analysis also has direct bearing on what was said in respect to lack of reciprocity, above (n. 93).

\textsuperscript{103} Cf. per Lord Diplock in Photo Production Ltd v. Securicor Transport Ltd [1980] A.C. 827, 848: It is a 'basic principle of the common law of contract ... that parties to a contract are free to determine for themselves what primary obligations they will accept'.

\textsuperscript{104} Hobbes, T., Leviathan (1651), 75. Cf. von Mehren, A., "The French Doctrine of Lesion in the Sale of Immovable Property" (1975) 49 Tul. L. Rev. 321, 325:

Things do not in general have a true price, or a just price; they are worth less to one person, more to another; the degree of luxury, the utility, the varying situations of the parties, there are plenty of reasons for different evaluations: but the price is known only by the agreement itself; it establishes the price, and the price should not be sought elsewhere.

\textsuperscript{105} Cf. also, Brudner, A., "Reconstructing Contracts" (1993) 43 U. Tor. L.J. 1, esp. at 43-5.

\textsuperscript{106} But the types of transactions we will be considering here lack the very element of voluntariness that allows us to say that the values exchanged are equivalent.

\textsuperscript{107} Further, see Section 4.1.2.3.
moreover, to market transactions generally. While an exploitee would rather exchange with her exploiter than do nothing at all, Miller argues, 'at the same time there is some third hypothetical transaction which [she] would prefer to engage in still more, forming a bench-mark against which we judge the actual exchange to be exploitative'. According to Miller, two conditions must be fulfilled before a market transaction can be identified as exploitative:

First, the transaction must typically be more advantageous to the exploiting party and less advantageous to the exploited party than some benchmark transaction which we use (tacitly or explicitly) as a point of reference [(so that in the standard case the exploiter gains and the exploitee loses relative to the benchmark)]. Second, the actual transaction must have come about through some special advantage which the exploiter enjoys, upon which he capitalizes to induce the exploited to engage in this relatively less beneficial exchange.

On Miller's analysis, both the terms of the exchange and the causal history leading up to it are necessary ingredients in identifying a case of

---

108 Miller, op. cit., 150.

109 This assumption is correct in most cases of exploitation. However, it seems to overlook the important possibility that the party might reasonably prefer not merely to have contracted on terms more favourable to herself than under the present status quo, but not to have contracted at all, for example, in the case of physical coercion. This problem is all too symptomatic of the value-transfer theories of exploitation, which do not seem to consider that the contractual status of the parties, as opposed merely to the contingent burdens and benefits flowing thereunder, is itself as an advantage seized in an act of exploitation.

110 Id, 149. Problems abound, of course, in determining what the appropriate bench-mark should be. Various bench-marks are possible. For these, reference may be had to Miller, op. cit., 149-56, who critically surveys many of these. Because nothing in this thesis ultimately turns on the point, however, the full substance of Miller's survey is not repeated here.

111 The bench-mark transaction Miller suggests is one which occurs at what he terms 'equilibrium prices'. An 'equilibrium price' is the price toward which every commodity gravitates under conditions of free exchange. This gravitation is determined by factors of two kinds: first, natural facts about the world, human preferences, and the availability and distribution of skills and talents; and second, basic entitlements of individuals participating in the market, including entitlements to natural resources and personal assets, as determined by the prevailing rules of property. There appears, therefore, to be the need here for making some assumptions about the "normal" state of the world; hence, the second kind of factors must potentially give rise to some matters of controversy.

112 Id, 156.
market exploitation.\textsuperscript{113} And yet, while Miller’s theory of economic exploitation may be more persuasive than some,\textsuperscript{114} it is at variance with the somewhat broader approach taken here. Exploiters themselves, or third parties at their direction, must gain as a result of their exploitative acts,\textsuperscript{115} and most often it is contingently (empirically) true that the expellee is harmed and suffers loss in proportion to that gain,\textsuperscript{116} but this writer takes it as axiomatic that the benefit, profit or advantage that results from an act of contractual exploitation is the having of the contract itself.\textsuperscript{117} There may, of

\textsuperscript{113} This is best demonstrated through a fairly stereotypical “distress-situation” example, used by Miller himself (cf. also Eisenberg’s example of The Desperate Traveler: “The Bargain Principle”, op. cit., 755): A, while driving along a deserted highway, runs out of petrol. She is miles away from the nearest service station. B happens upon her at the side of the road and offers to sell her petrol for $5 a litre. A would rather engage in this transaction than not, but would prefer still more to buy the petrol for $1 a litre, the price which B paid for it that morning in the service station. On a value-exchange analysis of exploitation, therefore, B is exploiting A to the extent of $4 a litre, the difference between the terms of the actual exchange, and the terms of the hypothetical bench-mark exchange. One major problem with Miller’s reasoning here, however, is the fact that Miller is treating exploitation essentially as a scalar category rather than a modal one. That is, Miller seems to be concerned not with our modal judgment of whether party A has or has not been exploited, but rather with the subsequent scalar one of the extent to which she has been exploited. For a fuller analysis of this distinction, see Section 3.1.1.

\textsuperscript{114} While Miller believes that exchange at non-equilibrium prices is a necessary condition for exploitation, it is clearly not sufficient; this is why he adds the second condition to his formulation of exploitation, thus mitigating the strict and narrow approach taken by pure value-transfer theorists, such as Marxians, to the problem of economic exploitation. Miller’s approach, moreover, applies to exploitation in markets generally, whereas Marxians concentrate specifically on exploitation in a particular market: the labour market. In addition, Miller’s approach is developed around interpersonal economic dealings, whereas Marxians tend to focus on exploitation between groups or classes: workers and their capitalist employers. Marxian objective-value theory, therefore, is unable to provide us with a general account of exploitation in the market.

\textsuperscript{115} Cf. Feinberg, op. cit., 215; Goodin, “Exploitation”, op. cit., 172, Tormey, op. cit., 210-11. It may be recalled from our definition of exploitation above, that some subsequent benefit must accrue to the favour of the exploiter, or to a third party, such as the exploiter’s agent, spouse, etc. Thus, Tormey comments: “A exploited B, but failed to benefit (gain) from it” is self-contradictory: id, 210. Where the exploiter fails to realise a perceived benefit from his act, we cannot sensibly say that his was a successful act of exploitation—a fortiori, an act of exploitation at all.

\textsuperscript{116} This proposition is consistent, therefore, with what Tormey, op. cit., 208, 211, presents as her third condition of exploitation: that ‘[e]xploitation resembles a zero-sum game, viz. what the exploiter gains, the expellee loses; or, minimally, for the exploiter to gain, the expellee must lose’.

\textsuperscript{117} See per Mason J. in Commercial Bank of Australia Ltd v. Amadio (1983) 151 C.L.R. 447, at 464; cf. Deane J., id, 489. Professor Birks, too, argues, in the restitutionary context, that the
course, be other sorts of more tangible or palpable benefits, profits, or advantages resulting from this having of the contract—benefits arising out of the actual or potential performance of the contract—but on a proper analysis, these secondary sorts of benefits, profits or advantages are themselves contingent, in an empirical or causal sense, on the first sort of benefit, profit or advantage: the right to the contract itself.\textsuperscript{118} It naturally follows, therefore, that an act would not necessarily lose its exploitative flavour if at the time of seizing his strategic advantage over the exploitee the exploiter \textit{thought} that his act would profit him in both senses of the notion of “benefit”—the right to the contract itself \textit{and} the contingent benefits flowing therefrom—where in fact it later transpired that he was mistaken and that he was profiting in the first sense only. In such a case where the exploiter has made a bad bargain, it may be true to say that his act of exploitation has “backfired”, but it nevertheless remains, on the conception advanced here, a “successful” act of exploitation.\textsuperscript{119}

\begin{footnotesize}

\textsuperscript{118} Conversely, assuming the zero-sum relation, the burden, harm or loss occasioned on the exploitee in an act of contractual exploitation must carry a corresponding interpretation. What the exploitee essentially suffers through being “exploited” in the present context is that she is potentially bound to terms that she would prefer to have avoided. Invariably she will suffer any number of other sorts of more tangible loss as a result of the desired bargain (lost expectations, opportunities, or property; pecuniary, out-of-pocket losses), but these too are themselves contingent on her first suffering the burden of being bound to her exploiter in contract.

\textsuperscript{119} As Tormey remarks, one of the ways in which exploitation can be differentiated from other forms of use is that it necessarily results in ‘gains’. In Tormey’s words, exploitation has a ‘success condition’ built in: \textit{id}, 210. The “gain” in the present context is the contract itself, whether it might be considered “good” or “bad” in terms of the benefits and burdens distributed thereunder.

\end{footnotesize}
Now, all this is not to say that the ultimate distribution of benefits and burdens arising from an act of exploitation ought to be disregarded from our enquiries altogether; it is quite the contrary. All the writer argues here is that there is no necessary analytical connection between outcomes and the constituent elements of the form of conduct we understand to be "exploitation". Unfairness in the final outcome of an economic transaction does not necessarily account for the unfairness (hence, wrongness) residing in the act of exploitation itself. There may, however, be a strong probative connection between the substantive outcome of an exploitative dealing and a legal conclusion about the processes that allegedly produced the outcome. We shall return to consider this connection below.\footnote{See Section 4.1.2.2.3.}

\subsection*{2.3. Exploitation as a Processual Conception}

While "using" people to one’s own, or a third person’s, advantage would seem to be a necessary, but not sufficient, condition of exploiting them, a proper understanding of the unfairness residing in exploitation seems to require ‘some specification of the ways in which people are being used’.\footnote{Goodin, “Exploitation”, 180.} This is partly a matter of looking at what is being used—‘the particular traits or circumstances of [the exploitee] that are being used’\footnote{Cf. Feinberg, \textit{op. cit.}, 217.}—and it is partly a matter of looking to the uses to which those things are being put.\footnote{Cf. Feinberg, \textit{id}, 204.} In the present context, therefore, the analysis of exploitation reduces to an examination of why, and in what respect, it is wrong—unfair, exploitative—to use certain attributes of one party and her situation for the purpose of procuring a bargain from her.\footnote{Cf. Goodin, “Exploitation”, \textit{op. cit.}, 181.} Thus construed, interpersonal exploitation involves a wrongful use of a contracting party and her circumstances, whether or not those circumstances were themselves a result of the actions of the exploiter.
A further consequence of this construction is that the essence of exploitation—the unfairness (wrongness) residing therein—must lie in some characteristic of the processes of a human dealing rather than in some characteristic of its outcome. The end-state analyses of exploitation, such as the value-transfer theories,\textsuperscript{125} fall into error precisely at this point. They fail to draw what the writer takes to be a crucial distinction. As was argued above, what is taken advantage of in an act of exploitation is an “advantage” of one sort (a “strategic” or “relative” position of advantage vis-à-vis the exploitee: advantages\textsubscript{1}) for the purpose of gaining yet another—a different—sort of “advantage” (a “substantive” or “material” advantage or benefit: advantages\textsubscript{2}).\textsuperscript{126} End-state analysts, however, erroneously suppose that the advantage taken in the act of exploitation is some benefit itself (advantages\textsubscript{2}) rather than merely some means to obtaining a benefit (advantages\textsubscript{1}). But “taking an advantage is not the same thing as taking [the] good itself”.\textsuperscript{127} Exploitation in exchange relations simply cannot be reduced to unfairness in the final distribution. Some unfair distributions seem to arise without exploitation by one of the parties (say, in a case of theft), while some objectively fair distributions seem to arise even where we can say with confidence that one party has acted exploitatively: say, gun-to-head threat employed to coerce a sale at fair market value.\textsuperscript{128} Exploitation, therefore, cannot be a matter of where a party ends up at all; it is, rather, a pure matter of how she got there.

In explicating the evils of exploitation, Goodin resorts to a ‘game analogy’,\textsuperscript{129} and links the unfairness rooted in exploitation to the Rawlsian tradition of viewing principles of justice as ‘solutions’ to certain ‘games’,\textsuperscript{130} wherein ‘justice’ is thought of as a ‘pact between rational egoists[,] the

\textsuperscript{125} See Section 2.2.2.1.

\textsuperscript{126} Cf. text, \textit{supra}, at p. 250.

\textsuperscript{127} Cf. Goodin, “Exploitation”, \textit{op. cit.}, 168.

\textsuperscript{128} Cf. the fact pattern in \textit{Barton v. Armstrong} [1976] A.C. 104.

\textsuperscript{129} Goodin, “Exploitation”, \textit{op. cit.}, 183.

\textsuperscript{130} See Rawls, “Justice As Fairness” (1958) 67 Philosophical Review 164, 176.
stability of which is dependent on a balance of power and a similarity of circumstances'. According to Rawls,

[j]ustice is the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights on each other.

Fundamental to our sense of justice, moreover,

is the concept of fairness which relates to right dealing between persons who are cooperating with or competing against one another, as when one speaks of fair games, fair competition, and fair bargains. The question of fairness arises when free persons, who have no authority over one another, are engaging in a joint activity and amongst themselves settling or acknowledging the rules which define it and which determine the respective shares in its benefits and burdens.

Parties who are negotiating with a view to entering contractual relations seem to fill this bill precisely.

Within the bargaining context, therefore, each contracting party has what Rawls terms a ‘duty of fair play’, which denotes a form of procedural fairness, and which is designed to ensure the same:

A practice will strike the parties as fair if none feels that, by participating in it, they or any of the others are taken advantage of, or forced to give in to claims which they do not regard as legitimate.

---

131 *Id.*, 174.

132 *Id.*, 175.

133 *Id.*, 178.

134 *Id.*, 180.

135 Rawls uses the term “practice” in a technical way, as being synonymous with “social institution”. It refers, therefore, to ‘any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure’. He gives as examples, ‘games and rituals, trials and parliaments, markets and systems of property’. (*Id.*, 164, n. 2) The activity of “bargaining” can hence be seen as a “practice”. Rawls does not, however, take up the issue of justice being a virtue of particular actions or of persons, which are connected to practices but not identical.


270
"Unfair play", according to Rawls, simply means playing at variance with the formal rules and informal ethos of the game at hand:

Usually acting unfairly is not so much the breaking of any particular rule, even if the infraction is difficult to detect (cheating), but taking advantage of loop-holes or ambiguities in rules, availing oneself of unexpected or special circumstances which make it impossible to enforce them, insisting that rules be enforced to one’s advantage when they should be suspended, and more generally, acting contrary to the intention of a practice.137

Viewed in this light, exploitation—taking unfair advantage—can be construed as ‘availing oneself of the strategic opportunities which are denied to one under the rules and ethos [of bargaining].’138 It amounts, in this way, to one’s failing to have a sense of a certain occasion; of somehow abusing the processes of bargaining; of using the particular bargaining occasion in ways which are contrary to its assumptions, intentions and true purposes,139 which are themselves moulded under our bench-mark set of equilibrium bargaining conditions, and which were discussed in Chapter Three.140

predicts that people will desire resources to be allocated in proportion to their contributions; the more one puts in, the more one gets out: id, 536.

137 Id, 180.


139 In illustrating the notion of "unfair play", Steiner (op. cit., 227) proffers an example of someone who gorges himself at a charity banquet:

It seems unlikely that we should be inclined to judge this an "equitable transaction," "only fair," and so forth. We should want to say, rather, that [the person] was not acting within the spirit of the occasion, that he was not truly a benefactor.

140 Recall from Chapter Three the general observations made about the bargaining process: that it remains an indispensable and unavoidable, self-directed, free-form market process in which the parties are essentially left free to fix the terms they decide, and in what manner they decide, as well as assuming that the parties themselves will monitor their respective behaviour within the process. Given these special features and suppositions of bargaining, one can readily envisage ways in which the process might be abused. And exploitation, doubtless, provides the most salient example of such abuse, for it involves, after all, using the bargaining process in ways which are contrary to its assumptions, intentions and true purposes.

Recall, also, from Chapter Three, the general intentions and true purposes of the bargaining process. The principal object of the bargaining process is to render a joint decision—an agreement—between the parties. But not just any agreement fits the bill: it must be one that is "acceptable" or (ethically or legally) "valid". Such an agreement should satisfy the principles which those who would participate in it could propose to one another for mutual
Whilst the functionalist model of bargaining ethics assumes that parties must exercise some measure of responsibility for looking after their own interests in bargaining, these assumptions largely fail under the non-equilibrium bargaining conditions thought necessary to give rise to the possibility of exploitation.

On this account, it would seem that what qualifies as exploitative (unfair) must depend heavily on the context in which the parties' acts are performed—on the precise nature of the "game" which the parties are playing. What is considered perfectly legitimate in one bargaining context may be exploitative in another.\footnote{141} Differing industry customs and practices, known by all the participants, for example, might give rise to bargaining process expectations which differ from industry to industry. Likewise, what might be considered legitimate behaviour in a discrete or a commercial context, might be considered deeply exploitative in a relational or a more intimate relationship:

Even if I could establish that caveat emptor was the appropriate reciprocal standard in a house sale between strangers, I would have trouble explaining my silence about a defect known to me in a car which I sold my father.\footnote{142}

Now, if what counts as exploitative depends heavily on context, this in turn seems to require us to give some consideration to the underlying ethos, assumptions or purposes of the particular dealing in question. This is

---

\footnote{141} To illustrate how contextual factors may change the nature of the game, and thus the rules of play, Steiner contrasts his gluttonous diner's behaviour at the charity banquet with the same person's behaviour at a Christmas party given by his Scrooge-like employer. Whilst the person's conduct in the second case 'might similarly fail to arouse our admiration, ... the terms of our disapprobation [might] be significantly different from those in the first case' (id, 228).

\footnote{142} Hawkins, R., "LAC and the Emerging Obligation to Bargain in Good Faith" (1990) 15 Queen's L. J. 65, 68.
a theme that should become apparent throughout the remainder of this thesis.

2.3.1. Exploitation as an Abuse (Misuse) of Contracting Power

For Goodin's part, it naturally follows that interpersonal exploitation translates into 'a violation of the norms governing certain social interactions',143 and the generic unfairness associated with this, specifically, lies in 'playing for advantage in situations where it is inappropriate to do so'.144 What one party does in an act of exploitation is to seize upon and use a strategic advantage he holds over the other party to the dealing in question. Thus construed, exploitation in the present context essentially consists in an abuse of—or wrongful exercise of—contracting power.145 It involves playing games of power, strategy or advantage (of which we know bargaining to be a cardinal example)146 in ways or in circumstances which render such a game somehow inappropriate.

Precisely what conditions or situations will be deemed to render it inappropriate to play for advantage naturally vary from case to case. Characteristically, in cases of contractual exploitation, these conditions will invariably amount to what the writer has called 'non-equilibrium bargaining conditions',147 in which one party (the exploitee) is seriously unable meaningfully to participate—to act voluntarily, or to give a responsible consent—in the particular transaction or dealing between exploiter and exploitee. To be specific, that party is, in one way or another, generally or on this occasion only, either unfit or unable to play the particular game of power, strategy or advantage.148 Not surprisingly under such conditions, the

144 Id, 187.
145 Generally, see Wilson, op. cit.
146 See Chapter Three.
147 See Chapter Three, Section 3.2.1.
148 That is, generally unfit, or on account of the specific acts of the other bargaining party, or her peculiar relationship to him, specifically unable to participate in the bargaining exchange between them.
stronger party is readily presented with an opportunity to abuse the processual features of the particular bargaining relationship: to use that relationship in a way contrary to its "rules", which are shaped under our bench-mark set of equilibrium bargaining conditions. Exploitation may thus be seen as making non-paradigmatic use of the particular bargaining process or relationship, either by artificially upsetting the balance of the negotiations in the first place (coercion, fraud, misrepresentation, and the like), or by making unusual use of some pre-existing non-equilibrium state of affairs, or, rather, a use that would be considered "unusual" given a bench-mark equilibrium state; in any event, of turning non-equilibrium processual features unfairly to one's own advantage.\textsuperscript{149}

Now, the type of special vulnerabilities which under modern conditions make it wrong, unfair or inappropriate to play for advantage in any given bargaining relationship are, obviously, varied. For example, it may be thought wrong to play for advantage against those who are in some special sort of relationship with you: a friend, a family member, a beneficiary, perhaps a long-term business associate, or someone who has reposed trust or confidence in you, or has in some other way become reliant or dependent upon you. What characteristically seems to be "vulnerable" about these parties is that they are, potentially at least, all players who have in some way 'let down their guard' to you: who have, in part or in full, 'renounced playing for advantage themselves'.\textsuperscript{150} Putting to one side for the moment those cases where the exploiter is himself responsible for disturbing bargaining equilibria, there is a multitude of other kinds of situation where, for a variety of reasons, one party may be unfit or unable to "play" (i.e., meaningfully to participate) in games of strategy, power or advantage. It may be considered wrong, for example, to take advantage of those who are 'in no

\textsuperscript{149} This approach would appear to be consistent with Julius Sensat's second framework of exploitation, which views exploitation essentially as using something in a way for which the thing was not designed: a way contrary to its assumed nature or purpose: Sensat, J., "Exploitation" (1984) 18 Nous 21, 33-5. Cf. Goodin, "Exploitation", op. cit., 170.

\textsuperscript{150} Cf. Goodin, \textit{id}, 185. See also, Feinberg, \textit{op. cit.}, 207-8; Wilson, \textit{op. cit.} In law, these cases typically comprise the so-called relations of trust, confidence and influence; or, essentially, fiduciary law.
position to bargain',\textsuperscript{151} or who have no effective or reasonable choice but to
accede to whatever demands the other party may make,\textsuperscript{152} or who are
‘hopelessly outmatched’, in size, skill, knowledge, etc. as against their
opponent,\textsuperscript{153} or who are caught up in ‘rapidly declining positions’.\textsuperscript{154} All
cases of exploitation have something to do with the parties finding
themselves in a non-equilibrium bargaining situation: a situation where one
party is, or has been made, especially vulnerable to the actions and choices of
the party described as her “exploiter”, and who is, or is taken, thereby, outside
the conditions that morality and possibly the law define as necessary for
genuine, voluntary-hence-responsible consent.\textsuperscript{155}

Notwithstanding the obvious overlap among these aforementioned
kinds of situation, they all exemplify, in a general way, the sort of
vulnerability with which we are here concerned: one party is always

\textsuperscript{151} This category quite obviously casts a very wide net, enclosing the simpleton, the infirm, the
distressed, the morally weak, and so forth. See Feinberg, \textit{op. cit.}, 208-12, 222-4. In addition, it
seems to cover those situations where, notwithstanding a party’s normal capabilities, she was
‘in no position to bargain’ because there was no “fair” opportunity for her to exercise those
normal capabilities. Such is usually the case where there has been antecedent coercion, fraud
or manipulation, or perhaps where the party has been presented with a standard-form
agreement on “take-it-or-leave-it” terms, where there is no opportunity to negotiate
additional terms or to modify existing ones.

\textsuperscript{152} Cf. Feinberg, \textit{id}, 208-9, on ‘coercive offers’.

\textsuperscript{153} Cf. Goodin, “Exploitation”, \textit{op. cit.}, 185-6. A paradigm of this form of vulnerability or
exploitation is the monopoly supplier of some commodity which others desperately need; or
indeed any other case involving vastly disproportionate bargaining power.

\textsuperscript{154} Cf. Goodin, “Exploitation”, \textit{op. cit.}, 185. The so-called ‘lifeboat cases’ appear fairly well
to encapsulate this form of vulnerability and exploitation. See, e.g., \textit{Post v. Jones} (1856) 60
deciding financial situation.

\textsuperscript{155} In Chapter Three the conditions for voluntary consent were linked to the type of
advantages a party may legitimately use to advance his own interests (wealth) in virtue of
the bargaining advantages he possessed relative to the other party. It was noted, too, in the
course of that chapter, that people have a broad right not to have their just (alienable)
property transferred from them without their consent; indeed, it is for this reason that theft is
unjust. Exploitation can thus be viewed as an interference, indeed an abuse, of this inviolable
domain of practical freedom. In this way, consent and voluntariness—the voluntariness of
consent, to be sure—are connected to the unfairness about exploitation. An exploited person
does not, in the full sense of the word, transfer her property, including her services,
“voluntarily”. In the context of market exploitation, Miller (\textit{op. cit.}, 149), for example,
remarks that where one party exploits another through a market exchange, ‘the transaction
seems to hover uneasily between voluntariness and involuntariness’.

275
described as “especially vulnerable” to the choices and actions of the other party where, for whatever the reason, she is seriously unfit or unable to preserve her own interests in the particular transaction or dealing in question. Where the stronger party is not himself responsible for the other’s bargaining disadvantages, but knows, or possibly has reason to know, of that other’s extraordinary susceptibility to his choices and actions (to help or not to help), it may then be considered unfair, wrong or inappropriate—perhaps downright irresponsible—for him to play for advantage without further taking steps to preserve the interests of the weaker party. To press the point, it seems somehow unfair, wrong or inappropriate to play by equilibrium rules in non-equilibrium situations.

2.3.1.1. Exploitation as knowing violation of generalised duty to protect the vulnerable

One must not do any of the several things which would constitute abusing those who are particularly vulnerable to one’s actions and choices.

What should be apparent at this point is the way in which we begin to regard exploitation primarily as a matter of how closely one party has, on the occasion in question, not adhered to the standard canons of decent behaviour toward others who are or have become especially vulnerable to him. The notion of vulnerability, moreover, is particularly significant here; for it is, as we began to see in Chapter Two, somehow at the very heart of the moral—possibly-legal responsibilities which exemplify standards of good faith and fair dealing in contract formation. Put simply, common to all cases of exploitation seems to be the situation in which one party is, or has been made, particularly vulnerable, in one way or another, to the actions and choices of the other (stronger) party, and that vulnerability is exploited. The

156 In which case there is stronger reason for complaint. See Section 3.2.1.1.

157 While the moral analysis of exploitation would maintain that exploitation cannot be accidental or casual, its principal deficiency appears to be the lack of any sustained or in-depth analysis of the knowledge criterion in exploitation. See section 2.3.1.1. below.


160 Section 4.2.
existence of these same circumstances is said to give rise to a strong moral responsibility on the part of the superior party: (1) first and foremost, not himself to create exploitable circumstances (vulnerabilities) in the other contracting party; and, (2) affirmatively to protect the interests of that party who is otherwise particularly vulnerable: that is, whose interests are strongly, and potentially adversely, affected by his own actions and choices to help or to hurt, regardless of the particular source of the weaker party’s vulnerabilities. This responsibility both precedes and constrains any bargain struck between the parties, and its strength depends strictly upon the degree to which the one party can affect, and affect adversely, the other’s interests in the relation in question.

Thus, one has a general moral-possibly-legal duty to suspend the exercise of one’s general capacities to render persons especially vulnerable to oneself in bargaining, and, specifically, to refrain from subjecting a bargaining opponent to a motivation for action from which a responsible individual otherwise would, and deserves to, be free. Beyond this general duty, one also has a specific bargaining duty to take positive measures actually to assist those who are otherwise especially vulnerable to one’s decision not to help in situations of non-equilibrium bargaining conditions. John R. S. Wilson was best able to capture in a few words a peculiar mode of acquiring a responsibility toward another. In Wilson’s view, I commit wrong against another

by [my] choosing to benefit from a position of power in regard to [that other], whether through the active exertion of pressure upon him or through the passive acceptance of what he offers. By deriving advantage from his plight, freely and knowingly, I give him a legitimate claim against me. I bring him within my sphere of

---

161 Cf. Goodin, Protecting the Vulnerable, op. cit., 114.

162 The word ‘choices’ in Goodin’s formulation embraces both ‘choices to help’ and ‘choices not to help’ to cover both acts and omissions (ibid, n. 9).

163 Cf. discussion in Chapter Two, Section 4.2.

164 This corresponds to the second part of Goodin’s ‘First Principle of Individual Responsibility’: Protecting the Vulnerable, op. cit., 118. This principle is essentially what distinguishes an arm’s-length, equal-footing dealing (one party’s interests ordinarily weakly affected by the other’s choices and actions) from, say, a fiduciary dealing (one party’s interests very strongly affected by the other’s choices and actions). See Section 3.2.2.1. below.
responsibility and create a new moral relationship between us, a relationship which prevents me from resorting to the disclaimer: "He is none of my business." I have made him my business.\textsuperscript{165}

The wrong that Wilson is describing here is, of course, that which we understand to be "exploitation". It is especially noteworthy that his formulation consists not merely in the fact that one party has gained from a "voluntary" transaction with another, nor in the fact that a mere relationship of power existed between the parties. What further is required to establish exploitation was that the former's gain resulted from the power he possessed in regard to the other:

It is the fact that the gain to the one with power comes to him through his power that brings the other within his sphere of responsibility.\textsuperscript{166}

By exercising his power in this way, moreover, the superior party has consciously\textsuperscript{167} played for advantage in the face of a strong moral duty actually to protect—to assist, or at least to have due regard to the interests of—a bargaining opponent whose interests can be strongly affected by the superior party's own choices and actions. On our final analysis, the duty to protect the vulnerable gives rise, first and foremost, to a duty not ourselves to exploit them.\textsuperscript{168} And we seem to exploit them precisely at the moment we choose to.

\textsuperscript{165} Wilson, \textit{op.cit.}, 310 (emphasis added).

\textsuperscript{166} \textit{Ibid.} The language of Australian law in justifying intervention in the cases involving "unconscionable dealing", so-called, is remarkably similar. For example, as one commentator writes:

\begin{quote}
The gist of the [unconscionable dealings] jurisdiction is not simply inequality of bargaining power; nor is it such inequality in combination with an improvident arrangement. It is abuse of superior bargaining position: "it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabiling condition or circumstances."
\end{quote}


\textsuperscript{167} Exploitation at least impliedly contains a knowledge component. Tormey suggests, for example, that exploitation 'characteristically implies more than casual or accidental gain': Tormey, \textit{op. cit.}, 210-11. This writer views the element of knowledge as crucial to the definition of, and indeed the unfairness residing in, acts of exploitation.

\textsuperscript{168} Cf. Goodin, "Exploitation", \textit{op. cit.}, 189.
exercise our power, to elicit, or accept without assistance or warning, their behaviour, while consciously ignoring or failing to take proper account of, give sufficient weight to, their interests (operative goals) when they stand or have been put into a position especially disadvantaged to us.\textsuperscript{169} To press this point, nothing short of ‘positively play[ing] for advantage against those [you] are duty-bound not only not to press advantages against but actually protect’, warrants the description “exploitation”.\textsuperscript{170} Exploiters typically are not merely \textit{neglecters} of their duties to protect those who are vulnerable to them,\textsuperscript{171} they are characteristically \textit{negators} of them.\textsuperscript{172} This they do through using the opportunities—the resultant power—that another’s vulnerabilities give to them; knowingly using (turning to) their own or a third person’s advantage the source of that particular power. In this way, ultimately, the intentional or \textit{conscious} use of power over those especially or generally vulnerable to our exercises of such power—the violation of the especially strong duty to protect the vulnerable in that particular way—becomes the defining feature of interpersonal exploitation.\textsuperscript{173} So too, in the final analysis, the wrongness (unfairness) residing in exploitation, our source of moral objection about it, wholly derives from our sense of the wrongness (unfairness) of violating that particular duty in that particular way.\textsuperscript{174} It is this very abuse of the

\textsuperscript{169} Cf. Tormey, \textit{op. cit.}, 208, who states as her fourth condition of exploitation:

\begin{quote}
When the exploitee is a person, exploitation requires a violation of principles of fairness consisting in either a disregard for the exploitee’s interests or an infringement of the exploitee’s rights.
\end{quote}

\textsuperscript{170} Goodin, “Exploitation”, \textit{op. cit.}, 188.

\textsuperscript{171} As those who violate Lord Atkin’s neighbourhood principle in negligence are: see \textit{Donoghue v. Stevenson} [1932] A.C. 562, at 580.

\textsuperscript{172} Cf. Goodin, \textit{ibid.} But cf. n. 174, \textit{infra}.

\textsuperscript{173} These are the cases where the stronger party is guilty of disregarding the weaker party’s interests primarily as a \textit{means} to pursuing his own.

\textsuperscript{174} Obviously not all violations of the duty to protect the vulnerable involve exploitation. We cannot say, for example, that one party has exploited the other whenever he has merely failed to protect her interests, no matter how strong the responsibility to do so. Goodin (“Exploitation”, \textit{op. cit.}) would thus like to differentiate between ‘flagrant’ violations of the duty to protect the vulnerable and ‘mere’ violations of that duty. The latter form of violation involves the stronger merely neglecting his duties toward the weaker, whereas the former involves him actually negating them (\textit{id}, 188). According to Goodin, only ‘flagrant’ violation of the duty to protect the vulnerable warrants a judgment of exploitation. He illustrates the
parties’ bargaining relationship, this very misuse of contracting power, that constitutes the process we understand to be “exploitation”.

How strongly exploiters can be described as “negators” of their duties to protect the vulnerable, however, seems in the final analysis to be related directly to the degree of awareness that they must in morals possess of the exploitee’s position of special vulnerability. Must an alleged exploiter actually be aware of the exploitee’s exploitable circumstances? Or is it merely enough that he was sufficiently aware of such facts that would indicate to him, or perhaps the normal or ordinary person, the possibility of such exploitable circumstances? If moral philosophy does accommodate the second possibility, such that it would not be possible, say, for an alleged exploiter to shelter behind his own “wilful blindness”, then elements of both “neglect” and “negation” (of the duty to protect the vulnerable), or _putative negation_, may be a defining characteristic of some instances of moral exploitation. Whilst at least acknowledging that exploitation cannot be ‘accidental’ or ‘casual’, a regrettable deficiency in the philosophical literature relating to exploitation seems to arise from the apparent lack of difference by a simple example involving a blind man on a busy street. Simply letting the blind man walk into the traffic may violate one’s duty to protect the vulnerable, Goodin argues, but it clearly does not constitute exploiting him: it involves, according to Goodin, a ‘mere failure to discharge the duty to protect the vulnerable’. If one says, however, ‘Give me £5 or I will not tell you where the traffic is’, the blind man is exploited. Only by ‘playing for advantage’ (demanding £5) in the face of a duty not only not to play for advantage but actually to help, does one commit a ‘flagrant violation’ of one’s duty toward the vulnerable, hence committing an act of exploitation: _id_, 196, n. 34.

It is not clear, however, whether Goodin’s distinction between ‘flagrant’ and ‘mere’ violations is helpful, wholly accurate or comprehensive. Would the blind man be any less “exploited” if he had offered the sighted man the £5, when in morals no fee should be payable at all, and was accepted? Goodin’s example involves a decidedly _active_ form of exploitation; indeed, one which approximates coercion: a threat and demand, and a clear case of exploitation. It is arguable that the second case equally involves exploitation, but of a comparatively _passive_ kind. The language of “flagrancy” and “negation”, while clearly applicable to the first variety of exploitation, seem to be inappropriate to the spirit of the second kind. Does not the objectionability in exploitation simply stem from _consciously_ taking advantage of the power given by another’s vulnerability, such that the violation of the duty to protect that other—to assist or desist—is a _deliberate_ and not merely an accidental or casual violation? For these reasons, the present writer has avoided resort to Goodin’s language of “flagrancy”.

175 Cf. Tormey, _op. cit._, 210-11. The writer assumes that Tormey is not merely talking about causation issues here: _id_, 210 (‘In addition ... ’).
A rigorous analysis of this important point. Consistent with the legal analysis of exploitation furnished below, a moral test based merely on "conscious" or "intentional" exploitation is under-inclusive. For a variety of possible reasons, the law accepts that lesser levels of knowledge suffice for the charge of exploitation. Accordingly, while the moral analysis is relied on here to provide what is perceived to be a useful jurisprudential framework for considering exploitation problems in the law, an acknowledgement of the deficiencies of the moral analysis in relation to the knowledge criterion requires an acceptance that morality may on occasion have something

176 Judith Farr Tormey, *id*, 208-9, appears to be the only philosophical writer to contemplate the possibility that exploitation may involve something less than actual consciousness. She suggests that, as with murder (but not with signing a contract), a 'person need not know that in doing S he is exploiting for the relation to be one of exploitation': *id*, 209 (see "Note" below). One can exploit, says Tormey, 'without its being true that one set out intentionally to be an exploiter: *ibid*). Unfortunately, Tormey does not develop this point; and, as it reads, it is perhaps prone to suggest too low a standard of knowledge for the charge of exploitation. The tenor of the remainder of her article, however, seems to leave room for the idea of putative consciousness—i.e., exploitation cannot be 'accidental' or 'casual'—in which case a person might be deemed to be an "exploiter" (in the same way one can be deemed to be a "murderer" with less than malice aforethought) whether or not he had in fact actually turned his mind to the question of what he was doing.

Note: In drawing her conclusions about exploitation and the level of consciousness required, Tormey draws on Anscombe, "The Two Kinds of Error in Action" (1963) 60 The Journal of Philosophy, at 395:

... there is a contrast between actions of the type of making contracts and such actions as murder. You have to think you are making a contract in order to be doing so, whereas you do not have to think that what you do is murder in order for it to be murder. What is necessary for your action to be murder is that you deliberately do such an such; ...

Tormey's analogy between exploitation and murder, then, is one that requires some elaboration. In order for a causal death to be murder, at least in law, a requisite level of knowledge or foreseeability of the probability (as opposed to the mere possibility) of the consequences of one's actions must be attained by the actor. To be specific, short of actual malice aforethought, an element of murder is that the actor's level of consciousness (or *mens rea*) must reach an intention-like state, such as recklessness indifference. See *Royall v. The Queen* (1991) 65 A.L.J.R. 451, especially the judgment of McHugh J. Like murder, therefore, exploitation may also involve forms of consciousness less than actual intent or full knowledge, a possibility seemingly not fully appreciated by Tormey in her analogy with murder.

177 For example, it may be felt necessary to ensure that vulnerability is not exploited; or it may be perceived to be a necessary incidence of legal methods, such as those relating to the acknowledged difficulties of proving subjective knowledge in ways other than by reference to objective criteria; or it may simply be felt that "intention" or "conscious" is too self-serving for defendants: permitting them to hide behind their wilful blindness or other "I didn't know" defences.

281
conceptual to learn from the law, rather than the other way round. The knowledge requirement is discussed in greater detail in Section 4.1.2.1. below.

3. FROM MORAL TO LEGAL EXPLOITATION

The discussion so far has been undeniably abstract. Whilst this has been considered necessary in order to highlight the normative underpinnings of interpersonal exploitation, the writer would like now to refine his analysis and suggest how it might apply to the legal context of contract formation. The law, however, unlike morality, is especially charged with the unique task of providing an operational—functional and intelligible—basis for justifying intervention in voluntary and consensual dealings; in particular, as the law is required to link specific instances of exploitation with a just and flexible system of remedies and defences. This task is magnified, moreover, in view of the importance, necessity and ubiquity of contract in modern commercial dealings.

Although the previous section reveals much about the nature of the social behaviour with which we are here concerned, there is a cogent reason why the account of interpersonal exploitation offered fails to provide a fully operational basis for legal intervention. It was assumed, though not stated, in that section that exploitation is a modal, or binary, category rather than a scalar, or graded, one:

Exploitation is not a matter of crossing some threshold on a smoothly sliding scale of greater or lesser advantage being taken of you. If it were, we could sensibly talk of you being ‘almost exploited’ if your treatment fell just below the threshold, or ‘just barely exploited’ if it fell just above. Those locutions are nonsensical. People are either exploited or they are not.179

A fully operational account of interpersonal exploitation in contract formation requires much greater normative refinement in its application.

178 If we assume that morality does require actual knowledge of another’s exploitable circumstances, this seems to necessitate the acceptance that the moral judgment of the law (see e.g., per Deane J. in C.B.A. v. Amadio (1983) 151 C.L.R. 447, at 478) may be much diluted compared with the philosopher’s judgment. Potentially, this feature creates a possible hiatus between the moral and legal views of exploitation.

than a purely modal analysis can offer, especially in relation to the consideration needed to be given to the availability or appropriateness of subsequent remedial redress. This point will be brought into sharper focus below (Section 3.1.1.).

3.1. Refining the Analysis

The discussion in Sections 1 and 2 of this chapter was offered not to suggest that a singular conception of exploitation is necessarily ubiquitous in our voluntary and consensual dealings but, rather, for the more modest purpose of demonstrating that all cases of exploitation share the common characteristic of involving a very particular violation of a very particular kind of moral, and possibly legal, duty. In substance, the aim of this part of the thesis is to demonstrate, in particular, that parties engaged in precontractual negotiations are under “neighbourhood”-like duties of responsibility: a theme hitherto more synonymous with tort doctrine than with contract.¹⁸⁰

This section, together with Section 4, suggests how the notion of exploitation may usefully be conceptualised into an appropriate analytical framework through which to channel the unconscionability enquiry. This framework is linked, in particular, to the talismanic “unconscionable conduct” formulation traditionally employed by the courts in the present context, and which, when informed by the suggested framework, provides a useful organising device for thinking about a particular problem in the formation of contracts. Of course, our principal difficulties will always arise from the fact-specific nature of unconscionability-related litigation. Eisenberg, for example, identified unconscionability in contract law as a paradigm for the expression of ‘individualized justice’ concerns.¹⁸¹ For it to

¹⁸⁰ Not all violations of neighbourhood duties involve advantage-taking, however. The classic case of a violation of a duty of neighbourhood which does not involve advantage-taking is negligence: the very sort of case in which neighbourhood traditionally finds its home. In the present context, the negligence duty merely to not injure one’s neighbour is elevated into an obligation in addition not to exploit her.

be useful, therefore, any suggested framework must also be capable of organising the factual nuances of the various cases.  

3.1.1. The “Modal” and “Scalar” Aspects of Interpersonal Exploitation

Exploitation is considered to be a modal or a binary category. The qualitative question: “Is this party being exploited?” properly admits only of a “yes” or “no” response. But even when we are confident in our affirmation, that a party has on this occasion been “exploited”, we are still told nothing of the infinite number of possible cases of exploitation that might fall between the extremes of, say, “strongly morally objectionable exploitation” and “weakly morally objectionable exploitation”. We need not here draw a clear dividing line for the purpose of distinguishing between the possible poles, but the mere existence of a normative continuum or scale tends to suggest that there are more refined, quantitative issues which need to be woven into our final, especially legal, analysis. An operational account of exploitation, we would expect, must sufficiently be able to embody any quantitative determinants required for the task of making refined judgmental distinctions about particular instances of alleged exploitation, in particular as these refinements are linked to an appropriate ranges of remedies and defences potentially available in such cases.

Thus, when required to say how badly, seriously or much a party is being exploited, for the purposes of granting a legal remedy, we become concerned with grades or shades of exploitative conduct. Only at this point does our analysis properly admit a scalar, or an all-things-considered,

---

182 For a good indication of the various considerations to be balanced in the unconscionability analysis, see Ostas, D., “Predicting Unconscionability Decisions: An Economic Model and an Empirical Test” (1991) 29 Am. Bus. L.J. 535; Spencer Bower, Turner & Sutton, Actionable Non-Disclosure (2nd ed., 1990), Chp 25 (‘Defences and Relief in cases of undue influence or unfair advantage’).

183 Some cases have made it clear, for example, that mere hardness or unreasonableness is not enough to justify a judgment of “unconscionability” justifying intervention: there must be ‘morally reprehensible’ conduct affecting the conscience of the party responsible. Cf. Multiservice Bookbinding Ltd v. Marden [1979] Ch. 84, 110; [1978] 2 All E.R. 489, 502; Alec Lobb (Garages) Ltd v. Total Oil G.B. Ltd [1983] 1 All E.R. 944, 961; [1985] 1 All E.R. 303, 313, 317, 318. In C.B.A. v. Amadio, op. cit., 461, Mason J. said the conduct must be at such a level as to ‘shock the conscience of the court’—be ‘inconsistent with equity and good conscience’.

284
response. The gradations, on this account, therefore come into the notion of overall "badness" rather than into the notion of "exploitation" itself. The notion of badness, moreover, for the purpose of distinguishing between our weaker or stronger moral objections to a particular instance of exploitation, seems rightly to be decided in terms of such considerations as how much the exploiter profits at the expense of the exploitee, or how much the exploitee is harmed, or the extent to which the exploitee has consented to the act of exploitation, or has borne the risk of it, or brought it on herself; or the presence or absence of reciprocity, or some form of antecedent moral or legal wrongdoing on the part of the exploiter; or any delay on the part of the allegedly exploited party in seeking to undo the consequences of the wrongdoing; or whether an innocent third party has taken an interest in the exploitatively procured bargain transaction.

The strength or weakness of our particular normative judgment, therefore, will depend on our weighing up many, if not all, of these factors in the given instance of exploitation. For as Feinberg points out, there may be any number of countervailing considerations which, when taken into account, render an act of exploitation 'morally justified-on-balance', and which, a fortiori, ought not to be subject to legal correction. But those countervailing considerations, whether deontological or teleological in nature, do not in the end annul, or even neutralise, the unfairness of the

---

184 In morals there is a well-known distinction between prima facie and all-things-considered moral statements. Definitive moral statements (judgments) are the product of the weighing and balancing of as many relevant moral principles, and as many criteria of coherent reasoning, as possible. On this analysis, rights and duties have a prima facie character only. Thus, each case of moral weighing is "contextual"; that is, unique, characterised by a unique cluster of considerations to be weighed. See Klami, Sorvettula and Hatakka, "Moral Reasoning and Evidence in Legal Decision-Making", in Sadurski, W. (ed), Ethical Dimensions of Legal Theory (1991), 35-51; Peczenik, A., "Prima-Facie Values and the Law", id, 91-109.

185 Goodin, for example, uses the case of smallpox as a compelling analogue:

Either people have smallpox or they do not. Saying that it is a very bad case, or a not-so-bad case, does not in any way qualify our judgment about the presence or the absence of the viral agents. (Id, 182).


187 Or, exploitation is always prima facie unfair, but sometimes morally justified.

188 See Chapter Three, Section 2.1.1.1—2.1.1.2.2.
act itself; nor, therefore, do they erase our *prima facie* moral objections to that unfairness. What they do, rather, is merely qualify or override those objections, and hence justify some legal departures from them, ordinarily as this is reflected by a denial or reduction of the remedy available. Our moral reasons for objecting to the particular behaviour do not disappear; they are merely weaker and perhaps trumped by other, stronger, normative considerations. The scalar aspect of the analysis, therefore, may be thought necessary to accommodate shifting community perceptions of the considerations or values needed to be weighed up in a court’s decision whether, notwithstanding the clear case of “exploitation” before it, to make relief available, and if so, its decision about what form it should take, or upon what terms. The “scalar” aspect of exploitation, therefore, is principally administered through the law’s recognition of defences to, and its provision of various forms of relief from, allegedly exploitative acts. It tends to be applicable at the remedial level, rather than being concerned with one’s initial culpability for an act of exploitation.

In the pages to follow, less will be said of the “scalar” aspect of the exploitation analysis, at least as a focus for detailed and systematic enquiry. Instead, the writer’s principal concern will remain with the “modal” conception of exploitation: the issue of “liability” or of “culpability”—the necessary and sufficient conditions for the legal charge of “exploitation”—rather than with the considerations to be raised in relation to the question of remedial redress. At the modal level, therefore, and subject to a possible divergence in the degree of “knowledge” required by each normative system, it is maintained in this thesis that the moral and legal conceptions of exploitation are coterminous. The law is ordained to make more refined

---


190 For example, where damages sound for the wrongdoing, issues of contributory negligence or failure to mitigate may reduce the final award made. Similarly, where contract avoidance is the only available remedy, all sorts of considerations apply that might operate to bar such a remedy in some cases (delay, affirmation, execution of contract, innocent third party taking interest, etc.), or, where rescission is allowed, adjustments may have to be made to meet the justice of the particular case, so that a contract is set aside “on terms”.

191 Mention is occasionally made of remedies and defences as they apply to particular doctrines, however. For a good discussion, see also Spencer Bower, Turner & Sutton, *Actionable Non-Disclosure* (2nd ed., 1990), Chp 25 (‘Defences and Relief in cases of undue influence or unfair advantage’).
scalar judgments about particular instances of alleged exploitation, however, as it must ultimately provide concrete remedial solutions that are commensurate with all the countervailing circumstances of the case at hand.

3.1.2. From “Exploitation” to “Unconscionable Conduct”

In the first section of this chapter it was observed how the concept of “unconscionable conduct” has become a significant theme in Australian contract law, especially over the past decade, and particularly as it has been used to justify intervention in voluntary and consensual dealings. In the context of contract formation, and not before or beyond, the “unconscionable conduct” formulation seems to provide the legal equivalent of the moral conception of “exploitation” expounded above. The “conduct” referred to in the formulation relates almost invariably to a form of advantage-taking in the procurement of a bargain transaction. The adjectival “unconscionable” part of the formulation tells us something qualitative about the “conduct” part of the formulation. It states, in essence, a legal conclusion—makes a judgment—about, a particular instance of advantage-taking: that it is sufficiently objectionable in law to be condemned as “exploitation”. However, the availability of relief for “unconscionability” in law often requires a sensitive weighing of a variety of countervailing considerations, as presupposed by the scalar conception of exploitation, and this exemplifies in particular the instance-specific nature of the doctrines characteristically grouped under its rubric.

Instances of advantage-taking in bargaining not condemned in law as “unconscionable” tend to be judged in non-pejorative terms, as involving, for example, “mere advantage-taking”, “mere commercial pressure”, “one’s merely making the most of business opportunities” and “hard bargaining”. We can never hope to have a litmus test in the manner of a set of necessary

192 See Section 1., above.

and sufficient conditions for state interference in cases of exploitation in the procurement of a particular bargain transaction; but we can and should acquaint ourselves with the various considerations which need to be weighed in the refined normative balance required in deciding to grant relief in any instance of alleged exploitation, and the necessary qualifications thereon. These considerations continue to be revealed through judicial and legislative standards, in particular as those standards are administered through the application of discrete legal and equitable doctrines, and their attendant remedial systems, in the disposition of actual, disputed cases.

3.2. The Forms of Interpersonal Exploitation: The Behavioural, Standards and Doctrinal Spectrums Considered

Exploitation manifests itself in variant forms in our law relating to contract formation. Notions of wrongdoing are more distinctive in some cases of exploitation than they are in others; one’s justifiable expectations of how others are to conduct themselves toward one in bargaining depends greatly on relational factors, such as whether the parties come to each other as intimates or as strangers; the discrete doctrines which are called into operation to police exploitation in the varying cases differ in their appearance, emphases and proof. In the following pages, the writer will introduce the various dimensions of "behaviour", "duty" (or "standards") and "doctrine", and the possible analytical significance of each to the remainder of this thesis.194 Further elaboration of the ideas introduced here, however, is reserved for subsequent sections and chapters.

3.2.1. The Behavioural Spectrum

Doubtless there are ‘infinite’ ways of wrongdoing another person.195 In terms of objectionable bargaining behaviour, however, it does seem possible to conceive a spectrum of behaviour which, potentially at least, attracts legal

---


supervision. As is naturally to be expected, this spectrum ranges broadly from those forms of wrongdoing which highly offend assumed societal notions of proper conduct, to those types of behaviour where “wrongdoing” is a less distinctive feature.196

At the stronger end of the behavioural spectrum, for example, one might reasonably expect to find a miscellany of wrongdoings in the nature of assaulting and threatening, lying, stealing, cheating, and ensnaring. However, many instances of such wrongdoing will have nothing at all in common with the concept of exploitation, whether or not such conduct relates to bargaining197 One might, for instance, be motivated to assault, threaten, lie to, steal from, cheat, or ensnare another person not in the hope of ultimately benefiting from such wrongdoings, but rather for the very purpose of harming that person. In each case, that behaviour may be liable, for what it is, to be condemned, either in law or in morals, in accordance with the so-called ‘harm principle’.198 But apart from the immediate denunciatory or punitive consequences arising therefrom, such instances of wrongdoing may produce other important consequences which are, in particular, relevant here. Certain instances of general social wrongdoing permit one party, the wrongdoer, to acquire a specific strategic advantage in the form of interpersonal bargaining power over another party, the victim, in a transaction or dealing between them. Deliberately applying pressure through the use of threats of physical violence, for example, almost

196 It is not uncommon with the more passive forms of exploitation, such as unconscionable dealings and unilateral mistake, for the courts to attempt to mitigate the condemnation inherent in their stigmatisation of behaviour as exploitative. See, e.g., per Deane J. in C.B.A. v. Amadio (1983) 151 C.L.R. 447, at 478, relieving the bank’s officer of any charge of ‘dishonesty or moral obliquity’. Deane J.’s comments only make sense, however, if one assumes that morality does not accept lesser forms of consciousness than actual knowledge to give rise to the moral charge of exploitation. The philosophical literature does not permit a conclusion on this point.

197 Deceiving, assaulting, threatening, etc., can occur as much within bargaining as they can without it.

198 Cf. Feinberg, op. cit., 225. The ‘harm principle’ can be seen as underlying a number of legal doctrines which often find their application in the context of contractual negotiations. The basic justification given for reliance-based liability, for example, is the prevention or cancelling of the detriment occasioned on any party who is induced to act upon particular assumptions created or confirmed by the conduct of the other party. Illustrative doctrines include certain forms of estoppel, if they have not all effectively been fused nowadays; part performance, and misrepresentation.
invariably will cause another’s choices to become unreasonably limited in bargaining. The conveyance of unreliable information may likewise give a special informational advantage over the recipient of that erroneous information.

In one way or another, such independent acts are considered wrongful, at least in morals, whether or not the wrongdoing party subsequently makes profitable use of, that is, exploits, the artificial strategic bargaining advantage thereby acquired. The reasons for this are numerous but related.\(^{199}\) Of course, in most cases a specific act of exploitation will follow naturally from the more general form of wrongdoing, for the wrongdoing itself is the very *modus operandi* of, and necessary precondition to, a more global exploitative process. The threat to sign a contract or to die provides an exemplar. Analytically, the initial threat is the first step in a two-stage process of coercive exploitation. The second stage merely follows as a corollary of the first—it is part of a single process or broader scheme of conduct.\(^{200}\)

---

\(^{199}\) Such acts transform our general social vulnerabilities, such as to threats of violence, or being lied to, into specific bargaining vulnerabilities or disadvantages, and hence violate the first injunction of Goodin’s duty to protect the vulnerable: see Chapter Two, Section 4.2. Those acts, in particular, wrongfully create exploitable circumstances in the bargaining relation. This is similar to saying that such acts deliberately and artificially disturb the balance of the negotiations and hence bring about a set of non-equilibrium bargaining conditions, and this is *prima facie* wrongful because the law is concerned to preserve the integrity of the bargaining process. Such wrongful acts also deny an otherwise ordinarily capable individual a ‘fair’ opportunity meaningfully to participate—to act voluntarily—in the particular bargaining game, and hence such acts violate the second premise of Hart’s Responsibility Principle. In law, such acts are often said to be wrongful because they subject the victim to an improper motive for her action; such a party is especially vulnerable to exploitation in the particular dealing because her judgement or volition has been impeded and vitiated by a factor from which responsible legal persons deserve, and hence are entitled to expect, to be free.

\(^{200}\) In order for there to be exploitation in bargaining there must first be exploitable bargaining circumstances: relative, peculiarly unequal bargaining positions of the parties. If these relative positions of inequality are not pre-existing, or are insufficient to give one party sufficient influence or power over the other, that party, the exploiter, must enter into a process of design, to create or exacerbate such conditions to the extent possible successfully to exploit them in the procurement of a contractual benefit. From the exploiter’s point of view, here lie the true benefits of antecedent wrongful behaviour.

But wrongful antecedent acts need not lead to exploitative acts, at least in the procurement of a bargain. Take, for example, the conveyance of unreliable information. \(^A\) might deliberately mislead \(^B\) in bargaining, and this he does to secure an informational advantage over \(^B\). This case is thus indistinguishable, at least in its motivational features, from the aforementioned coercion example. But assume \(^A\) unintentionally or innocently misleads \(^B\), honestly believing
As an analytical fact, contractual assent-policing doctrines are not concerned with the first-step forms of wrongdoing *simpliciter*. Such delicts may readily attract the attention of other bodies of law—notably criminal or tort law—but contract law, rather, is concerned strictly with their *sequel*: the actual cashing in on the strategic bargaining advantages artificially created thereby, to secure a contractual benefit, consent, that would not otherwise have been given, or if consent had been given, on terms putatively more favourable to the disadvantaged party.

The writer also considers that our sense of unfairness or wrongness residing in any antecedent wrongful conduct is analytically distinct from our sense of the unfairness in the sequel act of exploitation itself. Thus, since misusing (abusing, exploiting) one's bargaining power is considered here to be an independent form of moral-possibly-legal wrongdoing, such a misuse does not lose its wrongful (exploitative) flavour where the antecedent strategical advantage was legitimately or even lawfully acquired. Arguably, a party who misuses his bargaining power over another acts wrongly, whether
the power itself had been wrongly or rightly acquired. And whilst antecedent forms of wrongdoing cannot possibly affect our judgment as to the characterisation of the conduct in question, whether it is or is not, in our modal sense, exploitative, the presence or absence of such forms of wrongdoing may affect our more refined scalar judgment: whether it was, all

in the reliability of the information conveyed to B. A has undeniably committed some moral-possibly-legal wrong: he has manipulated B, misled her, subjected her to an improper motive for action, upset the balance of the negotiations; but he does not necessarily exploit her until the precise moment he consciously plays for advantage, using the circumstances he himself was responsible for creating. This knowledge of the exploitable circumstances almost invariably will not arise until after the contract is formed or even executed, so it cannot constitute an act of exploitation, at least in the formation stage of the contractual process, strictly speaking. This point is elaborated in Chapter Seven, Section 3.1.1. Should A become aware of his innocent deception before the consummation of the bargain, however, he then becomes duty-bound to correct the misapprehension he himself created: see Davis v. London & Provincial Marine Insurance Co. (1878) 8 Ch. D. 469, 475 per Fry J.; Jones v. Dumbrell [1981] V.R. 199, 203-4 per Smith J; Lockhart v. Osman [1981] V.R. 57; With v. O’Flanagan [1936] Ch. 575. If A does not so correct the deception, we then have a clear case of exploitation: a conscious violation or negation of the duty affirmatively to assist the misled party (B) before B’s decision to act upon the erroneous information supplied by A in making decisions pertaining to her entry into the contract, and this in law is deceit. That is to say, once the exercise of the resultant power is coupled with the conscious desire, on the part of A, to gain from the use of the power, this accompanying form of wrongdoing consists precisely in the process understood to be “exploitation”. In the context of contract formation, therefore, it may be considered wrongful both to threaten or lie to someone, and to exploit the opportunities thereby created to procure the contractual assent of the victim. Thus, we might want to describe wrongs involving “oppression” (e.g., threats, assaults, theft, etc., which unfairly exclude a party from certain resources, or utilities more generally) as ‘two-person one-step’ transactions, and wrongs involving “exploitation” as ‘two-person two-step’ transactions: Carling A., “Exploitation, Extortion and Oppression” (1987) 35 Political Studies 173, 174.

201 Cf. Wilson, op. cit., 301. Carling, A., “Exploitation, Extortion and Oppression” (1987) 35 Political Studies 173, 184, makes a similar point through the use of the following hypothetical:

Take, for example, a case in which I am at the bottom of a deep, dark hole and someone offers to throw me a rope for a million pounds. For this to be exploitation, does it matter how I got there? I may have created the situation inadvertently by my own actions: stumbling down the hole while preoccupied with thinking out the distinction between exploitation and extortion. It may have been an act of God, which caught me in an earthquake. It may have been an unintended consequence of ancient mining operations which made the ground subside at just the moment I walked over it. I may have wanted to commit suicide, failed and had second thoughts. A third party may have thrown me down the hole in a fit of pique.

Neither the causal nor the intentional sequence seems necessary to the finding of exploitation. Only in the case in which the person offering me the rope is the same person who threw me down the hole (having the subsequent offer in mind) does something else seem to be involved. This is, precisely, where exploitation gives way to extortion.
things considered, a very bad case of exploitation, thereby overriding most
defences to relief,\textsuperscript{202} or a not-so-bad case, admitting of various defences.\textsuperscript{203} We might like to say, therefore, that an instance of exploitation is merely
compounded by the presence of deception or pressure,\textsuperscript{204} and hence is more
likely in law to warrant relief for the unconscionable conduct, perhaps to the
exclusion of all other countervailing considerations, be they evidentiary or
substantive, such as that the final terms of the resultant transaction were
objectively fair.\textsuperscript{205} The presence of deception or pressure, moreover, may
give rise to questions of whether relaxed rules of proof\textsuperscript{206} or remoteness of
loss\textsuperscript{207} should apply in the particular case at hand.

3.2.1.1. "Active" and "passive" exploitation (victimisation)

Exploiters are typically opportunists; they extract advantage
from situations that are not of their own making. Coercers, on
the other hand, are typically makers, rather than mere
discoverers and users, of opportunities. (The model coercer is

\textsuperscript{202} For example, as will be seen in subsequent chapters, it is not ordinarily open for a party
engaging in active exploitation (e.g., fraud, duress, undue influence) to argue that factors other
than his own conduct may have contributed to his victim's decision to enter into the contract in
question.

\textsuperscript{203} For example, at common law, the fact that a contract has been executed is a bar to rescission
in the case of innocent misrepresentation but not in the case of fraud.

\textsuperscript{204} Cf. Carling, \textit{id}, at 185:

It has been maintained throughout that exploitation and extortion are unfair.
But where, precisely, does the unfairness come in? Given that exploitation
and extortion are two-step phenomena, the possible answers are: Step 1, Step 2
or both. Unfairness at Step 1 involves the unfairness of the denial of the
preferable alternative. The unfairness of the denial makes the situation of
the denied person unfair. Unfairness in Step 2 involves the unfair utilization
of another person's situation, regardless of whether that person's situation is
unfair in itself. Unfairness at both steps adds insult to injury.

\textsuperscript{205} Generally, see Ostas, D., "Predicting Unconscionability Decisions: An Economic Model and

\textsuperscript{206} Especially in relation to the question of causation.

\textsuperscript{207} For example, relaxed notions of foreseeability are generally understood to apply in the case
of fraud than in mere cases of negligence: cf. Doyle \textit{v. Olby (Ironmongers) Ltd} [1969] 2 Q.B. 158,
The possibility that an act of exploitation can be compounded by other cognisable forms of independent wrongdoing suggests that exploitation may take an “active” or a “passive” form. In a noteworthy passage from the judgment of Lord Brightman in *O’Connor v. Hart*, the following distinction was made in relation to the notion of “equitable” or “constructive” fraud:

“Fraud” in its equitable context does not mean, or is not confined to, deceit; “it means an unconscientious use of power arising out of the circumstance and conditions of the contracting parties”.... It is victimisation [(read, “exploitation”)], which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

In its active form, exploitation probably consists in a wrongful creation or acquisition of contracting power, followed by its exercise; in its passive form, it probably consists in a wrongful exercise of such power only. More precisely, “active exploitation” seems to denote well those situations where one party sets out to create a peculiar situation of asymmetry in relative bargaining power, or to exacerbate a pre-existing situation of the same, which he can, and does, subsequently exploit. The setting up of the initial power asymmetries involves the introduction of an unfair element into the parties’ bargaining relation. Typically this will involve some form of oppression or overreaching, such as the use of threats (pressure) or deception (fraud), as a precursor to the accompanying act of exploitation. The defining feature of

---

208 Feinberg, *op. cit.*, 208.


210 *Id.*, at 171 (citations omitted).


212 In both instances, exploitation consists of an unconscionable course of conduct, culminating in the formation of a contract.

213 The idea of oppression seems to lie in having one’s options unfairly excluded. So conceived, it would seem appropriate to call the unfair denial of a presumptively preferable alternative “oppression”. Cf. Carling, *op. cit.*, 185.
the more active forms of exploitation thus becomes the existence of intentional and causal relations between phase one and phase two.

Other forms of exploitation are plainly "active" though neither straightforwardly coercive nor outrightly deceptive. These centre loosely around the more subtle, artful and insidious\(^{214}\) notion of "manipulation",\(^{215}\) which, like all other forms of exploitation, appeals to some weakness in the victim.\(^{216}\) Broadly speaking, manipulation has three salient features.\(^{217}\)

\(^{214}\) Thus Joel Rudinow writes:

\[\text{[M]anipulation seems delicate, sophisticated, even artful in comparison with the hammer-and-tongs crudity of coercion and seems also to be similarly restricted in its application to beings with some minimum level of sophistication, complexity, and intelligence. One does not manipulate infants, animals, or the severely mentally defective.}\]


\(^{215}\) Manipulation loosely involves 'one party's playing on some character trait of the other for the purpose of securing some advantage': Kleining, \textit{op. cit.}, 110. 'The skilled exploiter plays on the other's character in a way a pianist "plays on" a piano', says Feinberg, \textit{op. cit.}, 203. At 205, \textit{id.}, Feinberg writes:

\[\text{A can offer inducements, employ flattery, beg or beseech; he can try alluring portrayals, or seductive suggestions; he can appeal in turn to duty, sympathy, friendship, or greed, probing constantly for the character trait whose cultivation will yield the desired response. If he finds it and thereby persuades the other to consent, the other cannot complain of being forced or tricked into it. After all, it was his own true, flawed, but autonomous self whose utilization produced the consent, not some overpowering external force.}\]

\(^{216}\) 'They bring out', Feinberg writes,

\[\text{the victim's worse rather than better self, but a real self nevertheless. And they engage that lesser self in the process of persuasion, so that in a sense the victim acts—not against his will—but against his "better judgment," and his initial disposition.}\]

Feinberg, \textit{op. cit.}, 222. Feinberg goes on to explain that if the manipulative process is excessively protracted, intense, or emotional, it is open to the victim to complain after the fact that her consent was not fully voluntary because of fatigue, clouded judgment, or otherwise diminished rational capacity. He continues, however, and suggests that such defences will not be successful where the process simply brings out the lesser self by a kind of direct appeal or lure that does not impair the victim's capacities so much as engage her vanities or greeds (\textit{ibid}).

\(^{217}\) Cf. Goodin, "Exploitation", \textit{op. cit.}, 177; cf. also, Goodin, \textit{Manipulatory Politics} (1980), Chp. 1. A possible exception to this characteristic is the case of economic duress, which seems to hover uneasily between coercion and exploitation, especially where there is a threat to do

295
First, it is an active rather than a passive concept. The manipulator *does* something rather than just sitting around and letting something happen. Secondly, manipulative practices are characteristically hidden from or unrecognised by the exploitee.²¹⁸ Thirdly, manipulation is contrary to the putative will of the party being manipulated.

A party who plays on the influence he has over someone who, perhaps over a long period of time, has come to commit her interests to him—reposed her trust, conceded her dependence or reliance in him—thereby becoming entrapped in his will, seems to fill this bill precisely. Such a case is characteristically different from coercion and deceit, however, for manipulators are not, in the full sense of the term, creators of their own opportunities. They typically play on a pre-existing general susceptibility in their victims, or a legitimately held and acquired relationship of trust, influence or reliance existing between them, and, actually or presumptively, either exacerbate, work or transform that weakness to suit their exploitative purposes.

Consistent with the themes expounded in Chapter Three, however, not all forms of straightforwardly active or manipulative conduct, such as threats or deceit, create exploitable circumstances, because, as the functionalist ethic assumes, such practices are often the point of the game. Parties are therefore required within the deontological an teleological limbs of functionalism to preserve their own interests in bargaining, which they can do so through the use of counter-techniques and strategies. As shall become clear in subsequent chapters, the conduct which allegedly creates the exploitable circumstances must itself be independently wrongful, in the sense that the conduct in question was of a kind not reasonably to be expected in the particular context, that is, recognised as a bargaining technique, and the conduct, too, was not otherwise necessary for bargaining to occur, or to achieve some broader social purpose.²¹⁹

---

²¹⁸ It makes sense to assume that manipulation would not succeed if its victims saw what was happening to them.

²¹⁹ See Chapter Three, Section 2.1.1.3.
At the other end of the behavioural spectrum are instances of what might be termed “passive” exploitation. Characteristically, these cases involve one party’s taking advantage of the relative power imbalances existing inter partes, though he himself is not responsible for them, in circumstances where he is strongly duty-bound not only to refrain from taking advantage but actually to assist.\textsuperscript{220} This might typically denote those situations where a stronger party (A), without encouraging or inducing the weaker party’s (B’s) special disposition, accepts the benefit of a contract simply with knowledge, or with reason to know, of B’s relative impairment of bargaining ability, and without affirmatively taking steps to preserve B’s position, which may consist merely in A’s failure to ensure that B is restored to a position of fair equality in bargaining (advised, informed, etc.), or, in some instances, merely in receipt of a “fair” exchange. In order to justify legal intervention in such cases, that is, to conclude that the particular case of exploitation is, all-things-considered, “unconscionable”, a greater number of countervailing considerations would need to weigh against the superior party than they would in those cases where, say, he illegitimately disturbed the balance of negotiations in the first place.\textsuperscript{221}

Examples of active and passive exploitation, as these concepts are manifested in legal doctrine, are furnished below.\textsuperscript{222} While exploitation and coercion, or exploitation and deception, may often often go hand in hand, they have, in law, fundamentally different foci.

\textsuperscript{220} Tipping J. perhaps best described this idea in law when speaking of the conception of ‘passive victimisation’ in an unconscionable dealings case:

I regard [“passive exploitation”] as meaning that there must be circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.


\textsuperscript{221} For an indication of the various considerations that might be weighed up in the unconscionability analysis, for example, see O斯塔s, D., “Predicting Unconscionability Decisions: An Economic Model and an Empirical Test” (1991) 29 Am. Bus. L.J. 535.

\textsuperscript{222} Section 3.2.3.
3.2.2. The Standards Spectrum

Recall that moral exploitation resides, specifically, in a conscious violation, indeed a negation, of a peculiarly strong duty to protect the vulnerable. An exploiter exploits another precisely at the moment he chooses to exercise his power—elicit, or accept without assistance or warning, the other party’s contractual assent—while knowingly (though perhaps merely with reason to know) ignoring or failing to take proper account of, or give sufficient weight to, that other’s interests when she is or has been put into an especially vulnerable position vis-à-vis the exploiter. Exploitation can manifest itself in various forms, ranging from very active at one end of the spectrum, to distinctively passive at the other; this suggests that different patterns of duty—of responsibility for the interests of another—will attend various bargaining relations. Exploitation is avoided in any case where the unbridled pursuit of one’s self-interest has been sufficiently qualified through one’s having the requisite minimal regard for the interests and expectations of the other, co-contracting party. This theme seems to be consistent, moreover, with the idea of relational “good faith” found in other legal contexts, such as in contract performance and enforcement, and which possibly informs the law of estoppel as well. The principal idea behind “good faith” in those other contexts seems to involve the curtailment of improper exercises of otherwise legitimate uses of one’s strict legal rights or powers where, owing to relational circumstances, one is positively duty-bound to have sufficient regard to the legitimate expectations of those subject to the exercise of those rights or powers.

There are, as Professor Finn has pointed out, varying degrees to which one party is to be held responsible for the preservation of another’s

---

223 The strength of the duty to protect the vulnerable depends on how strongly one’s own choices and actions can affect adversely the interests of another party.


interests in a dealing between them.\textsuperscript{226} This is to say there is a hierarchy of standards of "other-regardingness", or "neighbourhood", which regulate the conduct of persons engaged in voluntary or consensual relationships and dealings with others, and which oblige, to varying degrees, one party to a relationship to acknowledge or to respect the interests of the other. Broadly speaking, 'there is ... a progression ... from selfish to selfless behaviour'.\textsuperscript{227}

3.2.2.1. "Neighbourhood" vs. "loyalty"

We may tend to associate all neighbourhood responsibilities in precontractual relations as being directed at constraining but not necessarily precluding self-interested action. The protective responsibilities of "neighbourhood" exemplified through those cases of active exploitation are most strongly negative. They are directed primarily at the first injunction of the generalised duty to protect the vulnerable: the duty not oneself to create exploitable circumstances.\textsuperscript{228} These are "desisting" sorts of duties, and they relate almost exclusively to our concern to preserve the integrity of the bargaining process (bargaining equilibria), and to protect those who are vulnerable to the most selfish abuses in the nature of oppression, overreaching and deception.

Toward the other end of the duty spectrum, the standards of neighbourhood responsibility begin to look more positive: they have to do with affirmatively assisting another party who is already especially vulnerable to one's choices either to help or to hurt in the bargaining process: the second injunction of the duty to protect the vulnerable.\textsuperscript{229} Although a party is entitled still to pursue his own self-interest in the dealing in question, if he is to do so fairly, he must curb any too self-


\textsuperscript{227} Finn, \textit{id}, 4.

\textsuperscript{228} Thus, this sort of neighbourhood duty tends to be owed to a wide class of persons, and requires one actually to desist from using some general capacity that one might possess to interfere with bargaining equilibria. Broadly speaking, one must not introduce unfair elements, such as artificial choice constraints or misinformation, into the bargaining process.

\textsuperscript{229} See Chapter Two, Section 4.2.
interested behaviour, and have sufficient regard to the legitimate interests of his co-contracting party. In so doing, he may then be required to take such affirmative action, but no more, than is required effectively to restore bargaining equilibria, to render the parties functional equivalents, in the transaction between them. This may require him to explain the purport and effects of the proposed transaction between the parties; to recommend or to ensure that the other party seeks or receives independent competent advice; or, simply, to ensure that the transaction entered into was a fair, just and reasonable one. Proceeding to contract with knowledge, actual and perhaps less, of the other party’s vulnerabilities, while failing to take such necessary positive steps, is what we understand to be “exploitation”, albeit of a distinctively passive kind.

Negotiating parties who also stand in a fiduciary or a fiduciary-like relationship transcend mere relationships of “neighbourhood”. A fiduciary is not merely required to refrain from acting self-interestedly, and hence to assist only to the extent required to have proper regard for the interests of another; he is, instead, enjoined only to act in the interests of that other.\(^{230}\) Specifically, the fiduciary must ‘act selflessly and with undivided loyalty’ toward that other party, who has entrusted, or who is entitled to entrust him with her interests.\(^{231}\)

We are thus concerned here with a duty of “loyalty” as opposed to one of mere “neighbourhood”. In the present connection, the beneficiaries of such duties have renounced, and are entitled to have renounced, in fact or in law, playing games of advantage, power or strategy for themselves. They

\(^{230}\) This is to the subordination or very exclusion of his own or a third party’s several interests in a dealing between them. Sometimes, a fiduciary must act in the parties’ joint interests, such as in the case of partnerships, and possibly joint ventures.

have let down their guard, so to speak, and are justified in relying upon the fiduciary, or his agents, employees or advisers, for assistance going beyond the mere explanation of the purport and effects of any proposed transaction between them, that is, mere “neighbourhood”. It is presumed that the beneficiary’s interests can be so strongly affected by the choices and actions of her fiduciary, that she is so vulnerable to his influence, that, as a bare matter of public policy, even a disloyal tendency, or the mere danger of disloyalty, will raise presumptions of wrongdoing by the fiduciary: in this context, a presumption of exploitation, an abuse of the special opportunities or influence arising from the relation.

Fiduciary relationships, therefore, do not conform to our ordinary model of strategic, competitive bargaining; indeed they are at variance with it. In non-fiduciary bargaining, the law assumes that the parties’ interests must necessarily diverge, and are subject only to the constraints imposed by the emergent “neighbourhood” standard referred to above. However, in fiduciary relationships, the law views the parties’ interest structure as convergent, so that they are presumed to have identical interests over the range of their relationship. Playing for advantage in this structure,

---

232 Finn, id, 48, in relation to the de facto fiduciary cases, in particular, more eloquently describes this as a relaxation of [one’s] self-interested vigilance or independent judgment in favour of the other’s protection or judgment because the circumstances of the relationship justify the belief that that other is acting or will act in the former’s interests.

233 It is unrealistic to suppose that a person can be so much in another’s power as to keep her interactions free from even the gentlest pressure or influence resulting from that power. Given the presumption of wrongdoing, it is then incumbent upon the fiduciary to show affirmatively that no unfair advantage was in fact taken, but that the contractual benefit he received “was the independent and well understood act of [his beneficiary]”, who was “in a position to exercise a free judgment based on information as full as that of the [fiduciary]”: Johnson v. Buttress (1936) 56 C.L.R. 113, at 134 per Dixon J.

234 Cf. Lehane, J. R. F., “Fiduciaries in a Commercial Context”, Chp. 5 in Finn (ed), Essays in Equity (1985), 95, at 104: fiduciary relationships are predicated on a pre-existing relationship that is antithetical to that existing between mere contracting parties.

235 The parties’ “interest structure” in their relationship—i.e., in whose interests is the other party acting?—is one of the principal factors which directly influences the interpretation given to the other person’s actions, thus shaping the parties’ reasonable expectations.
therefore, amounts to representing the game as something other than what it really is. 236 A fiduciary cannot, therefore,

use his position to his own or to a third party’s possible advantage; or .... in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party unless this is freely and informedly consented to by his beneficiary or is authorised by law. 237

Unlike “neighbourhood” duties, the duties associated with “loyalty” do not begin and end with the negotiation process itself, but rather with the fiduciary relation, of which the negotiations are merely part.

3.2.3. The Doctrinal Spectrum

Although all the doctrines to be considered in detail in this thesis are seen as being concerned with “exploitation” in its widest sense, categories of legal doctrine change subtly in character as one moves from one end of the behavioural spectrum to the other. Unlike the behavioural spectrum, however, the doctrinal spectrum is more tightly circumscribed. 238 There is no one generalised doctrine of law which is at once concerned with all forms of opprobrious behaviour in the bringing about of a contractual relationship 239 although the same set of legal facts may support several doctrines. 240 Rather, each doctrine is introduced as a consequence of a

---


238 Doubtless much of this is due to the process of canalisation which took place during the nineteenth and early twentieth centuries, a period in which conscious efforts were made to formalise legal doctrine (see Chapter One, supra). The canalised features of formal doctrine have sat particularly well with the law of contract, although some of the lines of demarcation are not now as clearly defined as they have been in the past.

239 Indeed, we saw the dangers of this earlier in relation to the discussion of Lord Denning’s doctrine of inequality of bargaining power: supra, at n. 32. Cf. also, Green, M., “Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts” (1943) 43 Col. L. Rev. 176 (‘composite theory’).

specific behavioural concern within a much broader behavioural spectrum. What essentially distinguishes the categories from each other is the precise nature of the exploitative abuse involved and, especially insofar as technique is concerned (reversals of onus of proof, presumptions of wrongdoing, disregarded notions of causation, foreseeability and remoteness, and the like),\textsuperscript{241} the precise nature of the relational environment in which the abuse is said or presumed to have occurred.

At the extreme end of the behavioural spectrum, were pressure and deception. In law, these practices are characteristically policed by the doctrines of duress, undue influence and misrepresentation, and, in the context of trade or commerce, s. 52 of the \textit{Trade Practices Act} 1974 (Cth). Broadly speaking, the practices attracting these doctrines involve a violation of the negative duty not oneself to introduce an unfair element into the parties’ bargaining relationship.\textsuperscript{242} The law of duress is considered in Chapter Five, and the law relating to misrepresentation is canvassed in Chapter Seven.\textsuperscript{243}

\textsuperscript{241} On this score, see the useful contrast between fiduciary and non-fiduciary standards in Finn, “Equity and Contract”, \textit{op. cit.}, 107.

\textsuperscript{242} In duress, for example, one party subverts the bargaining process by making threats, thereby bringing wrongful pressure to bear on the other party, that is, wrongfully constraining her contracting choices, which is also coercive in effect: it influences the behaviour of the victim, who has no reasonable alternative but to submit to the coercerer’s demands. Under the law of misrepresentation, though especially fraudulent misrepresentation, one party consciously jeopardises bargaining equilibria by introducing erroneous items of material information into the negotiations, upon which information the other party reasonably relies in informing her contractual decision-making. Notions of wrongdoing are strongest in the cases of coercion and intentional deception, and the broadly related objectives of the law in these cases is to prevent active exploitation, protect an innocent party from another’s wrongdoing, and preserve and maintain the integrity of the bargaining process, which remains an indispensable societal instrument in the facilitation of economic coordination.

\textsuperscript{243} Even duress and misrepresentation, however, come in shades of culpability or activeness, from physical to economic duress, and fraudulent to non-fraudulent misrepresentation: these cases, too, will be considered in the abovementioned chapters. Some cases are more akin to “manipulation”, as described above (Section 3.2.2.1.), for they are not straightforwardly coercive, nor outrightly deceptive. The law of economic duress and innocent misrepresentation are less independently wrongful than are, say, physical duress and deceit. The former cases mostly derive their wrongfulness from the surrounding circumstances or from subsequent knowledge, and thus are strongly parasitic on the idea of “exploitation”.

303
At the other end of the behavioural spectrum, we had the cases involving so-called “passive” exploitation. These merely involved one party knowingly taking advantage of non-equilibrium bargaining conditions, not caused or exacerbated by his own antecedent wrongful conduct, in circumstances where he was duty-bound so to refrain, or actually to assist, by taking affirmative steps to restore the balance of power between the parties, and to ensure a fair contractual outcome. The principal illustrative doctrine in law is “unconscionable dealings”, which is considered in Section 4 below. However, it is also argued that the doctrine of unilateral mistake (in equity) is best viewed as a specific manifestation of that doctrine (Chapter Eight), as are possibly those cases involving bare ignorance in contracting: cases of nondisclosure where there is no antecedent duty to speak (Chapter Nine).

While the aforementioned doctrines characteristically find their several applications in precontractual dealings between non-intimates, and hence exemplify “neighbourhood” standards and “fair dealing”, the law relating to undue influence, it is argued, exemplifies fiduciary obligation between intimate parties. The cases of undue influence are usually divided into two classes, “actual” and “presumed”, which the writer refers to as “coercive” and “relational” undue influence, respectively. Coercive undue influence, as its name suggests, is treated as a species of duress. Relational undue influence, however, is treated as an exemplification of fiduciary law, reflecting “fiduciary” obligation and legal methods and hence the standard of “loyalty”, as opposed to mere “neighbourhood”. The law of undue influence is examined in Chapter Six.

244 The reasons for the non-equilibrium conditions are varied, although they stem mainly from some general social disability inherent in the plaintiff herself (enfeebledness, old age, physical or mental retardation, and the like), or from a specific transactional disability, where, owing to the nature or complexity of the particular transaction, a party with otherwise normal social capabilities is specifically disadvantaged vis-à-vis the other party and thereby unable effectively to preserve her own best interests in her transaction with the more able party. The law’s primary concern here is to constrain overly self-interested behaviour, and to ensure fair dealing between the parties.

245 To illustrate, where a special relationship of influence is proved, and a (possibly materially disadvantageous) contract is entered into between the parties thereto or with a third party, the law is prepared to presume that unfair advantage was taken (pressure or influence exerted) on the part of the superior party to the transaction, unless that party can show that the contractual benefit he (or a third party claiming through him) received was fairly procured. This he can do only by showing that the promisor’s manifested contractual
In the final section of this chapter, some thought is given to the operation of the unconscionable dealings doctrine in contemporary Australian law. It is intended that the ideas introduced in the first three sections of this chapter should be demonstrated as they find their application in the operation of a legal (equitable) doctrine which exemplifies them particularly well, and also that these ideas should be brought into much sharper focus. What is more, a contextualisation of the unconscionable dealings doctrine within the broad scheme of an exploitation thesis, arguably best provides a useful point of reference around which a critical discussion of the other doctrines can take place, and among which illuminating contrasts and comparisons can be made for the purpose of legal clarification and doctrinal rationalisation (as this task is to be undertaken in Chapters Five to Nine, inclusive).

4. EXPLOITATION IN ACTION:
UNCONSCIONABLE DEALINGS

There is no greater inequality than the equal treatment of unequals.246

In Chapter Three it was observed that underpinning the consensual model of contracts are the assumptions the law makes about the conditions relating to and necessary for a “binding” contractual assent—“equilibrium bargaining conditions”. The further the parties’ bargaining relationship is in

assent was the independent and well understood act of a person of free will and as fully informed as he, the superior party, himself was. The presumption does not presume any particular form of wrongdoing—any particular modus operandi—but it does assume an “active” process of exploitation, as such, or a process of “manipulation”. The law’s concern in this context is to prevent an unconscionious use of the special capacity or opportunities that may exist or arise out of the parties’ special relation to affect the will or freedom of judgment in reference to the vulnerable party’s contractual decision-making. The law is, in particular, through raising a presumption of wrongdoing in such cases, vigilant to preserve the integrity, credibility and utility of certain relationships perceived to be of special importance in our society, and to ensure that any power arising therefrom is not used in ways contrary to its intentions and true purposes. In so doing, the law is especially astute to insist upon and to maintain the role integrity of those who are or who have become fiduciaries in our society.


305
reality removed from these hypothetical conditions, the more closely the law will scrutinise the disadvantaged party’s consent, or, more accurately, the superior party’s conduct in accepting or procuring that consent for its voluntariness. This feature is exemplified in particular, through the heightening exaction of “neighbourhood-like” responsibilities—responsibilities of “fair dealing”—which progressively place an obligation on the superior party actually to earn the requisite contractual consent and not to exploit the peculiar strategic advantage he holds over the other party to the transaction or dealing in question.247

It has long been understood that the jurisdiction to grant relief from an unconscientious bargain rests in the notion of “equitable fraud”.248

---

247 Professor Finn perhaps best describes the central idea of “fair dealing” in the present context:

Though not disentitled from pursuing self-interest in or because of a relationship, one party’s decision or action may bear so directly upon the interests of the other that basic fairness to that other may require that in some circumstances he should have regard to those interests in addition to his own, and if necessary, should desist from or modify the proposed course of action in consequence.


[B]efore a contracting party with the immense bargaining power of the Mobile Corporation may limit its liability vis-a-vis an uncounseled layman, as it seeks to do in this case, ... it has an affirmative duty to obtain the voluntary, knowing assent of the other party. This could easily have been done in this case by explaining to the plaintiff in layman’s terms the meaning and possible consequences of the disputed clause. Such a requirement does not detract from the freedom of contract, unless that phrase denotes the freedom to impose the onerous terms of one’s carefully-drawn printed document on an unsuspecting contractual partner. Rather, freedom of contract is enhanced by a requirement that both parties [reasonably] be aware of the burdens they are assuming. The notion of free will has little meaning as applied to one who is ignorant of the consequences of his acts.

248 Generally, see Meagher, Gummow & Lehane, Equity: Doctrines and Remedies (2nd ed., 1984), Chp. 16, 368 et seq.; Keeton, Introduction to Equity (6th ed., 1965), Chp. 7. Unconscionable dealings, as an independent ground of equitable relief, might thus be viewed as one aspect of the wider principle that ‘a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure for the unjust enrichment of himself’: per Deane and Dawson JJ. in Stern v. McArthur (1988) 165 C.L.R. 489, 527. The common law of unconscionable dealings is now incorporated into the Trade Practices Act 1974 (Cth), s. 51AA.
According to Lord Hardwicke in *Earl of Chesterfield v. Janssen*, equity would intervene

... to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.

Having its roots as a protective jurisdiction in a very special class of case, in its contemporary setting, unconscionable dealings finds itself

249 (1751) 28 E.R. 82.

250 *Id*, 100. Elaborating on these words, we find yet another classic description in *Earl of Aylesford v. Morris* (1873) L.R. 8 Ch. App. 484. Instructively, in that case, Lord Selborne speaks of

... those cases, which, according to the language of Lord Hardwicke, raise "from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscionable use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable. (*Id*, 490-1.)

251 Historically, the presumption of fraud arose under the circumstances or conditions described by Lord Selborne (*ibid*), because of an apparent judicial concern with one party’s vulnerabilities. Early unconscionability doctrine thus focused almost exclusively upon protecting a person because of his or her own weaknesses: see Finn, “The Fiduciary Principle” in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), 7. Thus, Lord Hatherley, in *O’Rorke v. Bolingbroke* (1877) 2 App. Cas. 814, considered that such a protective jurisdiction will ‘come to the rescue whenever the parties to a contract have not met on equal terms.” (*Id*, 823) See also, *Benny v. Cook* (1875) L.R. 10 Ch. App. 389, 391; *Evans v. Llewellyn* (1877) 1 Cox 333, 29 E.R. 1191, 1194; *Waters v. Donnelly* (1885) 9 O.R. 391, 406; *Grealish v. Murphy* [1946] I.R. 35, 47. This strongly paternalist feature rendered the behaviour of the other party a legally irrelevant consideration. In the modern context, this protectionist approach is generally presumed to be the basis upon which Lord Denning formulated his principle of inequality of bargaining power in *Lloyds Bank v. Bundy*, *op. cit.*, today rejected as the basis of the unconscionability jurisdiction. The old protectionist approach is perhaps most prevalent in, and best exemplified by, the line of old equity cases concerning catching bargains with expectant heirs, reversioners and remaindermen just of age. Such an approach, however, still finds favour in some modern Canadian decisions: see Clark, R., *Inequality of Bargaining Power: Judicial Intervention in Improvident and Unconscionable Bargains* (1987), 26; Enman, “Doctrines of Unconscionability in Canadian English and Commonwealth Contract Law” (1987) 16 Anglo-American L.R. 191. For a discussion of the so-called expectant-heir line of cases, see Dawson, “Economic Duress — An Essay in Perspective” (1947) 45 Mich. L. Rev. 253, at 267-76; Cope, M., *Duress, Undue Influence and Unconscientious Bargains* (1985), 120-9; Clark, *op. cit.*, Chp. 1: seeing cause to conclude that the expectant heir cases ‘in fact do not provide
fundamentally reoriented\textsuperscript{252} as a doctrine potentially having general application to a wide range of dealings,\textsuperscript{253} and as one which is concerned almost exclusively to police and exclude opprobrious forms of victimisation or exploitative conduct in voluntary and consensual dealings.\textsuperscript{254}

The equitable jurisdiction to set aside unconscionable bargains is not a paternalistic jurisdiction protecting or assisting those who repent of foolish undertakings. It is a jurisdiction protecting those under a

the modern jurist with an historical basis for building an unconscionability thesis..." id, 23. It is not the writer's intention to undertake a systematic examination of these early unconscionability cases. It has been suggested that the old cases on catching bargains with expectant heirs have had only a tangential effect on the development of jurisdiction in Australia: Meagher, Gummow & Lehan, op. cit., Chp. 16, paras. 1601 et seq.

The important feature to note about the early unconscionability cases, moreover, is that it appears that the party seeking relief from the arrangement need not have pointed to anything at all unconscionent in the conduct of the other party. See Harrison v. Guest (1860) 6 De G.M. & G. 424, 11 E.R. 517; Waters v. Donnelly (1885) 9 O.R. 391; Fry v. Lane (1888) 40 Ch. Div. 312, 324; Harris v. Richardson [1930] N.Z.L.R. 890, 918-191. Cf. also, Morrison v. Coast Finance Ltd (1965) 55 D.L.R. (2d) 710; Knupp v. Bell (1968) 67 D.L.R. (2d) 256; Harry v. Kreutziger (1978) 95 D.L.R. (3d) 231; Multiservice Bookbinding Ltd v. Marden [1978] 2 All E.R. 489. Rather, the issue of advantage-taking was circumvented by using the technique of presumption. Ordinarily, the presumption of equitable fraud would arise upon the plaintiff merely establishing a special disability and the giving of an inadequate exchange. From this, it seems, the court had an \textit{a priori} 'right to infer that the bargain was brought about either by intimidation or fraud' (Gissing v. Eaton (1911) 25 O.L.R. 50, 56). This presumption operated to shift the onus of proof to the stronger party, and was one which he 'must repel by proving that the bargain was fair, just and reasonable; ... or perhaps by showing that no advantage was taken' (Morrison v. Coast Finance Ltd, id, 713).

\textsuperscript{252} The writer does not hesitate, however, to eschew the suggestion that this orientation is a universal one—quite the contrary. Perhaps the most systematic and expansive endorsement of unconscionability principles is to be found in the United States: see Uniform Commercial Code, § 2-302; Restatement (Second) of Contracts, § 208; and see authorities listed at n. 19, supra. Perhaps the most systematic confinement of unconscionability principles in to be found in England: see e.g., National Westminster Bank Plc. v. Morgan [1985] A.C. 686. Australia, in common law and statutory forms (see e.g., Commercial Bank of Australia v. Amadio, op. cit.; Walton's Stores (Interstate) Ltd v. Maher (1988) 164 C.L.R. 387; 76 A.L.R. 513; Stern v. McArthur (1988) 165 C.L.R. 489; Louth v. Diprose (1992) 110 A.L.R. 1; ss. 51AA and 51AB Trade Practices Act 1974 (Cth), and State Fair Trading Act equivalents; Contracts Review Act 1980 (N.S.W.); s. 88F Industrial Arbitration Act 1940 (N.S.W.)), New Zealand (see e.g., O'Connor v. Hart, op. cit. (P.C.); Nichols v. Jessup [1986] 1 N.Z.L.R. 226), and Canada (see e.g., Dusik v. Newton (1980) 62 B.C.L.R. 1 (damages remedy); Bertolo v. Bank of Montreal (1986) 33 D.L.R. (4th) 610; Bank of Montreal v. Featherstone (1987) 35 D.L.R. (4th) 626; Smyth v. Szep (1992) 63 B.C.L.R. (2d) 52 lie somewhere between these poles.

\textsuperscript{253} The jurisdiction applies to gifts as well as to contracts: Wilton v. Farnworth (1948) 76 C.L.R. 646; Diprose v. Louth, op. cit.

disadvantage from those who take advantage of that fact; equity looks to the conduct of the stronger party.255

Thus, in its modern context, the gist of the jurisdiction lies in the abuse of a superior bargaining position, and not simply with any notion of inequality of bargaining power.256 Modern formulations of the doctrine emphasise the need for the plaintiff to show 'that unconscientious advantage has been taken of [her] disabling condition or circumstances'.257 The emphasis is on conduct; on behaviour; on wrongdoing; on advantage-taking. The aim is to protect a person not because of her own weakness, but because of another's unusual strength relative to her.258 The doctrine operates not to assist or to protect an 'inept and incompetent interest', but to '[deny] to those who act unconscientiously the fruits of their wrongdoing'.259 The doctrine is, on this analysis, concerned with exploitation par excellence. In refining its normative judgment whether or not to bar enforcement or to allow rescission of the transaction in any given case, a court is ultimately guided by the analytically vague enquiry: 'whether, having regard to all the circumstances, it [is] consistent with equity and good conscience that [the superior party] should be allowed to [insist on the transaction].260


> The essence of the fraud thereby charged is that advantage was taken of weakness, ignorance and other disabilities on the side of the weaker, and the contract was derived from such behaviour.... (Emphasis added.)


258 Cf. Finn, "Commerce, the Common Law and Morality", *op. cit.*, 94: the pressure nowadays is 'to curb an overweening and self-interested power rather than to aid an inept and incompetent interest'.


4.1. The Elements of Unconscionable Dealings

In its primary setting, the unconscionable dealings jurisdiction is concerned with relationships\textsuperscript{261} in which one party, because of either her own circumstances, or the relative positions of both, is unable effectively to preserve her own best interests in the transaction in question.\textsuperscript{262} The first party is thereby peculiarly vulnerable to the choices and actions of the other, and is thus left open to being exploited at the hands of that other. At least where the superior party knows or has reason to know of that vulnerability, the law has shown a basic preparedness to author some degree of protective responsibility, on the part of the stronger party, for the preservation of the vulnerable party’s interests in a dealing between them. A failure on the part of the superior party to suspend or to modify what would otherwise be acceptable canons of bargaining behaviour in such circumstances, and, specifically, a failure on his part to refrain from using the weaker’s position of disadvantage as a source of either advantage to himself or detriment to that weaker party, in a way that would have been, as a matter in the nature of the bargaining “game”, perfectly permissible under ordinary equilibrium bench-mark bargaining conditions, constitutes a violation of that responsibility. To turn that vulnerability to one’s advantage in the face of such a protective responsibility inheres in the type of exploitative behaviour with which the unconscionable dealings doctrine is primarily concerned.

Now, the specific criteria of the unconscionable dealings jurisdiction are today attended with little, if any, debate.\textsuperscript{263} As it is currently formulated,

\textsuperscript{261} Ordinarily such relationships culminate in contractual outcomes; although the jurisdiction applies to gifts also: Wilton \textit{v. Farnworth} (1948) 76 C.L.R. 646; Diprose \textit{v. Louth}, op. cit. (Cf. n. 253, supra.)

\textsuperscript{262} Turner and Sutton refer to these relationships, in particular, as ‘relations of advantage’: Spencer Bower, \textit{Turner & Sutton, Actionable Non-Disclosure} (2nd ed., 1990), Chp.14.

\textsuperscript{263} Cf. the comments of Richardson J. in \textit{Contracting Bonding Ltd \textit{v. Snee}} [1992] 2 N.Z.L.R. 157, at 173: ‘The general principles underlying the equitable jurisdiction of the Courts to set aside transactions on the grounds of unconscionability are well settled. The difficulty lies in their practical application to particular facts’.
in order to satisfy the doctrine, the plaintiff\textsuperscript{264} in an unconscionability claim bears the onus of showing:

1) that she was 'by reason of some condition or circumstance ... placed at a special disadvantage vis-à-vis another'; and,

2) that 'unfair or unconsicentious advantage [was] then taken of the opportunity thereby created'.\textsuperscript{265}

Once the above circumstances are shown to have existed, it is still frequently said that the onus of 'shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract',\textsuperscript{266} although this writer would argue that this shifting of the burden of proof should be discarded as an anachronism, or at least as a redundancy, today.\textsuperscript{267}

\textsuperscript{264} Cf. Diprose v. Louth (No. 2) (1990) 54 S.A.S.R. 450, at 471, per Legoe J.: 'No doubt the ultimate burden of proof rests upon the plaintiff to establish the two-fold elements in this type of claim'.

\textsuperscript{265} Per Mason J. in C.B.A. v. Amadio (1983) 151 C.L.R. 447, at 462. The other members of the Court who discussed the jurisdiction did not materially depart from this formulation. See Gibbs C.J., \textit{id}, 459 (citing Blomley v. Ryan, op. cit., 415, per Kitto J., and 405-6, per Fullagar J.); Deane J., \textit{id}, 474; Dawson J., \textit{id}, 489: 'What is necessary for the application of the principle is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain' (emphasis added). Sometimes this list is elaborated into a greater number of factors, although its twofold essence remains intact: see Tipping J. in Bowkett v. Action Finance Ltd (1992) 1 N.Z.L.R. 449, 460.

\textsuperscript{266} Per Deane J., \textit{id}, 474, quoting Lord Hatherley in O'Rorke v. Bolingbroke (1877) 2 App. Cas. 814, 823; and citing Fry v. Lane (1888) 40 Ch. D. 312, 322; Blomley v. Ryan, op. cit., 428-9.

\textsuperscript{267} It seems strange that the shifting burden so synonymous with the old protectionist line of cases should have survived in modern formulations of a now wrongful conduct-oriented doctrine. Assuming the plaintiff's evidence is accepted in any case, the issue has effectively been concluded, leaving no room for the rebuttal of a presumption—indeed, rendering application of one quite otiose. As Prichard J. commented in Nichols v. Jessup (unrep. High Court, Auckland, A1381/83, March 1985), 'once it appears that the stronger party has intentionally taken advantage of the weaker, it will be unlikely that he can show his conduct was fair, just and reasonable'; cf. also, Clark, R., "The Unconscionability Doctrine Viewed from an Irish Perspective" (1980) 31 N.Ir.L.Q. 114, 126-7, Chen-Wishart, \textit{op. cit.}, 19; Spencer Bower, Turner & Sutton, \textit{Actionable Non-Disclosure} (2nd ed., 1990), para. 23.20, pp. 618-9. See also the discussion by Legoe J. in Diprose v. Louth (No. 2) (1990) 54 S.A.S.R. 450, at 470-1. There is probably no true presumption in cases of unconscionable dealing. In any event, there appears to be no special evidentiary reason, such as difficulty of proof, for shifting the burden of proof onto the defendant, as there is in cases of undue influence; generally see Chapter Six; the plaintiff's and defendant's respective motives, thoughts, intentions, etc. should naturally be borne out of the ordinary exchange of evidence that passes in the normal course of a trial. What is more, there is no strong public policy justifying the presumption of wrongdoing in unconscionable dealings as there is in the case of undue influence.
Each of the two central criteria for the operation of the unconscionable dealings jurisdiction calls for significant refinement in its application, and hence requires some elaboration.

4.1.1. Exploitable Circumstances: The “Special Disadvantage” Criterion

Since one party's disadvantage is the trigger mechanism for the invocation of the doctrine, the law has focused heavily on the level of disadvantage which must be reached before unconscionable dealings is attracted. Indeed, the potential breadth of the jurisdiction is limited solely by the class of potential supplicants which can be said to qualify for its constabulary and ameliorative functions. As with one's strong moral responsibility to protect those who are or become peculiarly vulnerable to us, the law very narrowly circumscribes those situations of vulnerability that will give rise to protective responsibilities in another.²⁶⁸ The disadvantage must indeed be a 'special' one.²⁶⁹ Thus, as Mason J. (as he then was) pointedly remarks in Commercial Bank of Australia v. Amadio:²⁷⁰

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 as to [her] own best interests, when the other party knows or ought to

²⁶⁸ Finn suggests that the operation of the unconscionable dealings jurisdiction can be seen 'as an instance of the law imposing a duty of affirmative action on one party for the protection of the other': Finn, “Equity and Contract”, Chp. 4 in Finn (ed), Essays on Contract (1987), 104, at 131. It is for this reason, too, that Professor Finn suggests that it is unnecessary in Australia to show that the transaction on its face is unfair to the disadvantaged party (id, n. 46); cf. C.B.A. v. Amadio, op. cit., 475, per Deane J.) But to the extent that the doctrine can be said to be concerned with promoting altruistic acts in contracting, the duties which follow remain distinctively of a self-regarding nature (see discussion in Chapter Two, supra, pp. 133-35). Hence, the protection such duties exact have no intrinsic protective (altruistic or paternalistic) value. Rather, they remain merely as qualifiers of a decidedly self-interested scheme of human endeavour.

²⁶⁹ It is to be applauded that Mason J. did not resort, as many have done before him, to the phrase “inequality of bargaining power”, even though this is clearly what is discussed here. That phrase's want of precision derives from an obvious cause: since intelligence, wealth, knowledge, talent, etc. are all almost invariably unequal, the phrase cannot possibly have its normal range of meaning. Rather, there must be exceptional or abnormal inequality, and Mason J.'s resort to 'special disadvantage' appears to suppose the need to think in terms of categories of exceptional inequality.


312
know of the existence or condition or circumstance and of its effect on the innocent party.271

Typically representative of the especially disadvantaged individual is the person ‘who is in someway afflicted with a condition which sets him apart in his capabilities from the ordinary run of mankind’—hence an incessant insistence on general and pre-existing social adversities: desperate need, debilitating illness, intellectual deficiency, lack of adequate schooling, language disabilities, and the like.272 The biblical exhortation to ‘[d]o right to the widow, judge for the fatherless, give to the poor, defend the orphan, clothe the naked, Heal the broken and the weak ... defend the maimed’,273 and so forth, would seem, even in these modern times, to require little justification.274 Such persons’ claim to protection is plainly warranted;

271 In Amadio’s case itself, the circumstances which showed a special disadvantage on the part of Mr and Mrs Amadio and the bank were summarised by Deane J. thus:

[T]he result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of understanding of the contents of the document was that ... they lacked assistance and advice where assistance and advice were plainly necessary if they were to be any reasonable degree of equality between themselves and the bank. (Id, 464.)


274 In commenting on poverty, for example, Peter Golding writes:

... [P]overty is not just about money but about powerlessness.... In so many ways active citizenship requires the capacity to confront the institutions, public and private, which frame people’s lives. Tackling the town hall, getting to see and challenge your child’s teacher, battling with the shop which sold you faulty goods, seeking advice in an unexpected run-in with the law, all demand that easy access to time, telephones, transport, and the soft terrorism of middle-class articulacy which are denied to so many. Poverty excludes, and not least it excludes from power and influence.

... [P]overty curtails freedom of choice. The freedom to eat as you wish, to go where and when you like, to seek the leisure pursuits or political activities which others expect, all are denied to those without the resources to buy their entry ticket through the many turnstiles our society sets up at the entry points to social activity. To be excluded by poverty is to be denied the full freedom of choice which is supposed to be the pivot of a modern industrial society.

Golding, Excluding The Poor (1986), x-xi. It has also been argued that low-income consumers are less rational in their market behaviour and may be less able to process market information.
especially where exploitative behaviour is evident on the facts. Thus, the courts have, readily enough, been prepared to intervene where such social incapacities exist, subject always, of course, to the qualifying threshold observed by Mason J. in Amadio: that the ‘disabling condition or circumstance [be] one which seriously affects the ability of the innocent party to make a judgment as to [her] own best interests.’

The precise occasions upon which a party may be said to be at a special disadvantage, however, are indeed varied, and quite unsusceptible ‘to being comprehensively catalogued.’ Nevertheless, in Blomley v. Ryan, Fullagar J. ventured to list a few:

... poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.

In advancing perhaps the most significant judicial analysis, in this country, at least, of the special disabilities potentially capable of attracting the jurisdiction, his Honour concluded that the ‘common characteristic seems to

---


276 Emphasis added.

277 Id, 474, per Deane J. Cf. also, Blomley v. Ryan (1956) 99 C.L.R. 362, 405 per Fullagar J.: ‘circumstances adversely affecting a party ... are of great variety and an hardly be satisfactorily classified’.

278 (1956) 99 C.L.R. 362.

be that that they have the effect of placing one party at a serious disadvantage
vis-à-vis the other.²⁸⁰

It is clear that Fullagar J.’s catalogue of potentially disabling conditions
readily includes the sort of disadvantaged individuals referred to above: the
‘socially disadvantaged’.²⁸¹ But what of those social members who, while
otherwise possessing ordinary capabilities, nevertheless find that owing to
the distinctive nature, complexity or circumstances of a particular
transaction, they are seriously unable to conserve their own best interests in
the particular transaction in question: the ‘transactionally disadvantaged’?²⁸²

²⁸⁰ Id, 405.

²⁸¹ Finn, “Equity and Contract”, op. cit., 131-2, draws a distinction between the ‘socially’ and
‘transactionally’ disadvantaged. While social disadvantages necessarily will result in
transactional disadvantages, the converse will not necessarily obtain. It is, of course, not
always possible to think of the boundaries between social and transactional advantage as
necessarily sealed. It will often be the case that a party’s position of special disadvantage
will be compounded by both. In Amadio’s case, for example, the question was whether an
elderly couple, who had little English and no business acumen, should be bound to a mortgage
given in support of their much admired son, whose judgment they trusted. We can hence see
elements of both “social” disadvantage here (age, language disabilities, natural affection for
son) and “transactional” disadvantage (no business experience and misunderstanding of terms).
Notions like “natural affection” or “emotional dependence” are oddly conceived of as general
social disadvantages, although they clearly are not of the transactional variety envisaged
here. These disabilities usually arise from relational factors, or peculiar circumstances in
which one might find oneself in relation to another. There may, accordingly, be some merit in
adopting a somewhat longer list, such as that offered by Birks, P., Introduction to the Law of
Restitution (1989), 204 et seq.; Restitution—The Future (1992), 44: classify ‘inequality’
depending on whether its source is ‘personal’, ‘relational’ ‘transactional’ or ‘circumstantial’.
Since inequality or vulnerability (and hence power) is often a product of a combination of these
various sources, it may be better for the purposes of a legal enquiry merely to ask the global
question: “whatever its source, did the innocent party’s disability seriously affects her ability
to make a judgment as to her own best interests, such as to have the effect of placing her party
at a serious disadvantage vis-à-vis the other party?” To press the point, does it seem natural
to speak of the infatuated solicitor in Diprose v. Louth, op. cit., as “socially disadvantaged”?

²⁸² Such a view may readily be accepted: see Eisenberg, “The Bargain Principle and its Limits”
(1982) 95 Harv. L. Rev. 741, 763-73. Professor Eisenberg describes the concept of ‘transactional
incapacity’ thus (id, 763-9):

[An] individual may be of average intelligence and yet may lack the aptitude,
experience, or judgmental ability to make a deliberate and well-informed
judgment concerning the desirability of entering into a given complex [i.e., non-
homogeneous] transaction.... A party (the “promisee”) who induces another
(the “promisor”) to make a bargain on unfair terms by exploiting the latter’s
incapacity has acted in a manner that violates conventional moral standards.
This is true even though the promisor has the competence to understand
ordinary transactions, and even if his lack of capacity stems from limitations
in experience or training rather than from emotional instability or below-
While Fullagar J.'s reference to a 'lack of assistance or explanation where assistance or explanation is necessary' as a potentially qualifying disabling condition may presage some movement in the direction of offering equity's protective jurisdiction to such persons, transactional incapacity has not as yet been accepted in Australia. This perhaps signifies some vestige of the respect still given to notions of private autonomy and self-reliance in contractual and near-contractual dealings. This failure openly to recognise transactional disadvantage, even under modern commercial conditions, and even when its effect may be to 'plac[e] one party at serious disadvantage vis-à-vis another', doubtless displays some justifiable timidity on the part of our courts. For the role of the unconscionable dealings jurisdiction should not be to upset or displace the risks inherent in ordinary commercial life. The courts are thus generally justified in assuming that a party should take reasonable steps to preserve her own interests in contracting; that she should recognise the point at which she begins to get out of her own depth in the particular negotiations, and thus to realise the extent to which she requires assistance; and that the onus lies, first and foremost, on that party to seek advice and explanation, either from the co-contracting party himself, or else from some independent third party. Of course, this assumption would not be a safe one where the transactional incapacity is itself of such an extreme nature that the disadvantaged party could not fully appreciate the importance of her seeking and obtaining advice and explanation in respect of the matter, and the other party knew, or had reason to know, of this fact.

average intelligence.... The unconscionability principle allows the courts to adopt, on analytical grounds alone, a rule denying full enforcement of promises induced by exploitation of the promisor's intellectual, experiential, or judgmental inability to deal competently with the transaction at hand.

See also the discussion in relation to merchants by Mallor, J., "Unconscionability in Contracts between Merchants" (1986) 40 Southwestern L.J. 1065.


284 Cf. Comment 1 to principal unconscionability provision in the United States' Uniform Commercial Code (§ 2-302): 'The principle is one of the prevention of oppression and unfair surprise ... and not of disturbance of allocation of risks because of superior bargaining power'.

285 Eisenberg, op. cit., 770, gives an example which signifies an actual assumption of risk on the part of the disadvantaged party:
In this case, it would not seem unreasonable for the law to author some protective responsibility in the stronger party for the interests of the weaker; and, moreover, in light of that responsibility, require further a general duty on the part of the stronger party to suspend ordinary rules of behaviour and to refrain from pressing for advantage against the weaker in ways that would have been perfectly acceptable had both parties met on a more equal footing.

Accordingly, in order to trigger the unconscionable dealings jurisdiction, the element of transactional disadvantage should itself include a serious inability on the part of the disadvantaged party herself to recognise her own lack of ability effectively to preserve her own interests in the transaction or dealing in question. Where such an inability to recognise the limits of one’s capabilities in the particular transaction is absent from the case at hand, and one presses on in face of one’s unreasonably failing so to identify the extent of one’s own transactional incapacities, might one not then putatively be said to have taken a calculated business risk, or to have been acting indolently or foolishly, or playing within the “rules” of the bargaining game? Again, this inference might reflect the functionalist assumption that a party is herself primarily responsible for her own interests in bargaining, and this may in turn require that the “special disadvantage” criterion in the present connection be qualified by a system of “risk analysis”, a point taken up in Chapter Nine.286 This requirement of self-reliance notwithstanding, any resort to, or an attempt by, the other party himself to provide explanation or assistance in a case potentially involving transactional disadvantage, or merely to point out the risks inherent in the transaction, may invoke other areas of law, such as s. 52 of the Trade Practices Act.
Act 1974 (Cth) and negligence, all of which may apply to supplement the unconscionable dealings jurisdiction.

Thus, despite all its ameliorative potential, for so long as unconscionable dealings is reserved for the paupers, aged, and alcoholics (etc.) among us, its jurisdiction will remain a limited one. For notwithstanding an extraordinary decade of rigorous and sustained analysis and expansion of the broader unconscionability principles and themes pervading many, if not most, equitable doctrines, Rogers J. once reminded us of our sense of occasion when the unconscionable dealings jurisdiction was raised by an international construction company against an international airline:

> The emphasis on the wealth and standing of the defendants and their ready access to the best of advice is to displace the operation of concepts of unconscionable conduct which underlie decisions such as Commercial Bank of Australia v. Amadio.... For a successful and wealthy international airline conglomerate to appeal to the safeguards the law provides for the elderly, the illiterate and the financially oppressed is to move into a totally inappropriate field of discourse.

Perhaps today the idea of “transactional disadvantage”, and unconscionable dealings through it, will find its most beneficial applications in relation to the problem of asymmetric information in bargaining, especially where one’s basic informational needs giving rise to the asymmetry proceed from the peculiar nature or complexity of the particular transaction or relational context in question, and, moreover, where these informational disparities are consciously exploited by the other party. (We shall return to consider these cases in Chapters Eight and Nine.)

---

287 The “foreign currency” loan cases provide good examples of this. See Chiarabaglio v. Westpac Banking Corp. (1989) A.T.P.R. 40-971, and Chapters Seven and Nine, infra.


4.1.2. Exploitation: The "Unconscionability" Criterion

Recall from our discussion in Section 2 above, that exploitable circumstances do not necessarily give rise to exploitation; something more is required. A party must knowingly turn such circumstances to his or a third person's advantage when he is duty-bound to refrain from doing so. To warrant a legal judgment of unconscionability, moreover, this process as a whole must not merely be morally unfair, but 'shocking'\textsuperscript{290} or 'reprehensible';\textsuperscript{291} 'sufficiently divergent from community standards of commercial morality'.\textsuperscript{292} '[U]nfair or unconscientious advantage [must be] taken of the opportunity thereby created';\textsuperscript{293} there must be 'real' unfairness.\textsuperscript{294} On the writer's processual conception of exploitation expounded above, this unconscionability resides merely in one's exploiting the known special strategic advantages he holds over another in bargaining, when these relative advantages can be said to give rise to a strong moral-legal duty actually to protect the victim susceptible to such exploitative practices, and that issues of substantive fairness are not analytical ingredients of the unfairness, and hence the cause for moral or legal complaint, residing in the act of exploitation. In law, however, a variable probative connection has been established between the apparent imbalance in the exchange resulting from the parties' dealing (advantages\textsubscript{2}), and the processual features of that dealing inferred to have wrongfully produced the exchange (a knowing exploitation of advantages\textsubscript{1}). For example, a glaring inequality in the resultant exchange may give rise to the inference that a party, despite his

\textsuperscript{290} Cf. \textit{per} Tipping J. in \textit{Bowkett v. Action Finance Ltd} (1992) 1 N.Z.L.R. 449, at 462:

I am a firm believer in the view that equity must tread carefully when intervening in commercial relationships. There is no room for such intervention on a tender moralistic basis. The circumstances must be such as call loudly for equitable relief; as it is sometimes put the circumstances must shock the conscience of the Court.

\textsuperscript{291} See n. 183, \textit{supra}.


\textsuperscript{293} \textit{C.B.A. v. Amadio}, op. cit., 462, \textit{per} Mason J.

not having actual knowledge of the victim’s exploitable circumstances, nevertheless had reason to know of those circumstances, thereby supplying the necessary ingredient of “consciousness” in the exploitation analysis. Such a connection, however, seems to have been overlooked by the philosophical analyses of exploitation (even those, such as Goodin’s, which eschew the value-transfer accounts of exploitation), and this seems to be a direct result of their not giving sufficient consideration to the essential criterion of knowledge. It is to the requirement of knowledge that our attentions now turn.

4.1.2.1. “Knowledge” of the exploitable circumstances

Because the basis of the unconscionable dealings jurisdiction is said to rest in “conscience”, a defendant’s conscience (or his agent’s)\textsuperscript{295} must be charged with his own wrongdoing. This will generally obtain through his contracting with actual “knowledge” of the other party’s position of special disadvantage \textit{vis-à-vis} himself (or a third party), which makes his actions \textit{prima facie} ‘unconscientious’ or exploitative.\textsuperscript{296} But we should not want to confine the level of knowledge required to invoke the jurisdiction to the exacting standard of \textit{actual} knowledge alone; lest we wish to provide a shield behind which the wilfully blind may shelter.\textsuperscript{297} In this context, accordingly, ‘wilful ignorance is not to be distinguished in its equitable consequences

\textsuperscript{295} See Nichols \textit{v. Jessup, op. cit.}, 229.

\textsuperscript{296} According to the modal conception of exploitation, this would be all that was required to qualify for a moral judgment of “exploitation”.

\textsuperscript{297} Professor Finn suggests that to limit unconscionability to the level of actual knowledge

would be to facilitate circumvention of the purposes equity here serves—would be to provide an incentive to disregard those inferences which are suggested by such facts as are known and to which an ordinary person would have regard in evaluating the environment in which his own decision of action is contemplated or called for.

Finn, "Equity and Contract", \textit{op. cit.}, 140-1.
from knowledge’. But we cannot allow a relaxed knowledge criterion to stray too far from that of actual knowledge, lest we also leave ourselves ‘open to the criticism of ... pursuing a policy of protecting the ... disadvantaged under the guise of proscribing what is essentially innocent behaviour’. The law must be seen to make ‘credible demands’ of persons whose conduct it calls into question. Accordingly, Australian courts suggest that in order to satisfy the knowledge requirement, it is enough that the superior party to the bargaining relation was actually ‘aware of facts that would raise [the] possibility [of the other party’s disadvantage] in the mind of any reasonable person’. This formulation must be treated with caution, however; for it is dangerously prone to merge into the conception of “constructive notice” applicable elsewhere in our law. In this light, therefore, Finn’s preference is that consideration be given to the formula enshrined in the United States’ Restatements: that of ‘reason to know’. Such a formulation recognises an objective test, based on the subjective circumstances of a person’s abilities:

A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist. A person of superior intelligence has reason to know a fact if he has information from which a person of his intelligence would draw the inference. There is also reason to know if the inference would be that there is such a substantial chance of the existence of the fact that, if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its possible existence.


300 What amounts to a ‘credible demand’ obviously must vary in different contexts; but an appropriate level of knowledge would not allow shrewd or experienced business persons to hide behind the obvious insensitivities they may acquire to the interests of those with whom they regularly deal.

301 C.B.A. v. Amadio, op. cit., 467, per Mason J.

302 See Restatement (Second) of Contracts, §§ 19, 153(b); Restatement (Second) of Agency, § 9; Restatement (Second) of Torts, § 12.

303 Restatement (Second) of Contracts, § 19, Comment (b); see also, Corbin on Contracts (1960), Vol. 3., para. 610.

321
This formulation is useful, if only because it avoids the potentially confusing language of “constructive notice”—at least in its extended form—employed by some courts and commentators in this context (though more appropriately finding its home elsewhere, in the context of priorities and estates), and if only, too, to avoid rigid adherence to such unreasonably stringent standards of proof as ‘calculated abstentions from enquiry’, ‘wilful ignorance’, ‘reckless indifference’ and ‘studied advantage’. Pointedly, the “reason-to-know” standard is to be distinguished from the language of “ought to know” or “should know”, which import a duty to others to ascertain facts—i.e., constructive notice in its broadest sense. As used in the Restatements, the words ‘reason to know’ apply both when the party has a duty to another and when he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know.

304 Which may itself create a duty to make enquiries, and hence cover mere negligence.

305 Cf. Nichols v. Jessup, op. cit., at 235 per Somers J.: ‘ought to have known’; ‘a reasonable man would have averted to the possibility’; ‘constructive notice in equity’; ‘he is bound to make inquiry and will be taken to know whatever such inquiry would have disclosed’; Melberson v. Commonwealth Development Bank of Australia (1989) A.S.C. 55-921, 58,459-60 (Hodgson J.): ‘I do not think that the matters that the bank did know were enough to put it on enquiry to the extent that one can say that the bank is fixed with notice or knowledge of the matters which it did not know ...’ (emphasis added); Chen-Wishart, Unconscionable Bargains (1989), Chp. 8.

306 Cf. Consul Development Pty. Ltd v. DPC Estates Pty. Ltd (1974-75) 132 C.L.R. 373, at 412-3 per Stephen J; The Hon Mr Justice G. A. Kennedy, “Equity in a Commercial Context”, Chp. 1 in Finn (ed), Equity and Commercial Relationships (1987), 2-3, 15-6; Davies, J., “New Directions in the Employment of Equitable Doctrine in England and Wales”, in Youdan (ed), Equity, Fiduciaries and Trusts (1989), 376-8. Constructive notice is not so concerned, as we are in this context, with “blameworthiness” or “conscience”, but more with “unusual circumstances” that would put a reasonable person on enquiry as to the possible existence of further states of affairs, whether or not such circumstances are indicative of any wrongdoing. Generally, see Finn, “The Liability of Third Parties For Knowing Receipt or Assistance” (to be published by Carswell, Canada, 1993).


309 Cf. Restatement (Second of Torts), § 12(1) and (2), and explanation in Comment (a).

310 Restatement (Second) of Contracts, § 19, Comment (b).
Characteristically, actual knowledge of facts or possibilities of facts that would give a party reason to know of the other’s position of special disadvantage might reside, for example, in that other’s observable appearance, speech, behaviour or circumstances;\textsuperscript{311} in the course of the first party having sufficient prior dealings with the other, disadvantaged party;\textsuperscript{312} in the fact that the party seeking to sustain the transaction has special expertise, whilst the other is inexperienced in such specialised or complex transactions;\textsuperscript{313} or, simply, in the fact that the improvidence to the complaining party is extreme.\textsuperscript{314}

(The subject of superior-party knowledge will also be considered in Chapter Eight.)

4.1.2.2. The element of "unconscientiousness"

Not merely is it enough in law for a superior party to accept the contractual assent of a party whom he knows or has reason to know is in a position of special disadvantage \textit{vis-à-vis} himself, to qualify for the judgment of unconscionability, he must also consciously fail in his "neighbourly" obligations:

1) to recommend that independent advice be taken, or else to explain the purport and effects of the proposed contract himself; and,

2) to ensure that the disadvantaged party receives, in the circumstances, a fair or an equal exchange.

\textsuperscript{311} See Blomley \textit{v.} Ryan, \textit{op. cit.}: palpable drunkenness.

\textsuperscript{312} See Stubb\textit{s} and Stubb\textit{s} \textit{v.} Ericksen (1981) 34 B.C.L.R. 45, 48; Knupp \textit{v.} Bell (1968) 67 D.L.R. (2d) 256, 275; Moffat \textit{v.} Moffat [1984] 1 N.Z.L.R. 600: strong inference in cases involving relationships of intimacy, such as marriage or cohabitation, and relationships of dependency; Diprose \textit{v.} Louth, \textit{op. cit.}


\textsuperscript{314} See Nichols \textit{v.} Jessup, \textit{op. cit.}, 231: ‘glaring’ or ‘overwhelming’ imbalance so that defendant ‘must have known or suspected that she was no judge of her own interests’.
These obligations usually find their expression through the traditional shifting of the onus onto the superior party to show that the transaction was "fair just and reasonable", although under the modern formulation of the doctrine, which its emphasis on superior-party misconduct, they are perhaps better viewed as items for negative proof on the part of the party seeking to be relieved of her contractual obligations.\textsuperscript{315} Once the superior party's "conscience" has initially been affected by his knowledge of the exploitable circumstances of the inferior party, our enquiry then shifts to focus on the more objective question of whether he has then done enough to restore a fair measure of equality between the parties, that is, has discharged his duty of "neighbourhood", or, in moral terms, his "duty to protect the vulnerable".

4.1.2.2.1. Independent advice and/or explanation by oneself

The relevance of independent or adequate advice or explanation goes directly, it seems, to whether or not the allegedly inferior party can be said to have been left in in a position of special disadvantage at the time when the contract was actually consummated.\textsuperscript{316} Analytically, therefore, its presence or absence forms part of the plaintiff's proof on that score. If it is assumed that independent advice or explanation is sufficient before contracting, its primary effect is to correct the plaintiff's position of disadvantage: to illuminate and inform her, to "open her eyes", or, simply, to give her the means of deciding for herself.

The function or purpose of advice in this context then, is to be distinguished from the equivalent criterion under the undue influence jurisdiction (to be considered in Chapter Six). In undue influence, the principal purpose of the advice is to put the parties 'at arm's length'\textsuperscript{317}—effectively to emancipate the inferior party from the superior's influence. Accordingly, in that context, the advice generally must in a real sense be

\textsuperscript{315} See n. 267, supra.

\textsuperscript{316} The issue of whether the party was or was not up to the task of effectively preserving her own best interests in the particular transaction, is also a question of whether she was nevertheless protected by someone equal to the task and fairly mindful of her interests.

independent advice. It is clear, therefore, why some writers have gone to such lengths to stress its importance. See e.g., Chen-Wishart, op. cit., Chp. 7.


322 The advice, of course, need not be followed. However, the inferior party’s departure from the advice may itself be interpreted as an inability to follow that advice due to the extremity of her impairment. See Fleury and Fleury v. Homocrest Dairy Co-operative (1958) 15 D.L.R. (2d) 161. The advice should as a minimum be capable of protecting the disadvantaged party; of ‘bring[ing] to the notice of the other party the true nature of the transaction’: Cresswell v. Potter [1978] 1 W.L.R. 255, 259 (a 1968 case of Megarry J.).

323 A lack of independence, however, may give rise to the inference that the advising party has not sufficiently been mindful of the inferior party’s interests, including her interests in being properly and fully informed and illuminated about the purport and effects of the proposed transaction itself—the “adequacy” of advice question. Cf. the comments of Kay J. in Fry v. Lane (1888) 40 Ch. D. 312, at 323.

324 Generally, see Chapter Seven, Section 3.1.2.
burdens and benefits under their resultant contract could be perceived, objectively, at least, to be fair.\textsuperscript{325} Similarly, as a normative matter,\textsuperscript{326} people should not complain when they have made a bad bargain and can point to no impropriety in the bargaining processes leading to that outcome.\textsuperscript{327} Accordingly, it has been traditional for the law, including equity, to emphasise "procedural" unfairness (unfairness in the bargaining processes)\textsuperscript{328} over "substantive" unfairness (unfairness in bargaining outcomes):\textsuperscript{329} "the concern ultimately is with abuse [of the bargaining process], not the quality of [the bargaining outcome]."\textsuperscript{330} Since autonomous


\textsuperscript{326} Though perhaps as a psychological or empirical one as well. See Penner, \textit{id}, 549-50. Research suggests that often people's judgments of the overall fairness of an exchange may be more influenced by the fairness of the procedures used to determine the outcome of the exchange than by the actual outcome. (\textit{Ibid.})

\textsuperscript{327} Generally, see Rawls, "Justice as Fairness", \textit{op. cit.} Rawls would give these persons grounds for complaint where their starting positions were unfair but the procedures nevertheless unimpeachable: Rawls, \textit{A Theory of Justice} (1971). As observed in Chapter Three, however, the law does not and cannot take this view, but must sanction distributions of resources within existing patterns of wealth, talents, resources, etc.

\textsuperscript{328} E.g., "Sell me yours share in the company or never expect to see your family alive again". There may be merit in Schwartz's view that "procedural" unfairness focuses too narrowly on the negotiating process, where it in fact also embraces the mere notion of the parties' relative bargaining positions or their "status". Schwartz thus preferred the term 'nonsubstantive' to "procedural": Schwartz (1977) 63 Va. L. Rev. 1053, 1054. The procedural-substantive distinction was endorsed in \textit{Guthmann v. La Vida Llena}, 709 P.2d 675 (1985).

\textsuperscript{329} E.g., "The Company has the right to remove a finger from Borrower's husband and children for each day she is in default of the loan".


The distinction between 'procedural unconscionability' and 'substantive unconscionability' was first introduced by Professor Arthur Leff, "Unconscionability and the Code: the Emperor's New Clause" (1967) 115 U. Penn. L. Rev. 485, 487:

[S]ome ... defences [to contract enforcement] have to do with the processes of contracting and others have to do with the resulting contract....
moral and legal agents must be left free to bargain, and to bargain well or badly,\textsuperscript{331} it is generally\textsuperscript{332} not considered to be the role of the courts to police procedurally benign bargains to ensure that the contractual payoffs to each party are fair.\textsuperscript{333} A contract is "procedurally unfair" when it has been

\textit{distinguish the two interests I shall refer to bargaining naughtiness as "procedural unconscionability", and to evils in the resulting contract as "substantive unconscionability".}

This distinction also figures predominantly in contemporary political philosophy: see Rawls, J., \textit{A Theory of Justice} (1971), 85-9, contrasting 'allocative' and 'pure procedural' justice; Nozick, R., \textit{Anarchy, State, and Utopia} (1974), 150-60, distinguishing between 'patterned' and 'historical' conceptions of justice.

\textsuperscript{331} Cf. Salmond J. in \textit{Brusewitz v. Brown} [1923] 42 N.Z.L.R. 1106, at 1109: 'The law in general leaves every man at liberty to ... dispose of his own property as he chooses [however] improvident, unreasonable or unjust ... such dispositions may be'.

\textsuperscript{332} There are a number of legal doctrines which are ostensibly directed more explicitly towards bargaining outcomes; most notably, the rules relating to penalties, forfeiture and common mistake. Cf., especially, \textit{Legione v. Hateley} (1983) 152 C.L.R. 106 and \textit{Stern v. McArthur} (1988) 165 C.L.R. 489; \textit{Skanosio v. McNamara} (1956) 96 C.L.R. 186, 198-9: 'total failure of consideration or what amounts practically to a total failure of consideration'. On the extent to which such an approach might be desirable, see Finn, "Equity and Contract", \textit{op. cit.}; Clark, R., \textit{Inequality of Bargaining Power} (1987), Chp. 7.

\textsuperscript{333} See \textit{O'Connor v. Hart} [1985] 1 N.Z.L.R. 159, 166, per Lord Brightman:

\textit{Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.}

Cf. also, \textit{Allcard v. Skinner} (1887) 36 Ch. D. 145, 182, 183 \textit{per} Lindley L.J.: not court's role to compensate individuals for their own indolence or folly. Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 J.L & Econ. 293, 315, stating that the only reasons invoked for not enforcing a contract are 'proof of some defect in the process of contract formation' or some 'incompetence of the party against whom the agreement is to be enforced', and concluding that the doctrine of substantive unconscionability does "more social harm than good".

There are aberrations in the United States, however, where excessive nominal price has been enough to justify intervention notwithstanding procedural fairness. See e.g., \textit{American Home Improvement, Inc. v. Maclver}, 201 A. 2d 886 (1964); White & Summers, \textit{Uniform Commercial Code} (3rd ed., 1988), § 4-5, pp. 189-94. Clauses other than that relating to price, such as exculpatory and termination-without-notice clauses, have also been struck down by U.S. courts, despite the absence of procedural unconscionability: White & Summers, \textit{id}, § 4-9, p. 209. Such cases are truly exceptional, however: generally, see Oistas, D., "Economic Logic of Unconscionability Adjudication" (1990, Ph.D. thesis, U.M.I. Dissertation Services).

The suppression of substantive fairness norms is not a recent development, for as early as the nineteenth century it became clear that an unequal distribution of contractual benefits by itself
induced through an improper use of bargaining tactics, strategy or power, 
although the courts have long been prepared to draw inferences about the 
likely presence of alleged processual abuses from the existence of more 
extreme cases of ‘contractual imbalance’ or substantive unfairness, as 
characteristically measured in this context through the inadequacy of 
exchange between the respective parties to the transaction.334

Now, as it has been developed in this chapter, exploitation is strictly a 
processual conception, such that there is no necessary analytical connection 
between the outcomes and the processes which produced them.335 Thus, in 
defining what they consider to be exploitation, the courts, in Australia, at 
least,336 have made it clear that

[i]t does not appear to be essential in all cases that the party at a 
advantage should suffer loss or detriment by the bargain.... But 
 inadequacy of consideration, while never of itself a ground for 
resisting enforcement, will often be a specially important element in 
cases of this type. It may be important in either or both of two ways— 
firstly as supporting the inference that a position of disadvantage 
existed, and secondly as tending to show that an unfair use was made 
of the occasion.337

1587, 1592-1603.

For provocative criticisms of the procedural-substantive fairness dichotomy, see Atiyah, P., 
“Contract and Fair Exchange”, in Atiyah, Essays on Contract (1986), 329-54; Kronman, A., 
“Contract Law and Distributive Justice” (1980) 89 Yale L.J. 472; Kennedy, D., “Distributive and 
Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms 
Principle and its Limits” (1982) 95 Harv. L. Rev. 741, 754 (distinction too rigid); Hillman, R., 
“Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302” 
(1990) 19 Hofstra L. Rev. 33, who seeks to ‘revive interest in substantive fairness norms’ on the 
basis of the efficiencies they serve.


335 See Section 2.2.2.1., above.


337 Per Fullagar J. in Blomley v. Ryan (1956) 99 C.L.R. 362, at 405; cf. also, Tate v. Williamson 
(1866) L.R. 2 Ch. App. 55, at 66; C.B.A. v. Amadio, op. cit., 475, per Deane J.; Contracting 
unfairness of the bargain is a factor for consideration it is not the touchstone’.
Generally, the courts should want, at least in most cases involving wholly passive exploitation, to enquire into the substantive merits of the parties’ resultant exchange, if only to bridge a necessary but irksome evidentiary gap, especially that relating to the degree of appreciation the superior party had of the inferior party’s serious vulnerability relative to him, which he allegedly exploited. In all cases, the presence of improvidence or inequality of exchange can only strengthen a party’s unconscionability claim.

Advantage-taking, however, is an accepted feature of bargaining, and some inequality in outcome will be apparent in all exchanges, especially those of a speculative or sentimental nature. We should of course want to tolerate most unequal exchanges in bargaining, and not to strive for absolute reciprocity in contractual arrangements. A liberal society avoids providing disincentives for those who wish to partake in socially useful activities. The premium which such a society places on the maintenance of bargains will in most cases outweigh the policy favouring the correction of most instances of advantage-taking in contracting, at least to the extent that legitimate business practices are not driven out of the market, or the minimum levels of mutual trust, which markets require for their proper functioning, destroyed. Thus, objectively unequal exchanges should be tolerated to a significant measure.

In looking at the question of substantive fairness, therefore, the courts sometimes ask whether the exchange is of such a nature that any ‘rational’ or ‘sensible, well-advised’ person would accept. But this approach still seems to refer adequacy of exchange back to the notion of special disadvantage: a processual feature. A plaintiff’s acquiescence in her own improvidence would appear to speak loudly of the inadequacy of any advice obtained, explanation given, or disclosure made, and the defendant’s putative awareness of this.

Even if inadequacy of contractual exchange were to be required as a substantive ingredient of the unconscionable dealings jurisdiction, as some


courts and commentators seem erroneously to suggest or argue,\textsuperscript{341} it is not so clear why the criterion should be judged objectively, from the point of view of a legal construct, such a “rational” or “reasonable” person, or in terms of an “adequate” (albeit possibly a minute) consideration.\textsuperscript{342}

Notwithstanding that adequate consideration may have moved from the stronger party, a transaction may be unfair, unreasonable and unjust from the view point of the party under the disability.\textsuperscript{343}

Proof of adequacy of exchange can in truth tell us nothing substantive about the unfairness or unconscionability residing in an act of exploitation, which, on the writer’s analysis, is a purely processual conception. For example, the distressed widow who sells the family home or an heirloom for fair market value under extreme grief from the recent loss of her husband may simply later prefer to keep the property.\textsuperscript{344} Fair market value likewise does not remove the burden of unwanted or inappropriate services.\textsuperscript{345} Conversely, a \textit{prima facie} unfair exchange might conceal a gift,\textsuperscript{346} or otherwise be explicable through motivations of ‘kinship, friendship or gratitude between the parties’.\textsuperscript{347} Fairness of the exchange can sometimes only be measured from the unique perspective or circumstance of the disadvantaged party herself, who is allegedly being exploited, and not in terms of some economically objective criterion.\textsuperscript{348} It is to be recalled from above, moreover, that the substantive advantage received in an act of contractual exploitation is the contract itself, and the other sorts of


\textsuperscript{342} Cf., also, discussion in Section 2.2.2.1., above.

\textsuperscript{343} C.B.A. v. \textit{Amadio, op. cit.}, 475 per Deane J.


\textsuperscript{347} Cf. Hardingham, \textit{op. cit.}, 276.

\textsuperscript{348} Cf. also, Waddams (1976) 39 Mod. L. Rev. 369, 392.
advantages contingent upon the contract, while not relevant in any analytical sense, can only assist the unconscionability enquiry to the extent necessary to evidence the strictly processual criteria of the exploitation claim, especially where such criteria are difficult to prove independently, as with knowledge.

4.1.2.2.3. The 'balance theory' of unconscionability

Of course, there is no fixed measure of the requisite amount of substantive unfairness required to suggest the possible existence of alleged procedural abuse, or exploitation. The nature of bargaining produces cases where equal values are rarely exchanged. The courts, however, are not concerned with every deviation from market price or subjective worth. The courts will tolerate merely "hard", "bad", or "improvident" bargains. Especially in the cases of passive exploitation, which seem to involve more difficult ingredients of proof than do those cases of active exploitation, in particular, in relation to the variable component of knowledge needed to be shown in the former cases, it might thus be advisable to subscribe to a differential evidentiary standard in unconscionability cases; in particular, one which 'disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves'. Essentially, this introduces a 'sliding scale', along which the relationship of substantive unfairness to procedural unfairness is in inverse proportion. That is to say, the more extreme the substantive unfairness manifest on the face of the agreement, the less the inferior party is required to furnish independent proof about the methods, tactics or practices used to produce that unfairness, since the courts are more prepared to displace the need for independent proof of procedural abuse with an inference as to the likely presence of the

349 Generally, see J. Levin and B. McDowell, "The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations" (1983) 29 McGill L.J. 25, arguing that once minimal threshold levels of voluntariness and fairness are met, in determining whether or not to enforce a contract, the elements, voluntariness and fairness, may be balanced against each other, so that a greater degree of one element permits a lesser degree of the other.


same. Vice versa, there are no probative reasons to rely on the presence of inference-raising substantive contractual unfairness where the facts about the presence of procedural abuse are themselves so strong that they independently bespeak the presence of exploitation, so the requirement of such outcomes-oriented items of proof for such purposes is de-emphasised in the judgments. Unconscionability, on this analysis, aims at striking some evidentiary “balance” between these two considerations, processes and outcomes, while maintaining flexibility in doing so. The mere passive acceptance of a contractual benefit might thus be considered unconscionable where the contractual imbalance is large but not where it is small, simply because the necessary procedural criterion of knowledge of another’s special disability, or merely having reason to know of that disability, can readily be inferred on account of the substantive irregularities that exist in the the former case but not in the latter. Likewise, a more active process of exploitation—a ‘drawing ... in to drink’; a ‘process of manipulation’; an

352 Such a useful method of analysing unconscionability problems has been influential in the United States, and seems to be traceable back to Spanogle’s article in 1969: Spanogle, J., “Analysing Unconscionability Problems,” (1969) 117 U. Pa. L. Rev. 931. The approach has apparently received judicial support in New Zealand. In Elia v. Commercial & Mortgage Nominees Ltd (1988) 2 N.Z.B.L.C. 99-136, for example, Gault J. said, at 103,310:

[W]here there is less imbalance in bargaining strength, or in benefit flowing from the contract, it is unlikely that there will be a finding of unconscionable bargain without evidence of lack of propriety, overreaching or unfairness on the part of the stronger party.

353 Such as difficulty of proof; particularly of knowledge.


357 Per Fullagar J. in Blomley v. Ryan, op. cit., 405, a case also involving a substantial undervalue.

358 Diprose v. Louth (No. 1) (1990) 54 S.A.S.R. 438, 448 (King C.J.): defendant manipulated plaintiff’s infatuation by manufacturing an atmosphere of crisis where no crisis existed. Diprose v. Louth, however, was a case involving a gift. Gifts by their nature are improvident.
exacerbation of existing predilections;\textsuperscript{359} the use of heavily persuasive, tricky or hasty sales practices or techniques;\textsuperscript{360} dissuasion from obtaining independent advice;\textsuperscript{361} the employment of influential intermediaries;\textsuperscript{362} and the like—might justify an unconscionability judgment where there is relatively less substantive unfairness than would characteristically be required to compensate for the shortfall in the process-related evidence which is ordinarily difficult to come by in the more passive cases. Indeed, sometimes in rejecting unconscionable dealings, the courts expressly note the absence of active victimisation on the part of the superior party in reaching their conclusion.\textsuperscript{364} The process of victimisation, however, may rise to a sufficient level of activeness to attract other legal doctrines, such as duress (involving threats) or deceit (involving deception), neither of which, as we shall see,\textsuperscript{365} require any element of substantive unfairness to be shown in order to reinforce an “exploitation” or “unconscionability” judgment. Such cases of fraud and duress may simply be seen as the most outrageous examples of unconscionable dealing, although to maintain doctrinal workability, integrity and intelligibility these cases are administered through well-established and independent legal doctrines. These cases are merely extreme variants of our exploitation theme, exploitation itself, in the legal analysis, being merely a matter of degree.\textsuperscript{366}

\textsuperscript{359} Cf. Blomley \textit{v.} Ryan, \textit{op. cit.}: purchasers supplying rum which alcoholic vendor drank; cf. Say \textit{v.} Barwick (1812) 1 V. \& B. 195: purchasers getting infant vendor drunk.


\textsuperscript{363} Generally, see Chen-Wishart, \textit{op. cit.}, Chp. 9.


\textsuperscript{365} Chapters Five and Seven.

\textsuperscript{366} This is also the reason why “unconscionable dealings” appears to be a residual category, such that a court might intervene where the conduct in question cannot otherwise readily be placed in any of the existing categories of fraud, duress, undue influence, and the like. “Unconscionable dealings” has been used in contractual settings to protect from exploitation persons known to be especially disadvantaged in conserving their own interests where no other
4.1.2.3. Unconscionable dealings and the standard-form contract?

I think we all start with a general predisposition in favour of freedom of contract.\textsuperscript{367} The freedom was all on the side of the big concern.\textsuperscript{368} The big concern said, ‘Take it or leave it’. The little man had no option but to take it.\textsuperscript{369}

There are few private law problems which remotely rival the importance; economic, governmental, or legal of the form pad agreement, and none has been more disturbing to life or more baffling to lawyers.\textsuperscript{368} That where bargain is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.\textsuperscript{369}

In Commercial Bank of Australia Ltd v. Amadio, Mason J. himself suggested that, since times have changed, it may be appropriate to apply the unconscionable dealings doctrine to meet new situations, instancing in particular ‘entry into a standard form contract dictated by a party whose bargaining power is greatly superior’.\textsuperscript{370}

Much of this thesis has been premised on the notion of a bargaining process, as it was elaborated in Chapter Three. In truth, a large number of vitiating element, such as duress or misrepresentation, is present. Clearly, if some other vitiating element were present, \textit{a fortiori} unconscionable dealings would also be satisfied, but this would be an otirose application of the doctrine.


As Chapter One showed, the mass standardised contract was a corollary of the post-industrial period, with its large-scale free enterprise, mass production and mass distribution. Such contracts were readily perfected in most fields of large-scale enterprise: notably, in transport, insurance, banking, consumer transactions, commercial and residential tenancies, national and international trade, and labour relations. As was also seen in that chapter, however, the use of standardised contracts gave rise to greater problems than had been foreseen by the proponents of the new industrialised and economic order.
contracts in our society are not “negotiated” at all, but rather the product of a set of mass standardised (“boiler-plate”) contractual terms, unilaterally created and imposed, characteristically on a take-it-or-leave-it basis, by well-organised private bureaucracies upon individual contracting parties, almost invariably consumers and small businesses, who are themselves unable effectively to negotiate around such terms or to find a better set of terms elsewhere, and who are thus ineluctably vulnerable to this modern form of contracting power. But such contracts are largely to be endured as beneficial in our complex, industrialised and impersonal free-market


372 Such contracts are often referred to as “contracts of adhesion”.

373 Standard-form consumer contracts are typically linked to the growth of bureaucracy in modern life. Some implications of this have been noted by Rakoff, T., “Contracts of Adhesion: An Essay in Reconstruction” (1983) 96 Harv. L. Rev. 1172, esp. at 1222.

374 Either because the proponent of the standardised form holds a monopolistic position, or because all competitors use the same or a similar form with similar or identical terms. But in Posner’s view, any ‘sinister explanation [of contracts of adhesion] is in general implausible because it implicitly assumes the the absence of competition’: Posner, R., Economic Analysis of Law (2nd ed., 1977), 84-6. But cf. Goldberg, V., “Institutional Change and the Quasi-Invisible Hand” (1974) 17 Journal of Law & Economics 461, 483-7, doubting whether competition among producers protects the consumer from other terms she must take in market transactions.

375 Kessler pointedly writes of such contracts:

With the decline of the free enterprise system due to the innate trend of competitive capitalism toward monopoly, the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from being a one-sided privilege. Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.

society. Accepted as a necessary part of modern life, standardised contracts are largely tolerated for their utility, convenience and efficiency in the world of business. Contracts, like their subject-matter, themselves become products on a shelf; but this effective limitation on freedom and choice does not alone, and should not alone, establish a presumption that the transaction is, or might be, unconscionable.

The standard-form contract typically rewards the resources held by one party only: the firm; and it tends to comprise an accumulation of seller-protective rather than consumer-protective clauses. The consumer’s protection through market forces alone is weak, though there is no simple solution to the problems such contracts create. Since standard-form

---

376 Society generally benefits because such contracts mean a reduction in transaction costs, which is in turn reflected in reduced prices.


378 Arthur Leff argued that it was misleading to conceive of standard-form contracts as contracts at all, especially in the sense of centrally involving a process of individual bargaining and exchange. Rather, he saw them as mass-produced products, which ought to be regulated or not depending on their social importance: Leff, A., “Contract as Thing” (1970) 19 Am. U.L. Rev. 131; Leff, A., “Unconscionability and the Crowd: Consumers and the Common Law Tradition” (1970) 31 U. Pitt. L. Rev. 349.

379 Farnsworth notes that it would 'defeat the purpose of standardization if the other party were free to negotiate over its terms': Farnsworth, E. A., Contracts (2nd ed., 1990), 312.

380 One of the questions asked by both s. 51AB(2)(b) of the Trade Practice Act 1974 (Cth), and s. 9(2)(d) of the Contracts Review Act 1980 (N.S.W.) is whether any provisions of the contract in question impose conditions which are not reasonably necessary for the protection of the legitimate interests of any party to the contract. Other aspects of s. 9 are also directed at boiler-plate contractual provisions.


382 Goldberg, ibid, comments:

In some instances all parties will benefit from the standard forms while in others all parties will be hurt. In many instances some consumers will benefit while others will be harmed. (For example, harsh terms will, in equilibrium, yield lower prices: those who would prefer the harsh term-low price combination will benefit at the expense of those who would have preferred an
contracts have tended to affect individual persons as a class, they have tended to be regulated both in an indirect and piecemeal fashion, and through broad legislative provisions and administrative agencies; the courts and the common law have had a lesser role to play. In controlling or regulating standard-form agreements, moreover, the law must be vigilant to maintain some incentive structure which encourages individuals to read and negotiate all terms for themselves, as well as to maintain a structure which also encourages those who draft form contracts to harmonise their contents with the standard and reasonable expectations of a relevant industry or community.

Characteristically, the broad emphasis of the complaints in cases of standard-form contracts lies with their harsh and unfair terms, rather than with the processes which created them, for we largely accept these processes as a necessary way of doing business nowadays. The law tends to police the terms through an array of specific rules relating to particular types of suspect

---

383 For example, through the requirement of relevant contract terms in certain types of contracts (notably credit contracts), statutory cooling-off periods, and the creation of inalienable rights through bans on the use of particular types of terms, such as under the Unfair Contract Terms Act 1977 (U.K.), ss. 6-7; Trade Practices Act 1974 (Cth), s. 68.

The common law, for example, has made sideways attacks on standard-form contracts through refusing to incorporate terms through insufficient notice, reading down exclusion clauses or construing them contra proferentem, or by refusing discretionary remedies from the stronger party. See Waddams, “Unconscionability in Contracts” (1976) 39 M.L.R. 369. (Cf. also, n. 387, infra.)

384 Most notably, the provisions in the new Part IVA of the Trade Practices Act 1974 (Cth), as inserted by the Trade Practices Legislation Amendment Act 1992 (esp. ss. 51AA and 51AB).

385 Such as the Australian and New Zealand Trade Practices and Commerce Commissions, respectively; or the U.K. Office of Fair Trading.

clauses on an *ad hoc* basis: especially exculpatory clauses,\(^{387}\) penalties and forfeitures,\(^{388}\) and, possibly, clauses of a nature “not reasonably to be expected” in the dealing in question.\(^{389}\) If such cases are at all concerned with exploitation then, it is usually of a distinctively passive nature,\(^{390}\) with a marked emphasis on substantive unconscionability.\(^{391}\) Theoretically, then, unconscionable dealings might apply to standard-form contracts,\(^{392}\) although


\(^{390}\) There is, in the ordinary case, no active procedural abuse. Standard-form contracts typically involve merely inequality (one-sidedness), knowledge and harsh or unfair clause. However, some active (added-procedural) ingredients may be supplied where, for example, the consumer has had no real opportunity to read and consider the terms, or to take advice on the document. A misleading or incomplete summary or explanation of the form may likewise supply stronger reason for intervention (cf., e.g., *Curtis v. Chemical Cleaning & Dying Co.* [1951] 1 K.B. 805). Obtaining the consumer’s signature on documents before filling in details of the particular transactions may also supply an element of procedural unfairness: cf. the facts in *United Dominion Trust v. Western* [1976] Q.B. 513 (*non est factum*). Some standard form-contracts may also in themselves be considered to involve misleading practices, such as where conspicuous or overly technical language has been used, hindering proper understanding by the consumer, or where onerous clauses are buried in the fine print.


the writer would, for two reasons, caution against too ready a deployment of the doctrine in that area. First, the unconscionable dealings doctrine finds its home only with the disadvantaged who are indeed ‘special’. We are as members of this society all generally vulnerable to the standard-form contract, and obviously the mere fact of being a member of the consumer class does not automatically qualify us for the description of “especially disadvantaged”. In order to qualify for unconscionable dealings, the consumer would have to prove that she was afflicted with some additional disabling condition: such as her tender years, unusual stupidity, naivety, credulity, comprehension disabilities, or specific transactional disability, and that the proponent of the standard-form was aware, or had reason to be aware, of this superadded fact. Of course, the proponent of the form might itself place the consumer in such a position, say by denying her a fair opportunity to read, consider or take advice on the document, or by giving a misleading or incomplete summary or explanation of the document, in which case unconscionable dealings or some other legal doctrine or statutory provision might attach to the conduct. Second, the problems created by mass standard-form contracts are so pervasive in our society that one suspects unconscionable dealings is too piecemeal an approach wholly to be an adequate solution to the problem. General consumer protection legislation and administrative agencies, as well as the common law rules and legislative provisions which are systematically designed to police the application of unfair terms themselves, perhaps continue to be more effective instruments for coping with the problems arising from mass standardised contracts.


394 In an extreme case the defence of non est factum may apply, assuming that the assenting party has not herself been negligent. Cf. Petelin v. Cullen (1975) 132 C.L.R. 355.

The writer thus leaves the reader with Epstein's sentiments in this latter regard:

In contract law, as in the law of torts, the impact of a rule will often depend on its specificity of reference. A broad common law doctrine of unconscionability that proceeds on a case-by-case basis is not of major significance. No matter how attractive the precept of unconscionability is as a judicial matter, the number of transactions that can be reached and controlled is too small to have a social impact, and the reluctance of courts to review countless agreements is too strong.

---

Chapter Five

BRINGING UNDUE PRESSURE TO BEAR I:
Duress

Chapter Contents

1. INTRODUCTION ........................................................................................................ 342

2. SOME PRELIMINARY THOUGHTS ABOUT DURESS ............................................. 346
   2.1. Introduction ......................................................................................................... 347
   2.2. On the Nature of Coercion .................................................................................. 352
   2.3. An Historical Encounter: The Confluence of Law and Equity in Relation to Duress ........................................................................................................ 356
       2.3.1. Duress at Common Law ................................................................................ 357
       2.3.2. Undue Pressure in Equity ............................................................................. 359
       2.3.3. An Expanded Common-Law Rule ................................................................. 361
   2.4. The Abandonment of the “Overborne Will” Theory .......................................... 363

3. THE ‘TWO-PRONGED’ THEORY OF DURESS .......................................................... 368
   3.1. Stating the Two-Pronged Theory of Duress ....................................................... 368
   3.2. The Choice Prong: “Threats” vs. “Offers” .......................................................... 371
   3.3. The Proposal Prong: The Nature of the Pressure Exerted .................................... 377
       3.3.1. The Proposal: Threat and Demand ............................................................... 378
       3.3.2. The Problem with Prima Facie “Lawful” Threats ......................................... 381
           3.3.2.1. Threats of legal process ......................................................................... 384
           3.3.2.1.1. Threats of civil process .................................................................... 386
           3.3.2.1.2. Threats of criminal process ............................................................ 388
           3.3.2.2. Threats not to do future business ....................................................... 389
1. INTRODUCTION

_He that complies against his will is of his own opinion still._¹

Aristotle identified ignorance and constraint as the two circumstances that render human action involuntary.² Ignorance in contract formation relates, in particular, to one’s deliberative processes in contracting: to one’s “cognition”, or to one’s informational needs. The subject of “ignorance” or “mistake” is the burden of Chapters Seven, Eight and Nine, and so discussion of that notion is reserved until those chapters. In this chapter, however, and in the chapter to follow, the subject of “constraint” is given particular attention. In this context, constraint relates, specifically, to one contracting party’s choices in contracting: to one’s volitional capabilities, or to one’s “freedom”. But the law does not concern itself with so-called “natural”

¹ Samuel Battes.

² Aristotle, _Nicomachean Ethics_, Book III (M. Ostwald transl., 1962), 1109b-11b. The ‘ignorance’ to which Aristotle referred, however, was the kind that would negative _mens rea_ in a criminal complaint, such as where a friend administers poison, believing it to be medicine, rather than the kind that would prevent one person from acting as wisely and as virtuously as another.
constraints on one party's choices. These "natural" constraints are said to come from within the self, or from one's own circumstances not wrongfully being the creation of another. Examples might thus include one's ordinary lack of spending power, pre-existing lack of bargaining alternatives, or natural monopolies, background social inequalities relating to choice—wealth, talents, resources, and the like. The law simply is not well-equipped to cope with the unequal patterns of choice-rendering capacities or opportunities already inherent in an unfair world.³ We all cannot do and have everything we would like. Nonetheless, the law is concerned with "artificial" choice constraints—constraints that are wrongfully imposed upon one by another. It is also concerned with what those others do with a fellow person's own natural choice constraints (poverty, need, necessity and the like), for these conditions can unfairly be exploited. The law is not, therefore, per se concerned with the circumstances giving rise to constraints on choice, and hence to questionable "consent". Rather, it is concerned to control or to regulate how people bring about such circumstances or conditions in others, and hence bring about their contractual assent, or what people make of such circumstances peculiarly pre-existing in others to procure their contractual assent. The law is concerned precisely with one party's exploitation, "active" or "passive", of another's choice-constraining circumstances or conditions.

One of the clearest examples of objectionable behaviour in bargaining resides in the situation where one party's consent to a transaction is extracted or obtained by the other, or by some third party with whose conduct he may be charged,⁴ by means of influence or pressure which the law regards as illegitimate or wrongful. Influence or pressure may be wrongful of its own nature, or by reason of some context-specific relationship of trust or responsibility in which the influencer stands to the victim.


The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions.

⁴ Though interesting, instances of third-party duress or receipt are not systematically considered in this thesis. Cf. the approach taken to the problem in the Restatement (Second) of Contracts, § 175(2), Comment (e); Note, "Duress of a Third Person as Grounds for Rescission of a Legal Transaction" (1930) 30 Columbia L. Rev. 714.
Accordingly, there are two quite distinct cardinal instances of unfair pressure in bargaining, both of which involve an abuse of power jeopardising the integrity of either the bargaining process itself, or a relationship of which that process is merely part. In the first case there is an abuse of the power which results from a wrongful act: for example, "I'll blow your head off if you don't sign this contract!";5 "Agree to my terms or I'll burn your bloody house down!".6 These cases are characterised in particular by the use of wrongful threats and demands (proposals), and thus are instances of "active" exploitation par excellence. These wrongful proposals, moreover, are potentially unfair in that they may have the effect of reducing the victim's bargaining options to such an extent that she is effectively denied the exercise of reasonable choice in the dealing in question. She has, by another's conduct, been denied a fair opportunity to exercise her otherwise ordinary volitional capacities in the particular bargaining process in question, and is, potentially, at least, thereby subjected to a motivation for action from which in law she deserves to be free.

Analytically, it is not necessary in this class of case that the party is in some way more specifically and antecedently vulnerable to having her volition unwarrantedly constrained, although this may assist in determining the efficacy of any pressure applied. Many cases of duress (i.e., wrongful pressure brought about by the use of threats), however—especially those involving threats of a prima facie lawful nature, usually directed at the victim's economic interests (economic duress)—are characterised as illegitimate because of the presence of additional exploitative circumstances, such as distress or need, and to this extent such cases effectively begin to shade into the outer limits of the unconscionable dealings jurisdiction considered in the previous chapter. These peculiar cases of duress are akin to those of physical and property-related duress (duress to the person and duress to goods), but they have a less crude, or more insidious, "manipulative" air about them, and are more analytically dependent on the special exploitable condition or circumstances of the particular complainant: for example, "Look, if you don't sign this guarantee I will personally see to it


that your dear son, whom we know to be a fraud, is prosecuted and extradited".7 “Agree to pay me more now or I, your only possible source of future supply, will terminate our course of dealing”.8

The second cardinal instance of abuse by pressure is more subtle than the first. This unfair exercise of power typically arises by virtue of one party’s legitimate possession of a peculiarly strong capacity or opportunity to influence the other party’s contracting choices and actions by virtue of a special relationship existing antecedently between them. Characteristically, such a relationship is, in fact or in law, one in which the party susceptible to the exercise of power (pressure, influence) is justified in her assumption that the other will only act in a manner consistent with her (the former’s) own welfare in their dealing inter se. In this category of case, the abuse consists, or is presumed to consist, in the superior party using his position of power, influence or opportunity arising from the parties’ relation, in a way contrary to this very assumption. The superior party uses the power or influence his special position gives him to advance his own or some third person’s interests, where in fact and in law he is duty-bound only to act in the interests of the other. Specifically, his benefit here resides in the procurement or acceptance of the other party’s contractual assent.

The first instances of abuse characteristically fall under the traditional common law heads of “duress”, “compulsion” or “coercion”, labels largely synonymous nowadays.9 Equity developed a parallel but broader


9 Cf. per Isaacs J. in Smith v. William Charlick Ltd (1924) 34 C.L.R. 38, at 56:

“Compulsion" in relation to a payment of which refund is sought, and whether it is also variously called “coercion”, “extortion”, “exaction” or “force”, includes every species of duress or conduct analogous to duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property or any right of the person who pays ....

The full range of language applied among the analogous species, however, may not strictly be appropriate to the forms of pressure we understand to be coercive. As Bayles points out, words like “forced” or “compelled” may not presuppose a human agent, whereas “coercion” always does:

Coercion is an interpersonal relation in which one person affects the behaviour

345
jurisdiction to grant relief in analogous instances of "undue pressure", although the lines of demarcation between these traditionally distinct areas of law have in recent years become difficult, if not impossible, to draw. The second instances of abuse tend to fall within the equitable rules of "undue influence", particularly the category that is parasitic on an antecedent fiduciary-like relation, with its attendant legal techniques. These rules and relations are singled out for specific consideration in Chapter Six. In the present chapter, the writer in particular considers the various principles and rules of "duress", as these potentially apply in the context of contract formation.

2. SOME PRELIMINARY THOUGHTS ABOUT DURESS

The central problem in the law of ... duress is to determine when it is advisable to exercise judicial control over the use of power, economic or otherwise, to obtain some private advantage by cancelling that advantage. In any situation in which persons with adverse interests deal with each other, each party presumably exercises whatever power he has; and if a transaction results, it will not be set aside merely because it is the product of such exercise. Nor will it be set aside merely because one person's power was superior to that of the other. Nonetheless, limits will be placed on the proper exercise of such superior power for private advantage....

The rationale [of the doctrine of duress] is that [a party's] consent was induced by pressure exercised upon him by [the] other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approved either expressly or by implication after the illegitimate pressure has ceased to operate on

of another. This characteristic distinguishes coercion from force, "making," compulsion, constraint, and restraint. Physical conditions may force, compel, or make a person act in a manner in which he would not have chosen without the conditions, but they cannot coerce him.


It is that deeper though moral criterion for coercion which we must look for.

2.1. Introduction

The capitalist philosophy upon which much of modern contract doctrine is founded characteristically assumes that market transactions are voluntary and uncoerced, even if they are made against a background of economic necessity. To sustain this position, however, it has been argued that there is an important and sharp distinction to be drawn between mere "circumstances" that limit alternatives non-coercively, and specific interpersonal threats that coerce. Though essentially valid, in the writer's view, this distinction nevertheless needs to be brought into much clearer focus.

Previous chapters have shown that there are manifold ways in which one party can become vulnerable to exploitation at the hands of another in a dealing between them. Importantly, the relative strengths of the parties may have been more a product of one party's circumstances than a consequence of any design on the part of the other. In distinguishing between coercion and other forms of bargaining abuse, therefore, the law makes it quite clear that it is one thing for D to cause P's dilemma (her constraint of choice) through threats, yet quite another for D knowingly to take advantage of—to exploit—P's pre-existing personal or situational choice-constraining circumstances for

---


12 Fried, C., Contract as Promise (1981), 97. The full quotation is as follows:

It is always neater if a moral conclusion can be made to turn directly on non-moral criteria, for when the moral depends on the moral there is always the danger of a vicious circle. And of course there are those who believe that calling a contract coerced does no more than announce our decision not to enforce it. But if a moral criterion is deeper, more general, or at any rate independent of the moral issue it determines, then there is no circularity at all. It is that deeper though moral criterion for coercion which we must look for.

which $D$ is not responsible. In the first class of case, $D$'s conduct is wrongful.

14 In *Hackley v. Headley*, 8 N.W. 511 (1881), Headley accepted less than he thought due him because he was in acute financial distress. In rejecting Headley's claim of duress, the court said (at 512): 'It is not pretended that Hackley ... had done anything to bring Headley to the condition ... or that [Hackley was] in any manner responsible for [Headley's] pecuniary embarrassment'. Cf., also, *Fruhauf Southwest Garment Co v. U.S.*, 111 F. Supp. 945 (1953) ('It has become settled law that the mere stress of business conditions will not constitute duress where [the other party] was not responsible for the circumstances'); *Johnson, Drake, and Piper v. U.S.*, 531 F. 2d 1037 (1976); *Higgins v. Brunswick Corp.*, 395 N.E. 2d 671 (1979); *LaBeach v. Beatrice Foods Corp.*, 461 F. Supp. 152 (1978) ('The mere presence of economic power, without some wrongful use of that power, does not ... constitute economic duress .... Even assuming Beatrice had knowledge of this loan and the pressure being asserted on LaBeach for repayment ... Beatrice cannot be held responsible for economic pressure put on LaBeach by a third party' (157,158)); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942): not duress for shipbuilder to take advantage of government's wartime need for ships; but see Frankfurter J.'s strong dissenting opinion. Cf. also, *Schmalz v. Hardy Salt Co.*, 739 S.W.2d 765 (1987); *Deer Creek Ltd v. North American Mortg. Co.*, 792 S.W.2d 198 (1990); *Blodgett v. Blodgett*, 551 N.E.2d 1249 (1990).

The point is well-illustrated in *Magnacrete Ltd v. Douglas-Hill* (1988) 48 S.A.S.R. 565. In that case the defendants, who were in pressing financial difficulties, contracted with the plaintiff to sell a quantity of shares. They later sought (unsuccessfully) to resist proceedings for specific performance on the grounds of, *inter alia*, economic duress. Mr Justice Perry, in the Supreme Court of South Australia, held that the plaintiff company had not in any way been responsible for pressure under which the defendants were operating. It had indeed come from an independent third-party bank, *in circumstances of which the plaintiff was not aware*. The pressure brought to bear by the plaintiff was thus itself not shown to have exceeded that commonly associated with commercial dealings. Cf. also, *Pope v. Ziegler*, 377 N.W.2d 201 (1985); *Winfield Developments Ltd v. City of Winnipeg* [1989] 4 W.W.R. 558, esp. at 565 per Philip J.A.; *Walmsley v. Christchurch City Council* [1990] 1 N.Z.L.R. 199, at 208-9 per Hardie Boys J.; *Shivas v. Bank of New Zealand* [1990] 2 N.Z.L.R. 327, at 351-3 per Tipping J.

Some have, of course, maintained that the distinction between causing a party's situation of advantage and merely taking advantage of another's background circumstances cannot be sustained or, at least, that it is of little significance. John Dalzell ("Duress by Economic Pressure I" (1942) 20 North Carolina L. Rev 237: hereafter, "Duress I", at 257), for example, maintains that when someone consciously takes advantage of another's adversity, 'the fact that he did not create [it] should be treated as of little importance'. In a limited sense, this view is correct—there is no reason to suppose that the degree of pressure on $P$ at the time of contracting with $D$, or the adequacy of the choice alternatives open to $P$, is contingent on whether $D, P$, or anyone or anything in particular caused $P$'s dilemma. But where the point of the distinction goes to differentiating duress from some other form of bargaining abuse, such as unconscionable dealings, the distinction clearly remains not unimportant. For whatever one might say about $P$'s choice situation itself, different considerations seem to count towards our judgment about the wrongness in $D$'s merely taking advantage of $P$'s distress—exploitation *simpliciter*—from those that count towards our judgment about $D$'s causing such distress in the first place. Therefore, it seems that a liberal theory of contract needs to presuppose some analytic distinction between pressures which $D$ exerts on $P$ and those which are, with respect to $P$, at least, simply part of $P$'s naturally pre-existing circumstances or state of affairs, even if these are caused by other persons. Just how much analytical and normative weight this distinction can bear, however, remains to be seen. Cf. Wertheimer, op. cit., 40. See also, Feinberg, J., *Harm to Self* (1986), 244: '[W]hen A merely exploits circumstances that he finds
simpliciter, for by definition we will assume that it involves an improper act, whereas in the latter it depends on the various criteria which apply to unconscionable dealings. A further issue does arise, however, as to whether it is nevertheless duress to make threats and demands within the context of P’s naturally pre-existing choice constraining circumstances, especially where D knows that his threats are more likely to be effective on account of P’s peculiar circumstances or condition relative to him. The wrongfulness of any proposals ("Do X or I will bring about undesirable consequence Y!") in this sort of case seems precisely to be contingent upon the legitimacy of using the vulnerable party’s peculiar circumstances to apply pressure that would not have been possible under more favourable bargaining conditions (i.e., under equilibrium bargaining conditions). If these cases can properly be called ones of duress, for they share a common modus operandi: the coercive proposal, or threat, then they potentially become almost indistinguishable from the more active forms of unconscionable dealing,15 such that, assuming the choice-constraining conditions reach the threshold set by the “special disadvantage” criterion, the equitable unconscionable-dealings jurisdiction may equally be called into operation to resolve the various cases that the common law has traditionally struggled to accommodate: economic duress involving so-called “lawful” threats. This is a point to which the writer will return at the conclusion of this chapter.16

Some degree of persuasion and pressure is natural and likely in the negotiations leading up to a contract, especially in arm’s-length commercial contexts.17 The nature of bargaining itself tolerates and encourages to some ready-made, then frequently, though not always, B’s consent ... remains valid’.

As will be seen below, the modern duress doctrine does incorporate ideas of vulnerability and unconscionable dealing; although this is merely as part of the broader duress enquiry, in determining what is a “wrongful” proposal, or a “threat”.


16 Section 5.1.

17 Hale, for example, notes that all contracting involves a measure of coercion, but not duress: Hale, R., “Bargaining, Duress, and Economic Liberty” (1943) 43 Columbia L. Rev. 603; cf. Philips, M., “Are Coerced Agreements Involuntary?” (1984) 3 Law and Philosophy 133, arguing
measure the use of pressure between the parties. Threatening to withdraw from the negotiations unless more favourable terms are agreed to by the other party is the most salient example: a practice commonly understood as "bluffing". Such threats are not usually considered as "threats" at all. Indeed they are viewed as beneficial, because they test the parties' preferences, and assist them eventually to reach an outcome that each considers to be "fair". Threats to withdraw from negotiations, therefore, typically do not amount to coercion.

The ideas behind this right to withdraw from negotiations are quite straightforward. A corollary of freedom to contract is "freedom not to contract", so that the notion of voluntary exchange means that parties are free to decide whether or not to participate in the deal, in addition to deciding upon what terms. The right to threaten non-participation is, therefore, an integral aspect of contractual voluntariness underpinning the freedom of contract philosophy. Of course, one cannot categorically assert that a threat to withdraw from a deal can never amount to unfair pressure. For example, bargaining conditions may be such, especially where parties are well along in the process, that it becomes unsafe for one party to withdraw without incurring some form of legal liability (cf. Walton Stores (Interstate) Ltd v. Maher (1988) 164 C.L.R. 387). Under such conditions, one party may become especially vulnerable to opportunistic behaviour on the part of the other; and in consequence of this, threats to withdraw on the part of the stronger party may place the other in a position of having little practical choice but to accede to his demands, and this may be viewed as coercion.

19 Many proposals to breach a contract with the other party, or to detain her property, or to initiate civil proceedings against her may, if made in good faith, amount merely to genuine invitations by the one party that the other should enter into a contract of settlement or compromise.

20 The case of settlements and compromises is considered in Section 3.3.2.1.1., supra.

requires individual responsibility (through the use of counter-techniques or practices) when such pressure is reasonably to be expected in the instance of bargaining in question, or where the use of such pressure produces the sort of socially beneficial results referred to above.

Where the application of pressure in bargaining is seen as legitimate, such cases are usually classified in law non-pejoratively, as "hard bargaining", or as involving mere "commercial pressure".\(^2\)\(^2\) It becomes the unique but formidable burden of the doctrine of duress (and its equitable analogues), then, to capture the distinction between these classes of case—between illegitimate, coercive pressure-hence duress, on the one hand, and ordinary legitimate commercial pressure, on the other hand.\(^2\)\(^3\) It is not, of course, easy to draw the necessary distinctions for this purpose. Our prevailing ideologies will necessarily dictate what it means to coerce, as opposed merely to applying legitimate commercial pressure. Since our dominant commitment in the commercial sector appears to be the promotion of competition, we should naturally expect, therefore, that the strong will in some measure be permitted to prevail over the weak. The philosophy of laissez-faire competition entails at its very core that the strong must be free to use their strength—to exert pressure—whilst the weak must be bound to succumb and have their choices limited;\(^2\)\(^4\) 'Competition', we are told, '[is] by its very nature ... deliberate and ruthless.'\(^2\)\(^5\)

Yet there are clearly limits to the use of comparative strength. In the


\(^{2\text{3}}\) Cf. Atlas Express Ltd v. Kafco (Importers and Distributors) Ltd [1989] 3 W.L.R. 389, 394 per Tucker J.: Economic duress must be distinguished from commercial pressure, which on any view is not sufficient to vitiate consent. The borderline between the two may in some cases be indistinct.


name of fairness, the strong must on occasion become subject to various checks on the exercise of their physical or, on occasion, economic strength, especially where such an exercise of strength or power can be said to “exploit” the weak and to jeopardise the integrity of the bargaining process itself. What precisely is “fair” competition, however, begs all the critical questions.

In extending our ideas of what it means to abuse one’s negative duty not to engage in duress in bargaining, this chapter aims to explain precisely how the law distinguishes, or should distinguish, between permissible and illegitimate uses of proposals in bargaining, and to locate this distinction within a proper theoretical framework for thinking about duress problems. This ultimately requires a complete descriptive and normative (or moralised) account of what it means legally to be “coerced”. Moreover, this in turn demands that two additional and independent normative theories be consulted in addressing the relevant questions. First, what is a “wrongful” proposal? For only wrongful proposals, or “threats”, can coerce. Second, when is a wrongful proposal or threat considered in law to be sufficiently grave in its effect on its recipient’s precontractual choices to justify that recipient submitting to the terms of the proposal and later turning round and seeking to be released from the resultant bargain transaction? The discussion begins with the first and major enquiry—the nature or legal coercion itself—but will consider in greater detail the two additional theories, the combined effect of which are crucial to our making the kind of refined judgmental distinctions required of a modern, developing law of duress.

2.2. On the Nature of Coercion

[Coercion is] an aspect of contract law that is of central importance in a society that depends as heavily as does ours on individual choice. For the larger the role accorded to individual choice, the greater the significance of coercion in contracting.27

In concept, dimensions, and the realities of

---

26 See Section 3.2., below.

According to John Stuart Mill, choice, even when it results in wrong choices, is a morally valuable expression of our self-directing freedom. The ability to obligate oneself by creating a binding contract, for example, is but one important aspect of this freedom. The freedom to exercise the power one acquires by virtue of physical or economic strength is yet another. Freedom and coercion, however, are considered to be antithetical relations or realities, such that ‘freedom entails the absence of coercion, and coercion involves the absence of freedom’. Thus, to say that D forced or coerced P to do X, or that P did X under duress, understandably gives rise to some powerfully emotive questions about precisely what it means to be “coerced”. Denominating D’s conduct toward P as “coerce” is to condemn in some sense D’s conduct. But beyond its obvious tendency emotively to persuade in favour of a coerced party, a “coercion claim” (or any of its more technical analogues) has in law, generally, special significance; for what one is really claiming when one complains of “being coerced” is that because of coercion, duress, or undue influence, one should be relieved of the normal moral or legal consequences of one’s actions. Hence, as a result of coercion, promises are not binding, rights waived can be regained, punishments are no longer justified or just.


30 The perennial challenge for contract law, therefore, is to specify the conditions under which individuals can voluntarily undertake mutual obligations that they otherwise would not have. See Fried, C., “Is Liberty Possible?”, in Tanner Lectures on Human Values (1982), 95-96.

31 Hence it becomes apparent that coercion or duress has to do with the freedom of both parties: the coerced and her coercer. Cf. Seddon, op. cit., 142.


33 Cf. Fingarette, H., “Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape” (1985) 42 Wash. & Lee L. Rev 65, at 105 (‘... but, because of having been Victimized into doing the act, the Victim asks to be legally excused from legal burdens ordinarily entailed’).
The main effect of all this is to ensure that the emphasis of legally cognisable coercion—“duress”—appears today to have less to do with “freedom” and “voluntariness” and more to do with “wrongness” or “unfairness”. Whereas coercion is itself a broad and versatile concept, covering myriad situations involving a threat which D brings to bear on P to do something that P would not otherwise have done for that reason, the concept of duress, while related, is narrower. Whereas “coercion” can encompass either normative or empirical compulsion, the concept of “duress” is essentially normative at its core. It is this feature of duress, for example, that prompted Professor Westen to define it as ‘normatively illegitimate compulsion’. The distinction between the broader notion of coercion and the narrower notion of duress has also received judicial support in Lord Scarman’s speech in *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* (hereafter: *Universe Tankships*):\(^{36}\)

In life, including the life of commerce and finance, many acts are done “under pressure, sometimes overwhelming pressure”: but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.

Characteristically then, the legal enquiry into coercion (duress) shows little evidence in its definition of the distinctively non-moralised, empirical or psychological ingredients of coercion: the mere feeling of being trapped or under pressure, of having no alternative or of being used. Instead, duress claims seem to involve complex moralised judgments at their very core. One eminent commentator, for example, remarks that the enquiry into the permissible limits of bargaining pressure has seen United States’ judges ‘caught up with making moral judgments of the most delicate sort’.\(^ {37}\)

---

\(^{34}\) That is, coercion is wide enough to cover both those cases that the law or morals would judge to be “coercion”, because they are by some criterion or set of criteria wrongful, and those cases that we as persons might say is coercive simply because that is what we experience it to be. See n. 38, infra.


\(^{37}\) Farnsworth, E. A., *Contracts* (1982), 262, citing the commentary to the *First Restatement of*
Accordingly, it has been the apparent and continuing aim of the law in this area to develop an acceptable theory of duress: one that explicates the normative, rather than the everyday psychological, value-free, understanding of coercion; one that secures the crucial connection or distinction between the empirical, psychological fact of coercion and the moral or legal judgment of mitigated or nullified responsibility. The formidable nature of such a task, however, is resonant in academic writing and judicial pronouncement.

---

*Contracts*, § 492, Comment (g): 'acts ... that are wrongful in a moral sense if made use of as a means of causing fear vitiate a transaction induced by that fear'.

\[38\] In his thorough philosophical treatment of coercion, Alan Wertheimer draws a sharp distinction between empirical and moralized views of coercion. He favours the latter over the former: Wertheimer, A., *Coercion* (1987). An empirical theory maintains that the truth of a coercion claim rests, at its core, on 'ordinary' facts: 'Will B be worse off than he now is if he fails to accept A's proposal? Is there great psychic pressure on B? Does B have any "reasonable" alternative? Would virtually all (rational) persons accept such a proposal?'. By contrast, a moralized theory holds that we cannot determine whether A coerces B so straightforwardly. We cannot avoid such questions as: 'Does A have a right to make his proposal? Should B resist A's proposal? Is B entitled to recover should he succumb to A's proposal?' (id, 7). Cf. also, Fingarette, H., "Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence and Excusable Prison Escape" (1985) 42 Washington and Lee L. Rev. 65, 87-8: 'It should be noted at the outset that the legally relevant issues here are patently not psychological or "subjective." So far as the law [is] concerned, there [are] essentially two interrelated sets of issues, those centering on the legal wrong, and those centering on the reasonableness of the alternatives available to the [victim]... [Whilst the language is "psychological"; the substantive issues are not].

\[39\] This is probably no better endorsed than in the eloquence of Sir John Salmond, as adopted by an English judge in 1937. In *Mutual Finance Ltd v. John Wetton and Sons Ltd* [1937] 2 K.B. 389, a case concerned with the analogous equitable doctrine of undue pressure, though synonymously labelled 'undue influence', Porter J. said (at 394-5):

The problem is, I think, well stated in *Salmond on Torts*, 1927 ed., p. 259: "Assuming, then, that the common law of duress has been thus superseded by the equitable doctrine of undue influence, the question remains, what forms of coercion, oppression, or compulsion amount to undue influence invalidating a contract as between strangers between whom there exists no fiduciary relation? How is the line to be now drawn between these forms of coercion or persuasion which are permissible and those which the law recognises as unlawful and as a ground of contractual invalidity? To this question it is impossible, as the authorities at present stand, to give any definite or confident reply. In the case already cited of *Kaufman v. Gerson*[1904] 1 K.B. 591 it is suggested that the line should be drawn by reference to general considerations of public policy, the question in each case being: 'Is the coercion or persuasion by which this contract was procured of such a nature that the enforcement of a contract so obtained would be contrary to public policy?'. Just as a contract may be invalid because it is contrary to public policy in its substance or its purposes, so that it

355
2.3. An Historical Encounter: The Confluence of Law and Equity in Relation to Duress

The modern conception of duress is said to be the product of ‘a convergence of several lines of growth’. It developed in a ‘piecemeal and disjointed’ fashion, there being ‘parallel but unharmonised’ developments in common law and equity. The broad effect of its evolution, however, has been to ensure that the modern concept of duress is much more liberal and broadly applicable than its historical counterpart; for in relation to contract law, duress today governs the use of any wrongful interpersonal threat may be invalid because it is contrary to public policy in respect of the coercive method of its procurement. If this is the true underlying principle, it is for the law in its future development to reduce this general principle so far as possible to the form of specific rules in respect of divers methods of coercion, just as the requirements of public policy have been similarly made specific in respect of illegal or nugatory contracts. Where the instrument of coercion is the doing or threatening of a wilfully illegal act of any description, it may be anticipated that, notwithstanding the limits of the older common law of duress, a contract so procured will in general be held invalid. But even although the instrument of coercion is not thus in itself illegal, as in the case of a threat of prosecution, the enforcement of a contract so procured may nevertheless be held in appropriate cases to the contrary to public policy.” That states the problem, but by no means solves it.

This writer will in this chapter investigate the extent to which the courts have, since 1937, solved the problem adverted to above.


41 Dawson, id, 288. Professor Dawson considers the various lines of growth to include influences from common law duress, undue influence in equity, equity’s protection of expectant heirs, and law and equity’s approaches to adequacy of consideration.


44 The law of duress colore officii (under colour of office) is not canvassed here. Generally, see Goff and Jones, The Law of Restitution (3rd ed., 1986), 216-22; Mason v. The State of New South Wales (1959) 102 C.L.R. 108, esp. at 139-42 per Windeyer J.; Bell Bros. Pty. Ltd v. Shire of
applied to the personal safety or liberty of the contracting party or a person related to or in affinity with her, to her property, or to her economic interests.\textsuperscript{45} What is more, there is no longer any difference in the prescribed criteria required of the respective forms of pressure.\textsuperscript{46}

2.3.1. Duress at Common Law

The common law traditionally confined duress within narrow bounds, requiring actual or threatened violence to the person, or unlawful deprivation of liberty.\textsuperscript{47} It was thus closely associated with the law's control of criminal and tortious conduct.\textsuperscript{48} The doctrine's operation, however, was further restricted by the requirement that the pressure be such as would overcome the will of the "resolute" or "constant" man,\textsuperscript{49} or the man who 'possesses that ordinary degree of firmness which the law requires all to exert'.\textsuperscript{50} This will be referred to in the following pages as the "overborne

---


\textsuperscript{45} Indeed, the distinction between the various interests against which a threat might be directed has been of little significance in United States and Australia, even from early times. See \textit{Wright v. Kelly} (1884) 5 N.S.W.L.R. 297. Cf. \textit{Smith v. William Charlick Ltd} (1924) 34 C.L.R. 38, at 56 per Isaacs J.


\textsuperscript{47} See Lanham, D., "Duress and Void Contracts" (1966) 29 M.L.R. 615, 620. Most famously, Blackstone's \textit{Commentaries} says this:

A fear of battery ... is no duress; neither is the fear of having one's house burned, or one's goods taken away or destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for loss of life or limb.


\textsuperscript{48} See (1633) \textit{Coke on Littleton} 253b and I Bl. Comm., Chitty (ed.) 131 (1859).

\textsuperscript{49} See, e.g., Dawson, \textit{op. cit.}, 255; Ogilvie, "Economic Duress", \textit{op. cit.}, 291.

will” theory. And while this account of the criteria of duress seems unduly restrictive by modern standards, it is also understandable, given its underlying rationale.

Initially, the unlawful detention of another’s property, or threats to unlawfully detain the same, did not amount to duress. But even when subsequently duress to goods was recognised at common law, its was considerably restricted by a ‘curious distinction’ drawn between “coerced payments” and “coerced contracts to pay”, the latter affording no ground for relief at law. This seemingly illogical distinction has not survived the modern day. It now appears that in the circumstances of a case involving

51 For duress to goods did not ‘deprive anyone of the free agency who possesses that ordinary degree of firmness which the law requires all to exert’: *Skate v. Beale* (1841) 11 Ad. & E. 983; 113 E.R. 688, per Lord Denman C.J. Commonly, the complaint here was determined under the law of “compulsion” and not “duress”, the latter historically referring to duress to the person alone. Generally, see Stoljar, *op. cit.*, 61.

52 It came to be established that money paid under duress to goods could be recovered at law in an action for money had and received, provided that the plaintiff could show that she owned or was entitled to possession of the goods: see *Astley v. Reynolds* (1731) 2 Str. 915; 93 E.R. 939; *Hills v. Street* (1828) 5 Bing. 37; *Ashmole v. Wainwright* (1842) 2 Q.B. 837; *Close v. Phipps* (1844) 7 Man. & G. 586; *Somes v. British Empire Shipping Co.* (1860) 8 H.L.C. 338; *Frazer v. Pendlebury* (1861) 31 L.J.C.P. 1; *Fell v. Whittaker* (1871) L.R. 7 Q.B. 120; *Maskell v. Horner* [1915] 3 K.B. 106; no distinction drawn between actual and threatened seizure; *Mason v. N.S.W.* (1959) 102 C.L.R. 108, esp. at 144 per Windeyer J.; *J & S Holdings Pty Ltd v. NRMA Insurance Ltd* (1982) 41 A.L.R. 539.


55 Indeed, Professor Atiyah discards the distinction as an anachronism, explaining the inconsistency in historical terms: *The Rise and fall of Freedom of Contract* (1979), 463: ‘The rules relating to the recovery of money paid were eighteenth-century rules; the rules relating to executory contracts were nineteenth-century rules ... made in the context of a market-based law of contract’. Indeed, Atiyah argues that there was no reason to distinguish between situations of pressure being applied to one’s person and pressure being applied to one’s goods, on the basis that: (a) no enquiry was made as to whether there was time to seek redress from the courts, say where there was a threatened destruction or removal of valuable goods; (b) to take the position that the will is overborne by certain types of pressure but not by others is illogical and impossible to apply in practice; and (c) it is inconsistent with the right to recover by action in quasi-contract for money had and received an amount actually paid under protest for the
duress to property, so long as the plaintiff has no reasonable alternative but to submit to the defendant’s demand, the element of compulsion is made out, whether or not the duress procures a benefit through a direct money payment or a contract to pay.\textsuperscript{56} For present purposes, therefore, no distinction is drawn based on the type of benefit extracted by the defendant.

2.3.2. Undue Pressure in Equity

As a consequence of the strict, traditional common-law position, the duress doctrine was generally considered to be unsuitable for controlling more subtle and insidious forms of coercion. In contrast to the common law’s approach, the courts of equity were discernibly more flexible. In particular, equity developed a much wider notion of “coercion” or “undue pressure” in relation to duress to the person.\textsuperscript{57} In its ‘constant rule’ that where a party was not equal to protecting herself from another, the court release of goods from unlawful detention.

The distinction was first openly rejected by Kerr J. in The Siboen and the Sibotre [1976] 1 Lloyd’s Rep. 293, at 335:

\[\text{[I]f I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of violence to anyone, I do not think that the law would uphold the agreement. I think that a plea of coercion or compulsion would be available in such cases.}\]

Cf. also Collins M.R. in Kaufman v. Gerson [1904] 1 K.B. 591, at 597: ‘… what does it matter what particular form of compulsion is used, so long as the will is coerced? Some persons would be more easily coerced by moral pressure, … than by the threat of physical violence’. The distinction between physical duress and duress to property has been disowned in the United States (Hellenic Lines Ltd v. Louis Dreyfus Corp., 249 F. Supp. 526, 529; affd. 372 F.2d 753 (1967)), and has been ignored by Canadian courts: see Fridman and McLeod, Restitution (1982) 191, n. 66. For the Australian position, see n. 56, immediately following.

\textsuperscript{56} See Hawker Pacific Pty. Ltd v. Helicopter Charter Pty. Ltd (1991) 22 N.S.W.L.R. 289: Court of Appeal not following distinction drawn in Skatte v. Beale. However, the rejection of the distinction between actual payments and promises to pay may have pre-emptively been rejected as early as 1918 in Australia: N.S.W. Association of Operative Plasterers v. Sadler (1918) 17 A.R. (N.S.W.) 340, \textit{per} Curlewis J.

\textsuperscript{57} Relief for duress to goods was never the subject of intervention in equity. Generally, see Winder, “Undue Influence and Coercion” (1939) 3 M.L.R. 97, 110-19; “The Equitable Doctrine of Pressure” (1962) 82 L.Q.R. 165; Chunn, L., “Duress and Undue Influence: A Comparative Analysis” (1970) 22 Baylor L. Rev. 572. Ormes v. Beadell (1860) 2 Giff. 166; 66 E.R. 70 appears to be an isolated example where equity held that a threatened breach of contract amounted to undue pressure. The case was reversed on appeal, however, albeit on the grounds that the resultant agreement had been affirmed by the plaintiff’s acquiescence.
would protect her, equity provided relief to a party induced to enter into a contract whose judgment was affected by any pressure that was regarded as improper or illegitimate. It was considered to be equitable fraud—against good conscience—for a stronger party to retain the advantage of a contract which he had extracted from one not able to protect herself by reason of such pressures brought to bear on her.

58 See Story, *Equity Jurisprudence* (12th ed., 1877), s. 239, at p. 234. It is important to note, also, that the standard of the “constant” or “resolute” man was never recognised in equity: *Re Brocklehurst’s Estate* [1978] Ch. 14, at 40, [1978] 1 All E.R. 767, 782-3 per Bridge L.J. Indeed, equity’s concern was more with the timid, weak or submissive person whose will had been subjected to unfair pressure: see Dawson, *op. cit.*, 262-7; Winder, “The Equitable Doctrine of Pressure” (1966) 82 L.Q.R. 165.

59 See Story, *id.*, s. 239, at p. 235; Greig & Davis, *op. cit.*, 942; Meagher, *et al.*, *Equity: Doctrines and Remedies* (2nd ed., 1984), para. 1216. However, the equitable jurisdiction relating to undue pressure was treated as separate from equitable fraud by the Privy Council in *Barton v. Armstrong* [1976] A.C. 104.

Cases of this kind do not feature prominently in the pages of the law reports: see *Ford v. Olden* (1867) L.R. 3 Eq. Cas. 461; *Davies v. London and Provincial Marine Insurance Co.* (1878) 8 Ch.D. 469; *Banks v. The Cheltenham Co-operative Dairy Co. (Ltd)* [1911] 29 N.Z.L.R. 979; *Mutual Finance Ltd v. John Wetton & Sons Ltd* [1937] 2 K.B. 389; *Jones v. Merionethshire Permanent Benefit Building Society* (1892) 1 Ch. 173: relief granted on ground of illegality and not undue pressure. The now expanded notion of common-law duress perhaps helps to explain the current dormancy of the equitable jurisdiction. However, a leading illustration is to be found in the case of *Williams v. Bayley* (1866) L.R. 1 H.L. 200, which involved a threat of lawful legal process, prosecution and imprisonment. Traditionally, the common law regarded such threats as insufficient to support a plaintiff’s case, for proper application of legal process did not amount to duress. Rather, there would have to have been some improper application, such as an irregularity of procedure. Generally, see Goff and Jones, *op. cit.*, 207-11; Section 3.3.2.1., below. In *Williams’ case*, the respondent’s son had forged his father’s signature to certain promissory notes which had been accepted by the appellant bankers. After being alerted to the fact of forgery, the appellants had discussions with the respondent, where, although there was no explicit threat, it was made clear that if he did not give them an equitable mortgage to secure the amounts of the promissory notes they had it in their power to prosecute the son, and the punishment would almost certainly be transportation for life. Although the case was not one where a presumption arose from any relationship of influence, nor one reserved for those under a special disability, the father being, after all, an experienced businessman in the presence of his solicitor, the House of Lords nevertheless set aside the mortgage on the ground that the implied threats amounted to undue pressure. Lord Westbury articulated the basis of the decision thus:

A contract to give security for the debt of another which is a contract without free consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, is altogether taken away from a father who is brought into a situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation. (*Id*, 218-9.)
While the equitable notion of undue pressure patently assumed a much wider application than did common-law duress, “legitimacy of pressure” as a test gave rise to some doubt as to the precise scope of the equitable rule. Equity and its broad notion of fraud, however, were clearly much better suited to the task of rendering more refined judgments about particular instances of pressure than was the common law, which commonly asserted that it was not duress to threaten to do what one had a lawful right to do. The principles of equity, therefore, which permitted to the judiciary greater flexibility in intervention, served to increase significantly the range of threats that it would be considered improper to make, even if these were directed merely to the victim’s person.

2.3.3. An Expanded Common-Law Rule

Given the developments in equity, and the recognition at common law of duress to goods, it was inevitable the courts should subsequently recognise an analogous form of wrongful pressure applied to a victim’s economic interests: hence the coinage, “economic duress”. This development did not eventuate until surprisingly late in England, and

60 Cf. the majority view in Smith v. William Charlick Ltd (1924) 34 C.L.R. 38.


62 In Re Boycott (1885) 29 Ch.D. 571, Cotton L.J. recognised (at 576) that the categories of pressure are not closed and that he would not attempt to identify them positively.


64 The Sibboen and The Sibotre [1976] 1 Lloyd’s Rep. 293; North Ocean Shipping [1978] 3 All E.R. 1170. It is surprising that the notion of economic duress arrived so late in England, where it could have been developed at least ten years earlier, in the mid-1960s, with the development of the analogous tort of intimidation. In Rookes v. Barnard, for example, Lord Devlin said ([1964] A.C. 1129, at 1209):

All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of—whether it is a physical club or an economic club, a tortious club or an otherwise illegal club.
owed its ancestry to several Australian decisions, which, from relatively early on, did not restrict the various sources of interest against which pressure could be applied.

In bringing about the recognition of economic duress, moreover, the influence of equitable ideas on the common law has indeed been marked. Greig and Davis, for example, comment that there has been a merger or fusion of the equitable and legal doctrines relating to duress. Hardingham suggests that the jurisdictions run parallel; although being separate jurisdictions, there is no longer any substantial difference in the criteria applied. In each case the essential question is whether the apparent consent was induced by pressure which the law does not regard as legitimate.

Cf. also the possibility for an earlier development of a doctrine economic of duress which existed at the time Lord Denning delivered his judgment in D. & C. Builders Ltd v. Rees [1965] 2 All E.R. 837, 841; [1966] 2 Q.B. 617, 625: 'No person can insist on a settlement procured by intimidation'.


66 In Smith v. William Charlick, for example, Isaacs J. said (op. cit., 56):

"Compulsion" in relation to a payment of which refund is sought, and whether it is also variously called "coercion", "extortion", "exaction" or "force", includes every species of duress or conduct analogous to duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property or any right of the person who pays .... Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay. (Emphasis added)

Cf. Nixon v. Furphy (1925) 25 S.R. (N.S.W.) 151, at 160 per Long Innes J.


69 Cf. also, Seddon, op. cit., 144. Seddon submits that the historical origins of the strands of growth in this area are of little importance as long as the courts are now able to address the
is significant, because in historical terms it presaged a reorientation of the emphasis of the rules relating to duress generally. In particular, the modern reorientation of the duress doctrine has witnessed the jettisoning of the common law’s preoccupation with “overborne wills”, and especially those of “constant and resolute men”, while at the same time admitting (via equity) of far more subtle and refined judgments about the type of conduct that will be considered “coercive” for the purposes of the duress enquiry.

2.4. The Abandonment of the “Overborne Will” Theory

The idea that a man’s will is ‘overborne’ by certain types of pressure and not by others is, both in logic indefensible, and in practice impossible of application. The reality is that some forms of pressure are in conformity with the social and economic system and the moral ideas of the community, and others are not. The line can only be drawn by distinguishing between different kinds of pressure, not by attempting to analyse the effects of the pressures on a man’s mind.

But then the quest for “involuntariness,” following the trail from the “broken will” to “no real choice” to “no reasonable choice,” has once again led to a sense of “involuntariness” that refers to a legal norm rather than to inner psychic trauma. The issue now is the reasonableness of the choice, as determined in law, rather than the psychic disablement of the victim.

The common law’s concern with the effects of the coerced’s behaviour on the coerced is well illustrated in the early duress cases. The developments which have taken place since that time, however, have been fragmented and unharmonised. A corollary of this is that for a short time into the common law’s recognition of a distinct category of economic duress, there was an

relevant issues and administer appropriate remedies (id). In this writer’s view, however, the convergence of common law and equity does seem to account for the present-day conceptualisation of a theory of duress, and the historical convergence is important to the extent that it supports a two-pronged theory of duress, elaborated in Section 3 below.

70 Indeed, the Restatement (Second) of Contracts omits any such requirement because of its ‘vagueness and impracticability’: § 175, Comment (b).

71 Atiyah, Rise and Fall, op. cit., 436.

72 Fingarette, op. cit., 81-2.
apparent conflict, if only a semantic one, between the traditional approach with its emphasis on "overborne" wills and the new, more expansive approach incorporating notions of equitable fraud. Accordingly, even until quite recently in England, the main enquiry in duress cases was directed to the question of the effect of the coecer's threat on its recipient's consent: whether the coerced's will was "overborne" so as actually to negate consent.73

Any detailed or refined examination into the legitimacy or acceptability of the pressure exerted tended largely to be absent from this enquiry, at least in the sense that only a very limited number of possible types of threat were considered to have this sort of effect on the volition of the allegedly coerced party.74 The danger in this preoccupation, Professor Atiyah warned, was that if taken literally it would 'divert attention into quite irrelevant inquiries into the psychological motivations of the party pleading duress'. Instead, Atiyah argues, we need to focus on the essential matters: 'namely, what sort of threats is it permissible to make, and when is it permissible for a victim of duress to reopen a question which has apparently been settled by his submission to the coercion'?75

It was somewhat inevitable, therefore, that a fallacy in the common law's overborne will theory would eventually be exposed by a number of

73 In *The Siboen and The Sibotre*, for example, Kerr J. said this (op. cit., 336):

[T]he court must in every case at least be satisfied that the consent of the other party was so overborne by compulsion so as to deprive him of any animus contrahendi. This would depend on the facts of each case.


In their Lordship's view there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable provided always that the basis of such recognition is that it must amount to a coercion of the will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.


74 Seddon remarks (op. cit., 143): 'So long as it could be said in a particular case that a person's will was "overborne", there would be a finding of operative duress no matter what the source of kind of pressure which was used.'


364
academic commentators, and, latterly, that it would be recognised by the judiciary itself. As early as 1942, an American writer, Dalzell, wrote:

It seems ... reasonable to say that a contract or payment secured by duress is defective not because of some difference in the nature of the consent, but because of the impropriety of the alternative presented; that is, of the pressure used.78

In the Anglo-Australian context, it was Professor Atiyah who, by drawing an analogy to duress in the criminal law, cogently argued that the overborne will theory is misconceived and ought to be jettisoned.80 These


78 "Duress I", op. cit., 240.


80 Atiyah, P. S., "Economic Duress and the 'Overborne Will'" (1982) 98 L.Q.R. 197. In his article, Professor Atiyah put forward several reasons why it is fictional here to speak of an absence of consent. First, a 'victim of duress does normally know what he is doing, does choose to submit, and does intend to do so. Indeed, as has been pointed out by American writers (Dawson, op. cit., 267; Dalzell, "Duress I", op. cit., 240) the more extreme the pressure, the more real is the consent of the victim'. (Id, 200). Cf. Fried, C., Contract as Promise, 93: '[T]he victim of duress is all too aware of what is happening and what will happen to him. Duress relates not to rationality or cognition but to freedom or volition'. Second, statements that the victim 'had no alternative open to him' are 'internally inconsistent and contradictory' and cannot be taken literally. The victim always has an alternative course open to him, albeit an unpleasant one. (Id, 201.) Cf., too, Holmes J. in Union Pacific RR v. Public Service Commission, 248 U.S. 67, 70 (1918): 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called'. Third, the theory is inconsistent with the view that duress renders a contract voidable and not void, and it is so treated because unlike non est factum there is not a total lack of consent. Some have argued that duress renders the contract void: see, e.g., Lanham, "Duress and Void Contracts" (1966) 29 M.L.R. 615; cf. Barton v. Armstrong [1976] A.C. 104, 120. But these authorities are clearly against the preponderance of recent opinion: see e.g., Pao On v. Lau Yiu Long [1980] A.C. 614, 634; Universe Tankships v. I.T.F. [1983] A.C. 366, 383, 400. It presupposes that the victim of duress has no alternative course open to her. (Id, 201.) There are some cases of duress which are nonvolitional, where a party is considered to be a 'mere mechanical instrument'. The case where the victim's hand is physically grasped by an outside agent and moved to write her signature, or the case where the victim is hypnotised and gives her assent, represent examples where there would be a

365
arguments seem to have had an effect on members of the English judiciary, who, since Professor Atiyah's article in particular, have subtly shifted their language away from that of "overborne wills":

The classic case of duress is ... not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him. 81

Members of the Australian judiciary, however, have been more candid in their rejection of the theory; 82 although it would be misleading to

total absence of volition, and hence the resulting contract would be void as opposed to merely voidable. These cases of "physical compulsion" are, however, extremely rare, and will not be considered in this thesis: cf. Restatement (Second) of Contracts, § 174, Comment (a). Instead, this writer considers those cases where "pressure" is applied only figuratively—to a party's will.

Some, however, have argued that the points raised here are purely matters of semantics, and that the whole debate about overborne wills is hardly worthwhile. See David Tipakay's response to Professor Atiyah at (1983) L.Q.R. 188, noting the linguistic difficulties in this area, and arguing that the overborne will theory does not get in the way of questions of legitimacy. See also, Atiyah's reply (1983) 99 L.Q.R. 353.

81 Per Lord Scarman in Universe Tankships v. I.T.F. (1983) A.C. 366, 400. Cf., however, Hobhouse J. in Vantage Navigation Corp. v. Suhail and Bawan Building Materials LLC, hereafter: The 'Alev' (1989) 1 Lloyd's L.R. 138, at 145, who resorted to the rhetoric of "overborne wills": 'The consent of the defendants was overborne. There was coercion of their will. They neither in law nor in fact entered into the agreement voluntarily'. His Honour had just previously quoted the passage from Lord Scarman's judgment in Universe Tankships regarding the 'classic case' of duress, however.

82 In Crescendo Management Pty. Ltd v. Westpac Banking Corporation (1988) 19 N.S.W.L.R. 40, at 45-6, McHugh J.A. put forward the following view:

In my opinion the overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take the alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether the pressure went beyond what the law is prepared to countenance as legitimate?

Lord Goff (obiter) voiced his concurrence in McHugh J.A.'s rejection of the overborne will theory in Dimska Shipping Co. v. I.T.F. [1991] 3 W.L.R. 875, at 883, but did not find it necessary to explore the matter. It is perhaps unfortunate that his Lordship phrased himself as finding it unhelpful to 'speak of the plaintiff's will having been coerced', instead of "overborne" (ibid). Of course, a plaintiff's will must be "coerced" for there to be duress, but the point is that for it be "coerced" it need not be "overborne". Cf. also, Scolio Pty. Ltd v. Cote (1992) 6 W.A.R. 475.
suggest that such rhetoric has left our law altogether.83

In the writer’s view, the rejection of the overborne will theory is to be applauded. The move is pivotal to the articulation of a sound conceptual rationale for the modern law of duress.84 Plainly, the concept of duress, and the nature of a threat itself, only come into proper focus when “involuntary”, in the broad, nontechnical sense of the term, is understood normatively, as an unwarrantedly constrained or deflected volition, rather than psychologically, as a defective or overborne will. The modern duress doctrine really has little to do with a party’s “willingness” at all: ‘For the moral question is whether [the allegedly coerced] is responsible for his action and not whether he is happy about it’.85 What a party really complains about when she alleges coercion is not that she is altogether deprived of her will but, as with fraud, that her will (or volition) has been subjected to a motive for action from which she ought to have been free.86 When the victim of duress “intentionally” submits to another person, this submission arises from the perceived lack of reasonable choice open to her. Submission is thus not “consent”, even under the so-called “objective” theory of contract. It is justifiably yielding out of an inexorable instinct for the preservation of one’s own or another’s personal or economic interests.


84 See Nozick, R., Anarchy, State and Utopia (1974), 262; Philips, M., “Are Coerced Agreements Involuntary?” (1984) 3 Law and Philosophy 133; but cf. McGregor, J., “Philips On Coerced Agreements” (1988) 7 Law and Philosophy 225; Wertheimer, op. cit., 9-10, Chp. 6: ‘Even if ... coerced acts are rarely unwilling, that leaves open the question whether a coerced choice can be said to be involuntary in the sense that it is against one’s will...’ (id, 290).

85 Wertheimer, op. cit., 305.

3. The 'Two-Pronged' Theory of Duress

It is argued in this chapter that the crux of the modern law of duress lies in the one party making a threat that induces the other party, who has no reasonable alternative, to manifest her contractual assent, with the result that the contract thereby created is voidable by the victim. There thus appear to be three elements of duress. First, there must to be a "threat". Second, the threat must induce the contractual assent of the victim. Third, the victim must have had no "reasonable" alternative but to submit to the demand and, in the present context, manifest her contractual assent. The writer analyses these elements below according to a two-pronged theory of duress. The first element comprises one prong of the two-pronged theory, and the second and third elements together comprise the other.

3.1. Stating the Two-Pronged Theory of Duress

One of the most systematic and celebrated modern treatments of duress is to be found in Lord Scarman's judgment in Universe Tankships. There his Lordship directly addressed many of the complex features of an economic duress claim. He noted also that the criteria to be applied in the economic duress enquiry are essentially applicable to all forms of duress. In the following passage a two-pronged test for duress emerges:

The authorities upon which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted.

---

87 For want of a better expression, the writer borrows the somewhat ugly 'two-pronged' coinage from Wertheimer, op. cit.

88 Farnsworth casts the third element of duress in the following terms: 'the threat] must be sufficiently grave to justify the victim's assent': Contracts, op. cit., 257.


90 Ibid.

Thus, in order to make out a claim of coercion sufficient to mitigate or nullify the normal legal effects of one’s manifested contractual assent, a plaintiff must show (1) pressure which in fact and in law compels her to manifest the said assent, such pressure in addition being (2) somehow illegitimate. Ostensibly, this brings the Anglo-Australian\textsuperscript{92} approach to duress somewhat into line with the approach taken under the American Law Institute’s \textit{Restatement (Second) of Contracts}, which requires an ‘improper threat’, the effect of which ‘leaves the victim no reasonable alternative’ but to give into the pressure arising therefrom.\textsuperscript{93}

The essential structural feature to note about this two-pronged approach is that it consists of two seemingly independent tests for duress, each of which is necessary but neither of which is simply on its own sufficient to establish duress. The first prong—“compelling pressure”—relates to there needing to be a threat or a proposal coming from one party, $D$, which deprives the other party, $P$, of the ‘freedom of exercising [her] will’,\textsuperscript{94} or, as it is frequently put nowadays, puts $P$ in a position of having “no reasonable choice”\textsuperscript{95} or “no acceptable alternative”\textsuperscript{96} but to submit to the

\textsuperscript{92} The modern English economic duress cases have been applied in Australia: see \textit{Magnacrete Ltd v. Douglas-Hill} (1988) 48 S.A.S.R. 565; \textit{Crescendo Management Pty. Ltd v. Westpac Banking Corporation} (1988) 19 N.S.W.L.R. 40; \textit{Hawker Pacific Pty Ltd v. Helicopter Charter Pty Ltd} (1991) 22 N.S.W.L.R. 298 (C.A.). However, as has been noted above, the branch of duress understood today as “economic duress” was recognised much earlier in Australia. Nevertheless, unlike the developments that have taken place in recent English legal history, there was a comparative dearth of so-called economic duress cases during the 1970s and 80s in Australia. This probably accounts for Australia’s recent adoption of the current position in England regarding economic duress.

\textsuperscript{93} Section 175 (1) of the \textit{Restatement} reads:

\begin{quote}
If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
\end{quote}

\textsuperscript{94} \textit{Ashley v. Reynolds} (1731) 2 Str. 915, 916; 93 E.R. 939. Cf. also, \textit{Restatement (Second) of Contracts}, § 175, Comment (b).


Sometimes ‘practical choice’ is used: see \textit{Universe Tankships v. I.T.F.} [1983] A.C. 366, 400, per Lord Scarman. The term can be ambiguous in this context, however. As shall be seen below, “no reasonable choice” perhaps more accurately captures the required effect of illegitimate
demands of D. Borrowing from Professor Wertheimer, we might call this first test the *choice prong*. The second prong—"wrongfulness"—relates to the need to show that for P to act under duress it is also necessary, but not sufficient, to show that D's threat or proposal is wrongful or illegitimate. D's proposal, moreover, cannot be wrongful simply because it denies P "free choice" (under the choice prong), for presumably it would be redundant then to speak of wrongful or illegitimate compulsion. Again to adopt Wertheimer's terminology, we might refer to this second test for duress as the *proposal prong*.

Thus, in situations of constrained volition, the two-pronged theory of duress holds that D coerced P to do X when (1) D's proposal created a choice situation for P such that P was in some sense "compelled" to do X, an enquiry which primarily concerns the choice prong; and (2) it was wrong (illegitimate) for D to make that proposal, which primarily concerns the proposal prong. In the case of the proposal prong, the law requires that D's proposal be shown to be wrongful for reasons independent of the fact that the proposal simply had the effect of constraining P's volition, or compelling her actions. D must propose to do something that will be found by a court of law to be illegitimate. Such a proposal might be independently illegitimate, as in the case of threatened violence, or illegitimate only on account of the pressure under the two-pronged theory of duress.

---

96 Various other synonyms have been employed in the literature and case law. For example: "viable", "acceptable", "adequate", and "real" choices or alternatives are expressions often resorted to. Cf. *Hennessy v. Craigmyle & Co. Ltd* [1986] I.C.R. 461, at 468; *Stott v. Merit Investment Corp.* (1988) 48 D.L.R. (4th) 288, at 305: no 'realistic alternative'.


98 Cf. per McHugh J. in *Crescendo Management Pty. Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40, at 46: 'Even overwhelming pressure, not amounting to unconscionable or unlawful conduct ... will not necessarily constitute ... duress'.

99 This is where, in particular, Lord Scarman's usage of 'practical choice' in *Universe Tankships v. I.T.F.* [1983] A.C. 366, 400 potentially gives rise to conceptual confusion.

100 Cf. *Stewart, op. cit.*, 441. Seddon, too, acknowledges and cites Stewart on this point (op. cit., 146, at n. 39). Cf. also, Lord Goff in *Dimskal Shipping v. I.T.F.*, *op. cit.*, at 883, who, evidently, wished to draw a clear line of severance between the question of a threat's illegitimacy and the effect of the threat on the plaintiff.

101 As compared to cases of nonvolition.
peculiar circumstances in which $D$ finds himself relative to $P$.102

Furthermore, the independence of the respective prongs of the two-pronged theory of duress serves to prevent our giving improper weighting to the conduct of the coarcer or to the plight of the victim. This preserves the bifocal nature of the duress enquiry, which this writer will argue is crucial to the proper resolution of duress disputes. The two-pronged theory of duress can be understood as claiming that whereas the choice prong defines duress as coercion simpliciter, there is wrongful and nonwrongful coercion (as distinguished by the proposal prong); and that only wrongful coercion amounts to legally cognisable coercion—duress—which can invalidate a contract. The emphasis on wrongness, however, does not excuse the need to provide a satisfactory account of the choice prong. Unlike early judges, who came to assume ‘that the wrongfulness of the means used made unnecessary any inquiry into their precise effects on the party coerced’,103 modern courts seem to require some account of the choice prong so as to distinguish between coercive and non-coercive choice situations (a distinction to be elaborated below). Nevertheless, there has been relatively little discussion of the criteria for applying the choice prong. Indeed, Lord Scarman himself, in Universe Tankships, merely paid ‘lip-service’ to the choice prong, concentrating his attention instead on the issue of “legitimacy” of the pressure exerted.104

3.2. The Choice Prong: “Threats” vs. “Offers”

Most lawyers would have no difficulty with the proposition that the defining feature of legally cognisable duress is the coercive “threat”. Threats produce a situation in which another’s options are narrowed, but narrowed relative to what? While legal writers and judges freely employ the language of “threat” in the context of duress, for the most part it is assumed that the


103 Dawson, op. cit., 256.

104 Cf. comments made by Stewart, op. cit., 424, and 436-7.

371
nature and meaning of threatening behaviour is self-evident. However, this assumption has tended to obstruct the formulation of a proper theory of duress in Anglo-Australian law. And since the notion of a "threat" seems to be at the very heart of duress, thus distinguishing that doctrine from various others ostensibly concerned with policing the genuineness of contractual consent, it warrants considered analysis at this juncture. In the pages to follow, "threat" is given a rather technical, and thoroughly moralised, meaning and content as distinct from the otherwise more popular usage employed by most contemporary judges and commentators in the area.

The choice prong of the two-pronged theory of duress identifies a party's situation in which she is in some sense actually coerced; that is, in which that party has "no choice" but to do what the other demands. What, then, is a coercive choice situation?

It is to be suggested below that some version of the "no reasonable choice" or "no acceptable alternative" theory provides the best account of the choice prong in contract law. It is certainly consistent with most, though not all, of the cases, including those which nominally refer to "overborne wills". Some have argued, however, that what these cases demonstrate is that contractual duress is rooted in the "inequality of the bargaining position" between the parties; although it is argued here that inequality, per se, is not the gravamen of duress. Whilst the modern duress doctrine may incorporate the notion of inequality of bargaining power, it is certainly not founded on that notion. Although it may contingently be true that duress involves an abuse of the dominant position one party holds over another, what essentially distinguishes duress from some other so-called abuses of a dominant position (unconscionable dealings, in particular) is that D, by the use of threats, creates an unfair choice situation for P in which P has no reasonable choice but to accede to D's demands. The focus in duress cases,

\[105\] See Section 4.2.2.1., below.

therefore, is primarily on the propriety of one party’s introduction of a power-enhancing element into the parties’ negotiations.\textsuperscript{107} This feature is often difficult to discern in those cases involving prima facie law threats, because, as has previously been mentioned, the illegitimacy of \(D\)'s proposals in such cases tends strongly to derive from \(P\)'s peculiar circumstances relative to \(D\) (or a third party), and what \(D\) has made of these to give substance or gravity to his threats.

Now, a choice situation may arise in different ways, but these differences will largely be ignored, at least for the moment.\textsuperscript{108} It should suffice, for present purposes, to recall Robert Nozick's famous distinction between mere "circumstances" that limit alternatives non-coercively and specific interpersonal threats that coerce:

Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary. ... Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends on whether these others had a right to act as they did.\textsuperscript{109}

Thus, according to Nozick, a transaction (exchange) is not "involuntary" when constrained by either facts of nature or the range of alternatives presented by others acting within their rights. From this, then, it seems that the key to duress lies not in the choice situation itself, but in its genesis: in the sort of behaviour, on the part of \(D\), that creates \(P\)'s volition-constraining choice conditions. As far as the choice prong is concerned, duress is a feature of the choice situation as it is created by another individual, and not as it exists in a state of nature, in one's mind, or in one's background circumstances. Duress 'must come from without, and not from within'.\textsuperscript{110}

\textsuperscript{107} There are clear parallels here with common-law fraud, therefore. Generally, see Chapter Seven.

\textsuperscript{108} It may arise, for example, from natural events, from the unintentional acts of others, or from intentional proposals: threats and demands.

\textsuperscript{109} Nozick, R., Anarchy, State, and Utopia, op. cit., 262.

\textsuperscript{110} King v. Lewis 4 S.E. 2d 464, 468 (1939). Whether an act is one's own, therefore, depends on whose will is operating. In a threat situation, it is another person's will that is operative.
In particular, we are concerned here with behaviour, on the part of D, which manifests itself as an intentional proposal: “I will bring about undesirable consequence X unless you do Y!” This does little to advance our enquiries, however, for not all intentional proposals create coercive choice situations. The crucial distinction to be drawn here seems to be that between a “threat” and an “offer”,111 for the dominant philosophical view about coercion maintains that threats coerce whereas offers do not.112 And whilst this distinction may partly be tied up in the parties’ beliefs, intentions, and motives,113 assuming that everyone involved ‘has sufficient reason to believe that the proposals in question will be carried out if their conditions are fulfilled’,114 our intuitive response is that threats limit freedom, whereas

111 The semantic distinction between the two is relatively unimportant. While both are concerned with the generic situation that A attempts to get B to do X—such that A proposes that if B does X, A will bring about or permit to happen a certain state of affairs (Y)—coercive proposals are biconditional in the sense that expressly or impliedly added is the condition that if B does not do X, A will bring about or permit to happen another state of affairs (Z). See Wertheimer, op. cit., 202, citing Haksar, “Coercive Proposals” (1976) 4 Political Theory 65. Cf. also, Westen, op. cit., 569 et seq.


The Restatement (Second) of Contracts may impliedly support the distinction between threats and offers. Comment (a) to § 176 reads:

An ordinary offer to make a contract commonly involves an implied threat by one party, the offeror, not to make the contract unless his terms are accepted by the other party, the offeree. Such threats are an accepted part of the bargaining process.

113 As Frankfurt points out, whether a party is ‘actually making a threat or an offer depends in part on his motives, intentions, and beliefs. Considerations of the same kind are also relevant in interpreting the subsequent response of the person to whom the threat or offer is made.’ (id, 66)

114 Ibid. Thus, one should be able to recognise the difference between a threat that is a bluff, and a threat that is made with the serious intent of its implementation. Ordinarily, the bluff is considered to be a strategic bargaining technique. Where such a technique is reasonably recognisable as such, bluffing will be permitted according to the functionalist ethic of bargaining and hence will not be considered as amounting to illegitimate pressure. Threats to withdraw from negotiations provide the cardinal examples of bluffs, and are thus probably

374
offers enhance it; one acts involuntarily in response to a threat, whereas one voluntarily accepts an offer; the recipient of an offer can turn it down, whereas the recipient of a threat may not reasonably be expected or required to do so.

The crux of the distinction between threats and offers lies in the fact that ‘A threatens B by proposing to make B worse off relative to some baseline; A makes an offer to B by proposing to make B better off relative to some baseline’;\textsuperscript{115} offers actually augment a party’s alternatives, whereas threats reduce them. The distinction can be illustrated by considering the philosophically paradigmatic case of the Drowning Person:\textsuperscript{116}

\begin{quote}
$D$ happens upon $P$, who is drowning. $D$ yells to $P$ that he will rescue $P$, but only if $P$ agrees to pay him $10,000$. $D$ and $P$ both realise that there are no other potential rescuers.
\end{quote}

If we assume that $D$ has no moral or legal obligation to rescue $P$,\textsuperscript{117} we must include the absence of a right to beneficial intervention in $P$’s baseline conditions. Relative to this baseline, $D$’s proposal is an offer because it actually increases $P$’s options. Should the right to beneficial intervention be included in $P$’s baseline, however, $D$’s proposal is a threat relative to it, because it actually narrows $P$’s options.\textsuperscript{118} And while it might readily be not properly perceived of as “threats” at all. Since a party ordinarily does not have an obligation to complete negotiations once they have begun, a proposal to withdraw unless a certain price is agreed to arguably is, in the absence of other special circumstances, best construed as an offer, because it actually increases the recipient’s options relative to the absence of her right to prevent the maker of the proposal from so withdrawing. It might be considered wrongful, for example, to threaten to withdraw from one set of negotiations with the victim or someone in a proximate relationship with her (e.g., family member, subsidiary, etc.) for the purpose of making an agreement wholly unconnected with the first set of negotiations, however.

\textsuperscript{115} Wertheimer, op. cit., 204.


\textsuperscript{117} See n. 208, infra.

\textsuperscript{118} It should be noted that it is possible to set $P$’s baseline in an empirical (pragmatic, statistical, or phenomenological) way, or in a normative (prescriptive) way. Often there will be no divergence in the results between the empirical or the normative tests; but there might be. Take, for example, Nozick’s ‘Slave Case’:

375
acknowledged that $D$ is here taking advantage of $P$'s situation of extreme need, unless he can be said to have actually committed some wrong by exploiting $P$'s need, he surely is not coercing her.

Consider also the contrasting cases given by Wertheimer:

The Private Physician Case. B asks A, a private physician, to treat his illness. A says that he will treat B's illness if and only if B gives him $100 (a fair price).

The Public Physician Case. B asks A, a physician, to treat his illness. A is required by the National Health Plan, and is legally required to treat all patients without costs. A says that he will treat B's illness if and only if B gives him $100.

Relative to B's baseline conditions, A is making an offer in the Private Physician Case because A does not have an obligation to treat B's illness free of charge. A is making a threat in the Public Physician Case because B's baseline here includes A's obligation—B's right—to treat B free of charge.

The coerciveness of proposals, therefore, seems to be all in the

---

A beats B, his slave, each morning for reasons unconnected with B's behaviour. A proposes not to beat B the next morning if and only if B does X. (Nozick, Coercion, 450)

Under the empirical test, A is making an offer. Relative to B's baseline, which includes the expectation that she will be beaten each morning, A is proposing to make B better off. Under the normative test, however, relative to B's baseline, which includes a moral obligation on A's part, and hence a correlative right on B's part, not to be beaten on any morning—indeed not to be a slave, A is proposing to make B worse off. It is possible to see, therefore, that the empirical test may cause us to set B's baseline too low, and the normative, prescriptive approach may be superior. See Section 4.1., below.


120 We shall see below, however, that this distinction is not so clear. As Joel Feinberg has pointed out, many leading examples of exploitation are also examples of coercion: Feinberg, "Noncoercive Exploitation", in Sartorious, R. (ed.), Paternalism (1983), 201-34, at 201. Yet despite their large overlap in application, the concepts remain quite distinct in morality: see Elster, J., "Roemer versus Roemer: A Comment on ‘New Directions in the Marxian Theory of Exploitation and Class’" (1982) 11 Politics and Society 363, 365; Carling, A., "Exploitation, Extortion and Oppression" (1987) 5 Political Studies 173, 175-80, though ostensibly less so in law today (see Section 5.1., infra).


122 Id, 208.
baseline. Relative to that baseline, only threats are coercive. Consequently, the extent to which it is possible to develop our theory of duress seems in turn to be dictated directly by the breadth of the spectrum of "wrongs" defined by what we set as a baseline of positive or negative "rights". This (we shall see) becomes the main burden of the proposal prong, which determines whether D's proposal is sufficiently wrongful to mitigate or nullify what would otherwise be the legal consequences of P's consent. To determine whether D's proposal is actually coercive, however, we must look primarily to its effect on P's options, and this, it seems, is the principal burden of the choice prong. At some point, however, and despite their seeming independence, the respective prongs of the two-pronged theory of duress must converge; for what constitutes a "threat" for the purposes of the duress enquiry can only be discerned by the effects it has on the victim's choice conditions relative to some baseline of rights or entitlements. If this is correct, then the proper order of analysis under the two-pronged theory of duress should be reversed from that offered by Lord Scarman in *Universe Tankships*.123 We do not begin with coercive choice situations and then determine which constitute legally cognisable duress; rather, proposals which are not wrongful under the proposal prong are best understood as offers and therefore do not create coercive choice situations in the first place.124 With this in mind, the writer will now consider which proposals are considered wrongful, and hence "threatening", for the purposes of the duress enquiry in the context of contract formation. A subsequent section will reconsider, in greater detail, the various criteria that apply to the choice prong of the two-pronged theory of duress.

### 3.3. The Proposal Prong: The Nature of Pressure Exerted

As seen above, the second part of Lord Scarman’s two-pronged test in *Universe Tankships* requires, in addition to ‘pressure amounting to compulsion of the will of the victim’, that the pressure is somehow

---

123 Some judges have, for example, slavishly adhered to the order of analysis presented by Lord Scarman: see *Gordon v. Roebuck* (1989) 64 D.L.R. (4th) 568, 572-3 (Fitzpatrick J.).

"illegitimate" in its exercise. In consequence, "legitimate" pressure presumably does not constitute duress, even though it may in fact compel her to act under the choice prong.\(^{125}\) What, then, is the difference between "legitimate" and "illegitimate" pressure? When is a proposal wrongful for the purposes of the duress enquiry?

Much judicial and academic comment has been directed toward attempting to answer these questions.\(^{126}\) Bearing in mind Professor Dawson's admonition that '[t]he history of generalization in this field offers no great encouragement for those who seek to summarize results in a single formula',\(^{127}\) in relation to what ordinarily does suffice as "illegitimate" or "wrongful", it is possible to state two important principles. First, it is always wrong to propose to do what is independently unlawful. Second, and as a corollary of the first principle, it is generally not wrongful to propose to do something that one has a legal right to do. However, the second of these principles admits of a number of important exceptions.\(^{128}\)

### 3.3.1. The Proposal: Threat and Demand

Since the concept of the proposal in a duress claim is made up of both a threat, in the nontechnical sense: "I intend to bring about undesirable consequence X..."; and a demand: "... unless you benefit me by doing Y"; features of either may assist in determining the legitimacy of the proposal itself. The threat contained within the proposal need not be explicit: 'Advice, suggestion, stating what will inevitably happen and gentle persuasion'\(^{129}\) may amount to an implied threat if a clear inference to that effect is to be

---

\(^{125}\) There is a distinction between "coercion in fact" and "coercion in law"; see the sentiments of Isaacs J. in Smith v. William Charlick Ltd (1924) 34 C.L.R. 38, at 56.

\(^{126}\) See Rafferty, op. cit.; Seddon, op. cit.

\(^{127}\) Dawson, op. cit., 289.

\(^{128}\) Seddon (op. cit., 151, citing Pao On v. Lau Yiu Long [1980] A.C. 614) would suggest that the first of these principles admits of exceptions too. However, this writer does not follow this view, since it is argued below that analytically, duress bifurcates into two independent components. See Section 4.

\(^{129}\) Seddon, op. cit., 150.
drawn from the circumstances.\textsuperscript{130} If the effect of a party's own conduct would be to make another worse off relative to that other's appropriately fixed baseline of rights or justifiable expectations, it is unlikely that the courts will take a technical stance on the matter and require an explicit threat.\textsuperscript{131}

In \textit{Universe Tankships}, Lord Scarman himself recognised the lexicographical\textsuperscript{132} nature of the proposal prong in his two-pronged theory:\textsuperscript{133}

In determining what is legitimate two matters have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.

What amounts to "wrongful" pressure for the purposes of the duress enquiry will often, though not always, require a sensitive weighing up of features of both the pressure exerted (the "threat") and the demand in the context of a given case.\textsuperscript{134} Where the threat and/or the consequences of its implementation are particularly offensive, we may reasonably expect a judgment of "wrongful" (i.e., "illegitimate") pressure, even in the absence of


\textsuperscript{131} Cf. Hawker Pacific Pty. Ltd \textit{v.} Helicopter Charter Pty. Ltd (1991) 22 N.S.W.L.R. 289, 303: no express threat required; it was sufficient that the circumstances reasonably conveyed the apprehension that appellant's goods would be detained; The 'Alev' [1989] 1 Lloyd's L.R. 138: party bringing pressure to bear was careful not to make explicit threats, but this was not sufficient to save his conduct from amounting to a wrongful, tacit threat. But see Camellia Tanker Ltd \textit{v.} I.T.F. [1976] I.C.R. 274, cited by Seddon, \textit{op. cit.}, 150, at n. 67: explicit threat required.

\textsuperscript{132} The phrase is borrowed from John Rawls, \textit{A Theory of Justice} (1971), 42-43. Rawls uses the idea of 'lexical ordering' to describe the idea of ranking or ordering certain principles or conditions in such a series that requires us to satisfy the first principle or condition in the ordering before we can move onto the second, the second before we can move on to the third, and so on. A principle or condition does not fail to be considered and satisfied until those before it are either fully met or do not apply, or, \textit{a fortiori}, until a fully-reasoned conclusion is possible without considering and satisfying further principles or conditions. That a conclusion may be reached in the present context notwithstanding our considering and satisfying Lord Scarman's second principle in the proposal prong is confirmed by Lord Scarman himself (in \textit{Universe Tankships} [1983] A.C. 366, at 401) who said that 'the law regards the threat of unlawful action as illegitimate, whatever the demand.'

\textsuperscript{133} \textit{Op. cit.}, 401.

\textsuperscript{134} Cf. the approach taken by Seddon, \textit{op. cit.}.
any item of impropriety or unfairness residing in the nature of the demand and/or the consequences of yielding to the demand.\textsuperscript{135} Some threats, for example, ‘in themselves necessarily involve some element of unfairness’,\textsuperscript{136} or are ordinarily ‘so shocking that the courts will not inquire into the fairness of the [demand]’.\textsuperscript{137} Independently unlawful threats, such as threatened violence to the person, typically fall within this class of case.\textsuperscript{138} Even where the threat is not itself unlawful in any technical sense, however, the demand, that is, the end to be achieved, may be so objectionable\textsuperscript{139} that, when coupled with the “threat”, the proposal as a whole cannot be justified and is seen as wrongful in some broader sense.\textsuperscript{140} Under this analysis, as we shall see, are the usually admitted exceptions to the general rule that it is not duress to threaten to do what one has a legal right to do.\textsuperscript{141} An unjustifiable or an exorbitant demand, for example, may give rise to an inference that \(D\) had knowledge, or at least reason to know, of the \(P\)’s peculiar susceptibility to being pressed, which would, on the writer’s unconscionability (exploitation)

\textsuperscript{135} Cf. Jaffey, A., “Wrongful Pressure in Making Contracts”, in Lasok et al. (eds), \textit{Fundamental Duties} (1980) 187-200, 196: ‘... it does not follow that the inadequacy of consideration may not be relevant in determining whether the threat (not being of an act itself unlawful) is wrongful. Some threats are wrongful however fair the contract induced \(\ldots\), while others are only wrongful because of the unfairness of the contract sought’.

\textsuperscript{136} Examples given here under the \textit{Restatement (Second) of Contracts}, \S 176 (1) (c) and (d) include an abuse of the civil process and a threat to break a contract in violation of the duty of good faith and fair dealing.

\textsuperscript{137} Examples given here under the \textit{Restatement (Second) of Contracts} \S 176 (1) (a) and (b) include threatened crimes or torts, or threatened criminal prosecutions. Generally, see \textit{id}, Comment (a).

\textsuperscript{138} Hence Lord Scarman’s remark in \textit{Universe Tankships} [1983] A.C. 366, at 401, that ‘the law regards the threat of unlawful action as illegitimate, whatever the demand.’

\textsuperscript{139} A demand may, for example, be objectionable in either of two senses: first, no \textit{prima facie} right to make the demand, in which case there would, by ordinary measures, be a lack of consideration; second, even though there is a right, the claim is exorbitant, or the resulting contract is in some other way disadvantageous.

\textsuperscript{140} Cf. \textit{Restatement (Second) of Contracts}, \S 176 (2) (a) (b) and (c). Cf. also, \textit{Scolio Pty. Ltd v. Cote} (1992) 6 W.A.R. 475, where one of the reasons for a threat to prosecute failing as duress was that the amount demanded was in fact owing.

analysis, render D’s proposal exploitative, and hence wrongful and "coercive" for the purposes of the duress enquiry.

The operation of these unconscionability considerations can be seen more clearly as we turn now to the established categories of wrongful pressure in greater detail. However, the failure of English courts to develop a general notion of unconscionability perhaps explains why that jurisdiction has not yet achieved the United States position of openly viewing duress in terms of a judicial perception of unconscionability.142 For this reason, moreover, it might be advisable for Australian courts, which have openly recognised duress as incorporating notions of unconscionability,143 to look more closely to the approach taken by United States courts and commentators to the problem of duress.144

3.3.2. The Problem with Prima Facie "Lawful" Threats145

In assessing the issue of the legitimacy of a proposal, Goff and Jones suggest that ‘[m]ost important is the nature of the threat or the pressure’.146 The learned authors cite Lord Scarman himself, in Universe Tankships, who said that ‘the law regards the threat of unlawful action as illegitimate, whatever the demand’.147 Indeed, from early on the courts recognised as illegitimate threats of physical harm and later threats of wrongful detention

---

142 Cf. Stewart, op. cit., 431. According to this perception, the question of “illegitimacy” under the proposal prong is equated roughly with the notion of “unconscionability” incorporated into various other doctrines having relevance to questions of fairness in contract formation. Hence, we might ask, under the proposal prong, as some commentators have, whether there has been an ‘unconscionable exercise of a superior contractual bargaining position’ (Ogilvie, M. H., “Contracts—Economic Duress—Inequality of Bargaining Power—Quo Vadis?” (1981) 59 Can. B. Rev. 179, 187); or an ‘excessive gain that results from impaired bargaining power’ (Dawson, op. cit., 289); or an ‘improper exercise of [contractual] power for private advantage’ (Palmer, G. E., The Law of Restitution (1978), Vol. 2, at 242).


144 In particular, the writings of Professor Farnsworth (Contracts, op. cit., § 4.16-19; “Coercion in Contract Law” (1982) 5 U.A.L.R. Law Journal 329) and the American Law Institute’s Second Restatement, §§ 175 and 176 (and accompanying commentary) prove to be instructive.


of goods. Given that the threatened action here was ordinarily a crime, or at least a tort, it should be taken as axiomatic that such threats are to be characterised as “unlawful”, or at least “wrongful”. And while it may be regrettable that such cases still reach the courts today, they no longer make up the bulk of duress cases. Accordingly, they will not be considered in detail here.

A perplexing problem in the context of contract formation, however, concerns the so-called “lawful” threat. This characteristically embraces those cases where a party proposes to do what he has every legal right to do, while using such legal rights to back up an un-well-founded demand, or else to apply pressure to a situation within which his victim finds herself peculiarly confined. If such proposals are at all to be considered "illegitimate", and hence on the writer’s analysis “threatening”, then they must depend heavily for their wrongfulness on either the illegitimacy of the demand contained within the proposal itself, or upon the knowing exploitation of the victim’s individual circumstances (usually distress, need or natural affection) which render the particular proposal peculiarly coercive.


In identifying what amounts to a "threat" for the purposes of the duress enquiry, there are clear advantages in adopting a test based on independent illegality, the obvious one being certainty of application.\(^{150}\) And even until quite recently the cases have been filled with such misleading dicta as ‘it is not ... duress to threaten to exercise neither more nor less than the existing legal rights of a party’.\(^{151}\) But for all that, it is now generally recognised that the lawful/unlawful distinction places a ‘highly artificial limitation’ on the courts' power to intervene in situations of pressure being brought to bear by one contracting party upon the other, especially in commercial contexts:

To say that ‘it is never duress to threaten to do what one has a legal right to do’ is to ignore the fact that the threat of a technically lawful act may be as coercive and as unjustifiable in commercial terms as the threat of an unlawful act.\(^{152}\)

Thus, the oft-cited rule that it is not "duress" to threaten to do that which a party has a legal right to do has, understandably, admitted of a number of important exceptions.\(^{153}\) Indeed, Lord Scarman himself recognised the case of blackmail as an example.\(^{154}\) The threat of lawful action—such as a threat to report criminal conduct to the police—once coupled with the demand, may amount to actionable duress.\(^{155}\) But in this

---


\(^{152}\) Stewart, op. cit., 427. Cf. also, Dawson, op. cit., 288; Sutton, op. cit., 586; Rafferty, op. cit., 432.

\(^{153}\) It has long been understood in the American context that it ‘does not follow that, because you cannot be made to answer for the act, you may use the threat’: per Holmes J. in Silsbee v. Webber, 50 N.E. 555 (1898).


\(^{155}\) On blackmail in this context generally, see Young, “Duress and Threats of Lawful Action” (1980) 1 Canterbury L. Rev. 55; Wertheimer, op. cit., Chp. 5.
sort of case, ‘what [one] has to justify is not the threat, but the demand ...’.^{156}

As shall be seen below, most of the exceptions to the general rule about so-called “lawful” threats centre loosely around the concept of “abuse of right (or power)”, or “unconscionability” (in purely processual terms), so that we can recast the principle applying to lawful threats thus: it is ordinarily not wrongful, for the purposes of the proposal prong, if a party proposes to do what he has an independent legal right or power to do, so long as that right or power is not exercised for a purpose that the law regards as illegitimate or to extract a benefit which is otherwise “unconscionable” (i.e., “exploitative”) in the circumstances of the case at hand.^{157}

In the context of contract formation, there appear to be at least two paradigmatic instances of a lawful threat.^{158} First, there is the threat to instigate the legal process against the victim or a person related to or in affinity with her. Second, there is the threat not to do business with the victim in the future. We shall consider each in turn.

### 3.3.2.1. Threats of legal process

> It should be recognized that the ability which a member of an organized society has to start a lawsuit is not a right, but a power, which is capable of being put to improper ends; and that any abuse of that power is wrong.^{159}

---


^{157} Cf. *Carpenter v. U.S.* 4 CL.Ct. 705 (1984): `Threats to do what one has the right to do are not coercion or duress unless such actions are deemed to violate fundamental notions of fair dealing`.

^{158} In the context of contract variation, we could add a further example of where an otherwise lawful threat might amount to an illegitimate or wrongful act. This is where a threat amounts to an abuse of a long-standing commercial relationship or, at a more general level, `where one party has been drawn into a relationship of reliance which can be exploited by the other to secure an advantage`. See, *Seddon, op. cit.*, 156; *Goff and Jones, op. cit.*, 238, citing *Lloyds Bank Ltd v. Bundy* [1975] 1 Q.B. 326, 339 *per* Lord Denning M.R. Such views are well entrenched within the American legal tradition: see *Restatement (Second) of Contracts*, §176 (1) (d); *Hillman, R. A.*, “Policing Contract Modification under the UCC: Good Faith and the Doctrine of Economic Duress” (1979) 64 Iowa L. Rev. 849.

^{159} *Dalzell, “Duress II”, op. cit.*, 354.
Assuming that a threat to bring legal proceedings satisfies the choice prong of contractual duress,\textsuperscript{160} it will generally fail to meet the proposal prong. The threat to sue is, after all, arguably nothing more than a statement of intent to refer a private dispute to a public tribunal for orderly settlement; how can it be duress to tell the adverse party that these tribunals are to be called in to administer justice according to established law?\textsuperscript{161}

And as an American court once stated:

the fact that one of the parties signed the settlement to avoid the trouble and expense of a law suit does not amount to intimidation or duress for that is ordinarily the purpose of a settlement....\textsuperscript{162}

Thus, the threat to exercise one’s right to sue is not wrongful and does not constitute legally cognisable duress unless the claim is made in bad faith, or unless the right to sue is otherwise used for some purpose which the law considers improper.\textsuperscript{163} Typically, an “improper purpose” is one that is considered contrary or extraneous to the purposes for which the right to

---

\textsuperscript{160} Even though the threat of commencing an ordinary civil action may in certain circumstances be considered improper, it may nevertheless fail to amount to duress because the victim has the opportunity of asserting her rights in the threatened action. Often this is treated as a “reasonable” alternative to succumbing to the threat, making the proposed contract, and then asserting her rights in a later civil action. Generally, see Section 4.2.2.1.1.

\textsuperscript{161} Dalzell, “Duress II”, op. cit., 344.

\textsuperscript{162} DuPuy v. U.S., 25 F. 2d 990, 1003 (1929).

\textsuperscript{163} Cf. Rafferty, op. cit., 456-7. In Link v. Link, 179 S.E. 2d 697 (1971), for example, an American court held that it was essential, in order to establish duress, for a plaintiff to show a wrongful act but that it ordinarily was not wrongful for a person to secure the transfer of property by threatening to institute legal proceedings to enforce a right which she believed, in good faith, that she had. The court continued, however (at 705):

The weight of modern authority supports the rule, which we here adopt, that the act done or threatened may be wrongful even though not unlawful, \textit{per se}; and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, \textit{per se}, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

bring legal proceedings is intended. We can see more clearly these principles in action by considering threats to bring, or cause to be brought, either civil proceedings or criminal prosecution.

3.3.2.1.1. Threats of civil process

It should be obvious from the foregoing that only in the most exceptional cases will the threat to litigate be considered “illegitimate” for the purposes of satisfying the proposal prong in the duress enquiry. If every threatened right to sue were considered unacceptable for the purpose of this enquiry, then the boundaries of legally cognisable duress would become dangerously wide. Too many settlements or compromise agreements would be liable to be set aside, and there are strong public policy reasons for upholding these.\textsuperscript{164} The efficient administration of justice depends on the promotion of such agreements, and parties simply cannot undertake genuine settlements or compromises if they are relatively easy to attack \textit{ex post facto}.\textsuperscript{165}

Nonetheless, as Seddon points out, an absolute position against scrutinising threats to sue ‘ignores the fact that litigation or the threat of litigation is used everyday by powerful players to coerce weaker players to yield’.\textsuperscript{166} The law has, therefore, recognised that threats to litigate can in certain circumstances be illegitimate.\textsuperscript{167} To this end, however, the distinction between good-faith and bad-faith claims becomes particularly important;\textsuperscript{168} for the traditional view regarding the re-opening of settlements

\begin{footnotesize}
\textsuperscript{164} That is, parties should not be compelled to litigate but should be allowed to settle their disputes and differences out of court without fear of their agreements being impugned for duress. See \textit{Wigan v. Edwards} (1973) 1 A.L.R. 497, at 513. Cf. also, Seddon, \textit{op. cit.}, at 154-5, noting (at 154) that s. 52A(3) of the \textit{Trade Practices Act} 1974 (Cth) (now s. 51AAB(3)) states that the mere institution of legal proceedings does not amount to unconscionable conduct; MacDonald, \textit{op. cit.}, 466.


\textsuperscript{166} \textit{Op. cit.}, 154.


\textsuperscript{168} Cf. § 176 (1)(c) of the \textit{Restatement (Second) of Contracts}, which reads:

(1) A threat is improper if ... (c) what is threatened is the use of civil process
\end{footnotesize}
or compromise agreements is that the courts are always reluctant to do so unless there was a lack of *bona fides* on the part of the party asserting the claim.\textsuperscript{169}

Clearly, then, if \( D \) knows or has reason to know that he has no valid cause of action against \( P \), and assuming that the choice prong is met, the resultant contract can be avoided for duress. On the other hand, a claim made in good faith—i.e., one made with an honest belief in its chance of success—will generally not constitute duress, even if it proves to be unmeritorious.\textsuperscript{170} Consequently, the notion of *bona fide/mala fide* settlements or compromises is incorporated into the duress enquiry thus: the extraction of a promise by threatening to pursue a claim known to be false is to use "illegitimate" pressure, whereas pressure is considered to be "legitimate" when the claim is believed to be valid. Dalzell treats the distinction merely as one manifestation of the broader notion of abuse of power:

So where a lawsuit is threatened in bad faith, by one who is quite conscious that his position is insupportable, there is a deliberate use of the power to initiate litigation for a purpose quite foreign to its proper end.\textsuperscript{171}

Many features of a particular case may operate as evidentiary indicators that a threat made by the one party was not made in good faith for the purposes of a settlement or compromise agreement, but the predominant

\textsuperscript{169} See *Knowles v. Roberts* (1888) 38 Ch.D. 263, at 272 per Bowen L.J.

\textsuperscript{170} To hold otherwise would be to substitute hindsight for reasonable foresight. In *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, for example, Bowen L.J. said (at 291):

\begin{quote}
The reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it.
\end{quote}

ones might include his failure to seek and act on legal advice,\textsuperscript{172} or his knowingly making an exorbitant claim, that is, one which he cannot subsequently justify.\textsuperscript{173} The features of a particular case which may operate as evidence that the other party did not intend to submit to a settlement or a compromise agreement might include the presence of protest on her part, and her promptly challenging the resultant agreement once the fear of the threat had been removed.\textsuperscript{174}

3.3.2.1.2. Threats of criminal process

The principle that it is wrong to abuse what would otherwise be a legal right is perhaps most apparent when a party proposes to exercise a right that he has in virtue of the criminal law. Analogous to the abuse we understand to be blackmail,\textsuperscript{175} the law has appeared loath to encourage a resort to threats of pressing criminal charges to compel or procure the settlement of private demands.\textsuperscript{176}

The abuse of the right or power to litigate a civil claim, and the abuse of the right or power to make criminal complaints or offer up incriminating information, can be seen as specific violations of a more general principle at work in our law: abuse of legal process.\textsuperscript{177} At the heart of this violation of this general principle is the complaint that legal processes should not be used

\textsuperscript{172} Cf. Jaffey, op. cit., 192.

\textsuperscript{173} Id, 189.

\textsuperscript{174} See Section 4.2.2., below


\textsuperscript{177} Generally, see Fleming, J. G., The Law of Torts (7th ed., 1987), Chp. 27. An abuse of legal procedures may amount to either the tort of abuse of process, in the case of threats to litigate, or malicious prosecution, in the case of threatened criminal prosecution.
in a way contrary to their proper ends, or to secure an unrelated or improper benefit. The notion of "abuse of right (or power)"\textsuperscript{178} as exemplified by the cases involving wrongful uses of the legal process, might usefully be extended to measure the propriety of so-called "lawful" threats under the proposal prong more generally.\textsuperscript{179}

3.3.3.2. Threats not to do future business

One of the clearest examples of a so-called "lawful" threat, which may have the effect of applying quite considerable pressure upon its recipient, resides in the proposed refusal to do business with the victim in the future.\textsuperscript{180} Ordinarily, such a threat is not duress because it fails to satisfy both the choice prong\textsuperscript{181} and the proposal prong of the two-pronged duress enquiry;\textsuperscript{182} although Goff and Jones, citing the American Law Institute's \textit{Restatement (Second) of Contracts}, argue that exceptionally a threat not to contract may amount to duress.\textsuperscript{183} The \textit{Restatement}, however, requires a detailed analysis of the processes and the outcomes of the transaction in question, so that a threat not to do future business may be considered improper if, and only if, the recipient is somehow disadvantaged (in substantive terms) by the transaction, and if, in the circumstances of the case, an element of procedural impropriety is also present. In other words, a threat not to do business in the future can only satisfy the proposal prong of the two-pronged theory of duress if the proposal can, in the circumstances of


\textsuperscript{179} Cf. also, Rafferty, \textit{op. cit.}, 441. See Section 3.3.2., below.

\textsuperscript{180} Cf. Rafferty, \textit{op. cit.}, 435-6.

\textsuperscript{181} The choice prong will almost invariably not be satisfied in the case of threats not to do business in the future. Assuming a competitive market, reasonable sources of alternative business will be available, and the victim of proposals should be required to take these rather than to submit to the demand. Of course, it is quite a different matter where the victim faces a monopoly supplier, as was the case in Smith v. William Charlack Ltd (1924) 34 C.L.R. 38, discussed below at Sections 3.2.2.2. and 4.1.1.

\textsuperscript{182} See \textit{Eric Gnapp Ltd v. Petroleum Board} [1949] 1 All E.R. 980.

the case at hand, be considered in some way "unconscionable"., as determined by balancing elements of both procedural and substantive unconscionability. These ideas are captured particularly well by § 176 (2) of the Restatement (Second) of Contracts, which reads:

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat.\(^{184}\)

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat.\(^{185}\) or

---

\(^{184}\) The Restatement (Second) of Contracts, § 176, Comment (f), gives as an example a threat motivated merely by malice or vindictiveness, such as a threat to make public embarrassing information about the victim unless she enters the proposed contract. See Perkins Oil Co. v. Fitzgerald, 121 S.W. 2d 877 (1938): employer threatens injured employee to sign release or else it would discharge his stepfather and prevent his securing employment elsewhere; Silsbee v. Webber, 50 N.E. 555 (1889): threat to tell victim’s husband of son’s alleged embezzlement; Wolf v. Marlton Corp., 154 A. 2d 625 (1959): buyer in housing development threatens to resell to undesirable purchaser and ruin seller’s building business unless seller agreed to settlement, cited, Farsworth, op. cit., 263, n. 25. For an Australian example, see Robertson v. Robertson (1930) Q.W.N. No. 41 in [1930] Qd. St. R.: threat to reveal an infidelity. Cf., also, the mention of "blackmail", supra, pp. 384-5.

\(^{185}\) The Restatement (Second) of Contracts, § 176, Comment (f), gives as a ‘typical’ example manipulative behaviour by the coercer that leaves one person ‘at the mercy of the other’. Illustration 13 to § 176 captures this idea:

A, who has sold goods to B on several previous occasions, intentionally misleads B into thinking that he will supply the goods at the usual price and thereby causes B to delay in attempting to buy them elsewhere until it is too late to do so. A then threatens not to sell the goods to B unless he agrees to pay a price greatly in excess of that charged previously. B, being in urgent need of the goods, makes the contract. If the court concludes that the effectiveness of A’s threat in inducing B to make the contract was significantly increased by A’s prior unfair dealing, A’s threat is improper and the contract is voidable by B.


Illustration 13, moreover, illustrates the difficulties that lie in defining with precision the permissible limits of bargaining. Even though one party here can be said to have taken
(c) what is threatened is otherwise a use of power for illegitimate ends.

It is not clear, however, why the authors of the Restatement should have wanted to insist so categorically upon substantive unfairness as an ingredient of duress in this context. Consistent with this writer’s analysis of unconscionability in Chapter Four, substantive fairness is relevant only to the extent that it tends to evidence procedural impropriety, and especially in the context of determining the legitimacy, hence coerciveness, of a proposal, we are clearly concerned with a procedural impropriety in the context of contract formation. The writer would thus treat with caution the United States position in relation to the apparent need to show unequal exchange in the present context. Rather, it is argued that unfairness in exchange should be relevant only to the extent that it tends to show: (1) that the threatened exercise of a lawful power employed to back up the demand was being used for an improper or exploitative purpose, and hence, purely in procedural terms, was “illegitimate” for the purposes of the duress enquiry (under the proposal prong); and (2) that submission to the demand was not itself a “reasonable” alternative (under the choice prong).

The classic reported instance of a threat not to do business in the future is Smith v. William Charlick Ltd. Briefly, the material facts were as

advantage of the other’s adversity, absent the prior unfair dealing on the part of A and we doubtless have a contract that has been dictated by the ordinary interplay of economic forces—a case of ‘hard bargaining’, which does not justify state intervention on the basis of substantive unfairness alone. (Cf. § 176, Illustration 14.) Farnsworth, for example, comments that other examples of this general principle can be expected to be identified as cases come before the courts (op. cit., 264). Cf. Chouinard v. Chouinard, 568 F. 2d 430 (5th Cir.) (1978): no duress where economic stress not ‘attributable to the party against whom duress is alleged; Cheshire Oil Co. v. Springfield Realty Corp., 385 A. 2d 835 (1978): ‘the coercive circumstances must have been the result of the acts of the opposite party’.

In the Australian context, prior unfair dealing might be revealed through the idea of unconscionability, in particular as exemplified through the notion of estoppel. To be sure, the effectiveness of the threat in inducing the manifestation of assent may significantly be increased by a relationship of reliance/detriment existing between the parties.

186 The most probably reason for the Restatement’s insistence is the influence that Professor Dawson’s article obviously had on the American Law Institute, the authors of the Restatement (see Reporter’s Note). Professor Dawson stressed the substantive role of unequal exchange in duress cases: Dawson, J. P., “Economic Duress—An Essay in Perspective” (1947) 45 Mich. L. Rev. 253, esp. 282 et seq. ‘The historical connection between duress and the law of crime and tort has obscured the main function of duress doctrines, the prevention of unjust enrichment’ (id, 282).

187 (1924) 34 C.L.R. 38. Cf. also, the similar scenario in Eric Gnapp Ltd v. Petroleum Board
follows. The plaintiff, a miller, always bought its wheat from the Wheat Harvest Board, a statutory monopoly. Both the Board and the plaintiff knew that there was no alternative source of supply. The Board demanded from the plaintiff, in respect of wheat already sold and paid for, a "surcharge" over and above the original contract price. The Board made it clear in the circumstances that a failure by the plaintiff to pay the amount demanded would result in the cessation of future supplies of wheat. The Board was not, nor did it claim to be, legally entitled to make the demand. Fearing that its business would be ruined if it did not submit to the Board's demand, and with full knowledge of all material circumstances, the plaintiff paid the amount so demanded, albeit under protest. The majority of the High Court of Australia, however, held that the plaintiff was not permitted to have its money returned on the basis that it had been made 'involuntarily'—under duress or compulsion. In reaching its decision, the majority stressed that the Board was not proposing to do any unlawful act, such as breach any legally recognised duty which it owed to the plaintiff—the Board's threat was not to contract with the plaintiff in the future, something it was perfectly free to do. The demand, too, was not considered in anyway illegitimate, for in light of the majority's finding about the "lawful" nature of the threat, the payment provided a perfectly valid consideration for the Board's promise to forbear from doing that which it had a lawful right to do.188

It should be recalled, however, that at the time when Smith v. William Charlick was decided, in 1924, "freedom of contract" was very much the catch-cry of the day. We can seriously doubt, therefore, whether the same result would obtain today. This point is argued in the following section.189

[1949] 1 All E.R. 980: The Petroleum Board, a monopolist supplier of petrol to retailers, threatened not to accept future order from the plaintiff company unless certain written allegations made against the Board were withdrawn by the plaintiff. As there was no statutory duty to supply, the Board's conduct was held not to amount to duress or undue influence.

188 *Per* Knox C.J., *id.*, at 51: 'The payment was made, not in order to have done what the Board was legally bound to do, but in order to induce the Board to do that which it was under no legal obligation to do'. Cf., however, the case of *White Rose Flour Milling Co. Pty. Ltd v. Australian Wheat Board* (1944) 18 A.L.J. 324.

189 See, in particular, Section 4.1.1., below.
4. RESTATING THE TWO-PRONGED THEORY OF DURESS

According to the theory of duress advanced here, a party, P, acts under duress if, under the choice prong, the other party, D, creates a choice situation for P in which P has no reasonable choice but to accept D’s proposal and if, under the proposal prong, D acts wrongly in creating P’s choice situation. The emergent, salient feature of this theory is that whether P is held to the normal legal consequences of her contractual assent in the face of putatively coercive proposals, is determined largely by normative, or ‘moralized’ criteria that have little to do with the ‘pre-analytic’, psychological or empirical conception of coercion: simply with the amount of “pressure” that P herself experiences or feels, or with pressure that can be said to overwhelm P’s “will”. And whilst there appears to be general academic and judicial consensus on the essential structure of this theory, it is equally apparent that there is still much work to be done in developing an appropriate set of criteria that apply to the respective prongs of the two-pronged theory of duress.

Now within the law, the two-pronged theory seems to have the structure that it does because it is the product of the logic of “corrective” justice in consensual, private transactions, where relative equality of bargaining position is presumed. That is, Anglo-Australian law has been shaped by the powerful ideological constraint of “liberty of contract”, which ordinarily restricts the authority of a court to assess the distributive fairness of the outcome of a transaction, or to pierce the express language of a contractual document. It is in light of this constraint that duress must count as a violation of freedom, and a violation, in particular, that is constituted by a defect of contractual voluntariness implicit in the assumptions surrounding the bargaining process. In a situation of duress then, one party can be said to be acting beyond the scope of his liberty,

---

190 The term ‘moralized’ is the expression used throughout Wertheimer’s Coercion, (1987), op. cit., to convey the same idea.


stepping outside the authority granted by the regime of rights and entitlements which delimit consensual transactions and define bargaining equilibria.\textsuperscript{193} When this occurs, a court of law is empowered to "correct" the transactional defect in the logically most appropriate way, namely by relieving the wrongfully coerced party of the responsibilities that would normally flow from the manifestation of her contractual assent.\textsuperscript{194}

On this account, moreover, what seems to be unacceptable, and more particularly, responsibility-relieving about entering a contract under duress, is not the initial inequality—who has more bargaining power?—or the equality of the end results—who got what?—but rather the violation of "voluntariness" that was implicit in the transaction. Thus, we are here concerned more with the processual features of the transaction at hand, with freedom and autonomy, and less with issues of its distributive or substantive fairness. What seems to offend our senses in cases involving duress is not that the transaction is improvident overall (although we have seen that this aspect might itself be evidentially important for determining whether a proposal is to be considered illegitimate under the proposal prong), but whether the victim's responsibility for her contractual assent was nullified on account of her "involuntariness", as her freedom was denied to her by the wrongful conduct of the coercer.

\textbf{4.1. Setting the Allegedly Coerced's Baseline}

Whilst the writer is confident that the two-pronged theory of duress is

\textsuperscript{193} Cf. Dawson, \textit{op. cit.}, 281: "[T]he function of judicial remedies becomes a policing function, the detection and correction of those factors which disturb and disrupt the market".

\textsuperscript{194} Cf. Dalzell, "Duress II", \textit{op. cit.}, 363: 'In working out the rules applicable to duress it is to be remembered that we are dealing not with retributive nor even compensatory justice so much as with restorative justice. A judgment based on duress simply requires the specific restitution of property to its former possessor, or the annulment of an executory contract, so as to undo a transaction which has taken place'. Of course, where the wrong involved in the threat is recognised as being independently actionable and causes loss to the victim, relief might sound in damages if the particular cause of action supports such a remedy. Indeed, Lord Scarman himself, in the \textit{Universe Tankships case}, recognised that economic duress could be actionable as a tort should it cause damage or loss ([1983] A.C. 366, 400. Cf. Lord Diplock, \textit{id}, 385). Cf. also, Seddon, \textit{op. cit.}, 158-63, who canvassed the issue of remedies in respect of economic duress, including the possible sources of compensatory remedies, in tort, contract and under statute.
today producing the right legal results, once stripped of its content, the theory is prone to draw the obvious criticism that it appears actually to be rather vacuous. Until we know the conditions under which a proposal is wrongful, the proposal prong will not engage our intuitions about the permissible limits of bargaining pressure since we have no idea to what, in concrete terms, the theory commits us.\textsuperscript{195} This vacuity becomes even more apparent when we consider that the two-pronged theory of duress appears to rest upon the traditional distinction between threats and offers, and that the crux of this distinction itself lies between proposals to make someone worse off relative to some baseline and proposals to make someone better off relative to some baseline. While this may give us a structure for the notion of what it is that creates coercive conditions, it does not advance our enquiry very far; for threats and offers are notoriously intertranslatable if we manipulate the baseline. For example, the highwayman who proposes to P, “Your money or your life!”, could be taken to be offering P the continuation of her life in exchange for cash (a good bargain by any measure), if we understood P’s baseline as including the imminent prospect of being killed.\textsuperscript{196}

Clearly, therefore, the distinction between threats and offers serves no useful purpose if we are free to stipulate the baseline in any way we wish. What is needed instead is a method of fixing P’s baseline that avoids this sort of trivial intertranslatability and successfully distinguishes threats from offers for the purposes of differentiating coercive from non-coercive proposals. One possible technique is to use a descriptive or empirical measure, of which there are, in turn, both objective and subjective possible applications. Another is to use a normative measure. According to the first measure, P’s baseline is a prediction of what, in the normal course of events, will happen, or perhaps what P believes or expects will happen, if P refuses to submit to D’s demand.\textsuperscript{197} According to the second measure, P’s baseline includes the full range of D’s independent rights and duties, as these might affect P. Accordingly, we define the baseline in terms of where the recipient


\textsuperscript{196} Cf. Westen, op. cit., 573-4, 581.

of a proposal *ought* to be for refusing to submit to the proposal.\(^{198}\) Taking again our example of the highwayman, according to the first measure the highwayman is clearly proposing to make \(P\)'s situation worse, since in the normal (expected) course of events \(P\)'s life would not be at risk. According to the second, and in light of the highwayman's obvious moral and legal obligations, the proposal is clearly a threat. Thus, in the highwayman situation, and perhaps in many others, both measures, the empirical and the normative, will produce similar results.

It is clear, however, that the respective measures are not necessarily co-extensive. Often, what the recipient's future conditions will *actually* be differ significantly from what she *expects* them to be, which differ still from what they *ought* to be. Sometimes, what \(P\) ought to be able to expect from \(D\), previous experience or well-grounded pessimism may make it unreasonable for her to expect.\(^{199}\) On other occasions, what beliefs or expectations \(P\) actually holds about \(D\) may, from a normative perspective, be totally unreasonable or unjustifiable in the circumstances. This is because some forms of expectation may, in morals or in law, unreasonably be held, such as \(P\)'s expectation that \(D\), an innocent passer-by, is unconditionally obliged to rescue her from a perilous situation. It becomes clear, therefore, that to set a party's baseline according to an empirical or subjective measure would in practice give rise to great potential for fraud on the part of either party.\(^{200}\) In law, consequently, the baseline that renders the proposal a "threat" for the purposes of the duress enquiry cannot wholly be a description of the condition that the recipient actually expects or prefers to occupy, but rather a prescription of the condition she ought to occupy.\(^{201}\) This accounts, too, for

---

\(^{198}\) Cf. Fried, *op. cit.*, 97; Westen, *op. cit.*, 576, n. 112: 'We cannot escape using some normative criterion to distinguish offers from threats.... A proposal is ... coercive if it proposes a wrong to the object of the proposal'. A "threat" is thus a conditional promise to leave the recipient worse off than she ought to be.

\(^{199}\) Consider, for example, Nozick's "Slave Case", cited *supra*, at n. 118.

\(^{200}\) For a coercker could always plead ignorance of his obligations toward the coerced, and the coerced could always attempt to revive a failed business decision on the basis of duress.

\(^{201}\) In *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (1983), for example, it was considered that a fundamental issue in a duress case was not the victim's state of mind but whether the statement that induced the promise was the kind of 'offer to deal' that courts want to discourage, and hence call a "threat".
the distinction drawn earlier between "coercion" and "duress". "Coercion" is clearly the wider of the two, for it 'consists of conditional promises to leave a person worse off either than he otherwise expects to be or that he ought to be for refusing to do the proponent's bidding'.202 "Duress", on the other hand, consists in the prescriptive measure of the coercion definition only: i.e., a conditional promise to leave a person worse off than where she reasonably ought to be for refusing to give in to the proponent's demands. If we were considering coercion generally, we need a two-baseline measure, consisting of both a descriptive and prescriptive measure. For duress, however, we need just the one. Cast in this way, Professor Westen would describe the concept of a "threat" in the duress enquiry thus:203

A proponent "threatens" for the purposes of coercion when he conditionally promises to leave a recipient in a position in which it would be wrong by the society's standards for the proponent to leave him for refusing to do the proponent's bidding.204

However, even given the fact that for duress we need just the one, normative baseline, our problems are only just beginning; for to get down to the business of actually distinguishing coercive and non-coercive proposals under the proposal prong we have to be able to state precisely what is the content of P's baseline; and this may be a task for which there is no single, right answer. For if we are committed to the normative baseline for the purposes of the duress enquiry (the non-descriptive test for P's baseline seems precisely to be the motivation behind Lord Scarman's version of the proposal prong),205 the substantive legal determination of a duress claim

202 Westen, op. cit., 587. Cf. also, the same author, id., at 589.

203 Id, 584 (emphasis added).

204 One might, therefore, for the purposes of the proposal prong of the duress enquiry, recall what Lambert J.A. said about the notion of "unconscionability" in Harry v. Kreutziger (1978) 95 D.L.R. (3d) 231 (at 241): "[T]he single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".

205 Dalzell, too, was discernibly in favour of a strongly normative and open-ended test under the proposal prong: "Duress II", op. cit., 364-5: 'In fixing upon a measure of right and wrong for the present purpose, it is easy enough to consult too closely the rules governing the technical rights of litigants in the normal tort and contract actions and the "moral sense of the community" not enough'. Indeed, he lists as one of his descriptions of what should be held as wrongful for the duress enquiry, the all-encompassing category of 'a threat to violate the
will, quite naturally, vary from society to society and from time to time, and vary even within the same society at different times.\(^{206}\) The point is that "duress" simply will incorporate by reference whatever moral or legal standards of unfair dealing, if any, a relevant community may adopt and apply at any given time.\(^{207}\) For legal purposes, the values which underlie these standards can be said to be borne out of the decided cases and the facts which express their essence.\(^{208}\) Perhaps finally, the best one can hope to say about the content of \(P\)'s baseline is that in law it will invariably comprise what might be termed \(P\)'s "reasonable expectations", as these positive and negative expectations are determined both by \(P\)'s actual expectations, if any, which are reasonable, and those expectations which the law is prepared to say \(P\) is reasonably entitled to hold, whether or not she actually turned her mind to the matter in question.\(^{209}\) Thereby, "reasonable expectations" becomes both the 'formal justification' for, as well the measure of, the content we are standards of decent conduct in the community'(id, 366). Cf. Note at (1920) 20 Col. L. Rev. 80, 83: '...the prevailing notions of what constitutes equitable and decent conduct furnish the basis for the legal definition of duress'.


\(^{207}\) Cf. Westen, \textit{op. cit.}, 585, at n. 132.

\(^{208}\) In a the most general sense, it may be, as Nozick argues, "Coercion", \textit{op. cit.}, that the normative baseline rests on a theory of rights, such that judges may presuppose and accept a set of background institutions, such as private property, against which \(D\)'s proposals are to be understood.

To illustrate, we can return to our case of the Drowning Person (offered above, \textit{supra} at p. 375). Whether \(D\)'s proposal is an offer or a threat depends on whether \(P\) has a right to be rescued. If \(P\) has such a right, \(D\)'s proposal is a threat. If not, it is an offer. Ordinarily \(P\) would have no such legal right, but the exact measure of rights may vary depending on her moral or legal relationship to \(D\). For example, \(P\)'s "right" to be rescued might grow morally, and possibly legally, stronger should \(D\) happen to be her guardian, or happen to have caused \(P\)'s predicament in the first place, or perhaps if \(D\) happened to be a lifeguard instead of a mere passer-by. Generally, see Lyons, D., "The Odd Debt of Gratitude" (1969) 29 Analysis 92, 95; Weinrib, E., "The Case for a Duty to Rescue" (1980) 90 Yale L. J. 247; Reeder, "Beneficence, Supererogation, and the Role Duty", in Shelp, E. (ed), \textit{Beneficence and Health Care} (1982) 83-108, 99; Adler, J., "Relying Upon the Reasonableness of Strangers: Some Observations about the Current State of Common Law Affirmative Duties to Aid or Protect Others" (1991) Wisconsin L. Rev. 867.

legally to ascribe to $P$’s baseline in any given case.\textsuperscript{210} Given, too, that an expectation actually held by $P$ is ultimately subject to a court’s judgment that that expectation is what $P$ is reasonably entitled to expect, it is clear that $P$’s baseline for the purposes of the duress enquiry will primarily remain a normative or prescriptive rather than a descriptive, psychological or empirical one. Perhaps the most important consideration in determining the reasonableness of $P$’s expectations in the present context is the extent to which, under functionalism, advantage-taking is an accepted feature of bargaining, and that it is allowable and required under the “rules” of the game, even when the result of the advantage-taking is to apply quite considerable pressure to $P$, the vulnerable party.

The next section illustrates the foregoing points by returning to the facts of \textit{Smith v. William Charlick Ltd.}\textsuperscript{211} The case exemplifies the problem of the so-called “lawful” threat not to do business in the future,\textsuperscript{212} and it potentially illustrates how the content of a coerced party’s normative baseline changes with shifts in the perceived values of fair dealing prevailing in a given community over time.

\textbf{4.1.1. Smith v. William Charlick Ltd Revisited}

By translating legitimate threats into offers, the normative baseline account of coercive proposals would explain why it is ordinarily not legally cognisable coercion—duress—to threaten to do something one has a right to do. A lawful threat ordinarily does not constitute duress because relative to the position $P$ ought to occupy for refusing to submit to $D$’s proposal (i.e., relative to $P$’s baseline), $D$’s threat is actually an offer, and offers do not coerce.

To illustrate this point, consider the putative content of William Charlick Ltd’s baseline when, in the heyday of freedom of contract, the Wheat Harvest Board “informed” the company of its intentions not to

\addtocounter{footnote}{1}


\textsuperscript{211} (1924) 34 C.L.R. 38.

\textsuperscript{212} It is considered that to propose to do something which is unlawful—such as a crime—is always a threat relative to the victim’s normative baseline.
supply it with wheat in the future unless certain, unjustifiable, payments were made. In 1924, the majority of the High Court held that the payment had not been made under compulsion (duress) because the Board was not obliged under the relevant legislation of the day to supply wheat, and hence it had a right to refuse to do business in the future with Charlick.

It is understandable that we often define our situations in terms of where we are, or think we are, and not in terms of where we have a right to be. Given this phenomenon, it is not surprising that Charlick should have experienced the Board’s proposal to be a “threat”, as proposing to make the company worse off than it was before. Doubtless Charlick felt as if it was being coerced. But the dangers inherent in the psychological, descriptive or empirical approach to duress begin here to reinforce the superiority of the normative approach. Since the Board had a right, presumably according to the societal-cum-legislative standards of the day, to refuse to do business with Charlick in the future, the possibility or risk of the Board exercising this right must have been written into Charlick’s (1920) baseline. Even assuming Charlick had in fact expected the Board to continue supplying wheat in the future, such an expectation would putatively be, by the normative baseline test, and hence the perceived prevailing standards of the day, unreasonably or illegitimately held. Thus, despite its apparent “threatening” behaviour, the Board was, in 1920, actually proposing to make Charlick better off relative to its baseline: the Board was indeed making Charlick an offer. It was an ungenerous offer, perhaps, but an offer nonetheless. And even though it may have been a selfish exercise of a right, or an offer Charlick could not reasonably have refused, that did not make it coercive.

213 Cf. MacDonald, op. cit., n. 35.


It may have been different, of course, if there had been some prior unfair dealing on the part of the Board, such as representations, assurances, promises, or other acts inducing reliance, or acquiescence in the company’s acts of reliance, which actually induced reliance or created legitimate expectations in Charlick that supplies would be forthcoming on any and every future occasion. (Cf. Restatement (Second) of Contracts, § 176, Illustration 13, cited at n. 185.) In such a case the Board’s obligation not to breach those expectations would have to be included in the company’s empirical and normative baseline. Relative to this baseline, then, the Board would be proposing to make the company worse off, and hence would be issuing a coercive threat.
Yet for all that, there is today a general consensus that Smith v. William Charlick would be decided differently according to perceived modern societal standards of propriety in dealing.215 The broad effect of the recent developments in the law of contractual duress has been to increase significantly the forms of proposal that will be recognised as “wrongful” for the purpose of satisfying the proposal prong in the duress enquiry. The corollary of these developments must be that the spectrum of rights and entitlements to be included in a party’s baseline situation is correspondingly broadened. No longer is a party’s baseline primarily determined by technical legal standards, such as those applying to crimes and torts, but it has been extended to consult the standards of decency which stem from the ‘moral sense of the community’ generally.216 The precise sources of these various standards which have served to enlarge the province of duress prove to be an amalgam of both the slowly liberalising judicial developments which have taken place during the latter part of this century,217 and the expansion

As it was decided, Charlick’s case can however be contrasted with White Rose Flour Milling Co. Pty Ltd v. Australian Wheat Board (1944) 18 A.L.J. 324, a case of similar factual nature, albeit in the context of contract variation rather than formation. The White Rose case involved a threat not to supply the plaintiff with the wheat it needed if it did not pay a charge imposed. The contract did not provide for the payment of any charge. Unlike Charlick’s case, however, the plaintiff in White Rose was entitled to recover its money because there was an existing contract for the supply of wheat between the parties, and the Board’s threat thus amounted to threatening a breach of its contractual obligation. The precise distinction between the two cases is not entirely clear. In each the plaintiff’s position was the same, the proposal was the same, the extent of the coercion was the same. Unless some distinction can be drawn between the motivations of the respective Boards, or there are different principles operating between cases of contractual variation and other dealings, one might be excused for thinking that policy would surely dictate that the result be the same in each case. The only material distinction appears to lie in the fact that White Rose Flour Milling Co. was fortunate enough to have a standing contractual relationship with the Australian Wheat Board, so that the Board’s obligation to perform could be built into White Rose’s normative baseline conditions. In such a case, the Board’s proposal reduced White Rose’s options, so that the company was worse off relative to their baseline by succumbing to the Board’s demand—i.e., there was a discernible coercive proposal, or a “threat”, here. Cf. also, Business Incentives Co. Inc. v. Sony Corp., 387 F. Supp. 63 (1975): no duress because Sony merely proposed to exercise a pre-existing right; Simmonds Precision Products Inc. v. United States, 546 F. 2d. 886 (1976).


217 The development of unconscionability has itself accounted for much of this. The
of various legislative standards which touch and concern the law of duress, especially in dealings between commercial players, though not exclusively so. 218 These analogous standards, it has been argued, may influence and guide judges in assessing allegedly coercive conduct in particular transactions, even where the legislation raised in guidance is not directly applicable to the case at hand. 219

In modern cases, therefore, particularly those involving duress to a party’s economic interests, we may nowadays include within a proponent’s sphere of obligations, the duty not himself to act “unconscientiously” toward the coerced. Whilst it is clear that a superior party has no unconditional duty to assist those whom he finds in trouble in the commercial market place, there are serious questions as to whether he is nevertheless under a negative development of the so-called “economic torts” (conspiracy, intimidation, and interference with contractual relations) may also have a similar effect in this area. See Seddon, op. cit., 160-1.

218 Seddon, for instance, gives the following provisions of the Trade Practices Act 1974 (Cth) as examples: ss. 45 and 45B: contracts, etc., which restrict dealings or affect competition; 45A and 45C: price fixing; 45D: secondary boycotts; 45E: contracts, etc., affecting supply and maintenance of goods; 46: misuse of market power; 47: exclusive dealing; 48: resale price maintenance; 49: price discrimination; 51AB: unconscionable conduct; 53A (2) and 60: use of physical force and harassment.

219 Cf. the majority decision in Smith v. William Charlick Ltd, op. cit., where a major factor for finding in favour of the Wheat Harvest Board was that the Wheat Harvest Acts 1915-17 did not impose upon the Government a duty to supply wheat to any persons desiring it, and hence the Board’s refusal to supply to Charlick was not a breach thereof (Knox C.J., at 49 and 51; Isaacs J., at 63). Lord Scarman, also, in Universe Tankships, remarked that for the purpose of determining the issue of legitimacy of behaviour it was not possible to say that pressure was “illegitimate” where the behaviour complained of was protected from suit by statute: [1983] A.C. 366, 401. See, too, per Lord Diplock, id., at 385; and the decision of the House of Lords in Dinskal Shipping v. I.T.F., op. cit. It is suggested, however, that this should not be so in all cases, especially where a party seeks to abuse the protection it obtains from a statute in order to secure some private advantage to itself: see Higgin J.’s compelling dissent in Smith v. William Charlick Ltd. Cf. also, the Canadian decision of Johnson v. Tretheway (1979) 14 B.C.L.R. 373, where certain fees had been paid to the defendant owner of a mobile home site after the plaintiff had assigned mobile home pads rented from the defendant. The fees were allegedly paid upon fear that the assignments would be frustrated by the defendant. The County Court Judge held that the case was one of “practical compulsion”, a significant fact in this finding being the Residential Tenancy Act (R.S.B.C. 1979, c. 365, s. 30(4)), which gave tenants a right to assign free of charges.

duty not knowingly\textsuperscript{220} himself to exploit the serious distress of others, however it may have arisen, for personal gain.\textsuperscript{221} This is precisely what the Wheat Harvest Board did in Smith v. William Charlick Ltd. The Board was a monopoly seller: this resulted in the buyer, Charlick, being severely disadvantaged in terms of bargaining power \textit{vis-à-vis} the Board. The seller, too, was aware of the serious need of the buyer, and that a refusal on its part to submit to the demands would result in the ruination of its business, for which there was no adequate remedy. The significant strategic advantage that resulted from the respective positions of the parties, and the Board’s knowledge thereof, was abused when the Board turned its dominant position to its own advantage—used its power—to secure a benefit to which it had no moral or legal right, and which was in no way connected to the office or powers of the Board as it was constituted by the relevant legislation of the day.\textsuperscript{222} Here was an officially created public monopoly engaging in private action to the detriment of a citizen who was dependent for his livelihood on the provision of its services. It is today generally considered that the regulation of public authority “service” enterprises is of immediate

\textsuperscript{220} By analogy with the equitable unconscionable dealings and unilateral mistake jurisdictions (for the “exploitation” ideas here are parallel), some degree of knowledge on the part of the superior party is essential. As Dadson asks:

\begin{quote}
How can the conduct of a threatening party truly be characterised as ‘oppression’ or ‘extortion’ unless that party knew or should have known of the circumstances that made his threat coercive? How can the threatening party be said to take ‘undue advantage’ of the claimant’s situation, if he is unaware of the threatened party’s urgent need for performance?
\end{quote}


\textsuperscript{221} Cf. Westen, \textit{op. cit.}, 585. Indeed, in Smith v. William Charlick itself, Higgins J. (dissenting) thought that ‘i]n each case the proper issue would seem to be, had the party receiving the money the right to take advantage of his neighbour’s necessity or not’ (\textit{op. cit.}, 65).

\textsuperscript{222} In addition, there is today a probable violation of the anti-competitive provisions of the \textit{Trade Practices Act 1974} (Cth)—in particular an infringement of s. 46 (misuse of market power)—and this might also operate as a guide to our assessment of the illegitimacy of the Board’s conduct for the purposes of the economic duress claim. It could be noted, also, that the High Court of Australia, in \textit{Queensland Wire Industries Pty Ltd v. Broken Hill Proprietary Co. Ltd} (1989) 63 A.L.R.J. 181, has interpreted s. 46 as not requiring any ‘conscious predatory activity’ on the part of a monopoly: Hodgekiss, “Casenote” (1989) 63 A.L.J. 438, at 439, as cited by Seddon, \textit{op. cit.}, 158.
interest to the community at large.\textsuperscript{223}

Arguably, the content of William Charlick Ltd’s 1993 normative baseline would thus read very differently from its 1920 baseline. Written into its 1993 baseline, for example, must be the company’s reasonable expectation that the public monopoly would not, in the absence of the company by its own prior actions giving reason justifying the Board’s refusal, use its unique powers, rights or privileges \textit{vis-à-vis} the company in excess of the ends for which such powers, rights or privileges existed or were created, to exploit the superior position this gave them over the company, which was powerless. Relative to this legitimate expectation, and hence right, the Board’s proposal today would consist of a promise to make the company worse off than the company had a right to be. Whereas in 1920 the proposal was arguably an “offer”, and hence non-coercive, today it would clearly be seen as a coercive “threat”.

Now, the notion of abuse of power or right seems to be at the heart of the resolution of all the cases involving so-called “lawful” threats. Recall in this connection, for example, our discussion of the right to litigate. In the case where a party has a \textit{bona fide}, and perhaps reasonable, belief in his right to sue, so that he gives up a disputed claim in exchange for the meeting of his contractual demands, most so-resulting agreements will be considered as valid compromises or settlements because the claimant was proposing to do \textit{less} than he had the right to do, and relative to that baseline, he was actually making the other party an offer. This can be contrasted, however, with the situation where D extracts a contractual promise through a proposal to press criminal charges against P or a member of P’s family. According to the distinction between threats and offers, the case of \textit{Williams v. Bayley}\textsuperscript{224} can be accommodated and explained. Written into the respondent father’s baseline must be the legitimate expectation that the appellant bankers would not use even otherwise justifiable threats of criminal prosecution against his son for the purposes of securing a private agreement. Relative to this baseline, the appellants were proposing to do \textit{more} than was permissible.

\textsuperscript{223} Generally, see Finn, “Public Function—Private Action: A Common Law Dilemma”, Chp. 4 in Benn and Gaus (eds), \textit{Public and Private in Social Life} (1983), esp. at 95-100.

\textsuperscript{224} (1866) L.R. 1 H.L. 200. See, \textit{supra}, at n. 59.
under this expectation; hence they were making a "threat".

Many other cases also seem to fit into this broader conception of an unconscionable (abusive, unfair, exploitative) exercise of rights or power. In the American case of Lafayette v. Ferentz, for example, the court held that a threat to strike is a legitimate means to secure higher wages, but not to force the employer to hire unwanted and unneeded employees.\textsuperscript{225} Similarly, an employer who has a right to terminate a contract of employment at will may do so,\textsuperscript{226} but not as a means of obtaining some unrelated advantage, such as the release of a claim\textsuperscript{227} or the sale of shares of stock.\textsuperscript{228} As Dalzell summarised the American position, a proposal is wrongful—a threat—if it is 'an abuse of the powers of the party making the threat; that is, any threat the purpose of which was not to achieve the end for which the right, power, or privilege was given',\textsuperscript{229} and P's right (D's responsibility) to be protected from such an exercise of power must correspondingly have been written into P's baseline. Closer to home, we find that similar reasoning features in the dissenting opinion of Higgins J. in Smith v. William Charlick Ltd itself.\textsuperscript{230} There his Honour was prepared to depart from the orthodox lawful/unlawful distinction favoured by the majority of the High Court. Applying equitable principles to hold that although the demand may have been lawful, the Board had no right to take advantage of Charlick's necessity:

In my opinion, the pressure was clearly illegitimate. The Wheat Board has no right or power to refuse to sell to the company in the future, whatever the circumstances should be or to insist upon payments as a condition of making future sales. Whatever it has done


\textsuperscript{227} See McCubbin v. Buss, 144 N.W.2d 175 (1966); Mitchell v. C.C. Sanitation Co., 430 S.W.2d 933 (1968).

\textsuperscript{228} See Laemmar v. J. Walter Thompson Co., 435 F.2d 680 (1970)

\textsuperscript{229} Dalzell, "Duress II", op. cit., 364. See, also, Restatement (Second) of Contracts, § 176, Illustration 16; Calamari and Perillo, Contracts (3rd ed., 1987), 339-41.

\textsuperscript{230} (1924) 34 C.L.R. 38.
is in excess of its powers, and even in fraud of its powers.\textsuperscript{231}

The whole idea that seems to be at work here is that it is wrongful to secure our ends by seizing upon other people's bargaining vulnerabilities, and that it is, in a connected way, wrongful to assert our strict legal rights to secure advantages with which those rights have no intrinsic connection, and for which they are not intended to serve. Our real complaint, in the present context, is that while these threats may be "lawful", so-called, they are nonetheless exploitative of $P$'s peculiar circumstances relative to $D$. To resort to familiar contemporary legal rhetoric, an insistence on one's strict legal rights, in circumstances which render their exercise somehow unfair, is "unconscionable" or "unconscientious".

This reasoning also appears to find its analogue in the language of "relational good faith theory" or "unconscientious insistence on strict legal rights", usually employed in the context of contract performance and enforcement, and also in the context of estoppel.\textsuperscript{232} The dominant theme

---

\textsuperscript{231} \textit{Id.}, 66. Higgins \textit{id.}, at 67, approved what Lord Parker of Waddington said in Vatcher \textit{v. Paull} (1915) A.C. 372, at 378, that fraud on a power 'merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.' Cf. Curlewis J. in \textit{N.S.W. Association of Operative Plasterers v. Sadler} (1918) 17 A.R. (N.S.W.) 159, who stated the basis for intervention in similarly wide terms (at 161):

In my opinion, this amounts to procuring consent by what is called in the Equity jurisdiction in some cases fraud, in others duress, and in others undue influence. But whatever it is called, the effect is the same. The species of improper conduct by whatever name it may be called is defined by Lord Selborne in \textit{Earl of Aylesford v. Morris} (1871) L.R. 8 Ch. App. 484, 490-1)—"Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of those circumstances and conditions'.

\textsuperscript{232} In the United States, and in the present connection, the language of "good faith and fair dealing" is expressly used in relation to "threats" to breach a contract unless certain demands (usually a contractual modification without fresh consideration) is asssented to by the recipient. For example, § 176(1)(d) of the \textit{Restatement (Second) of Contracts} states: 'A threat is improper if ... the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient'. Cf. also, the \textit{Uniform Commercial Code}, § 2-209, Comment 2,

extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith.... The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance

406
behind "good faith" in these other contexts seems to be the restraint of improper exercises of otherwise legitimate uses of one's strict legal rights or powers where, owing to relational circumstances, one must have sufficient regard to the legitimate expectations of those subject to the exercise of those rights or powers.233

4.2. The Choice Prong Revisited

If the writer is correct in the analysis thus far, receiving a coercive proposal is a necessary condition of being coerced—only threats are coercive—and the distinction between threats (coercive proposals) and offers (non-coercive proposals) is rooted in a normative account of one's baseline. Yet this, as we know, is still not sufficient for a finding of duress. For 'although all threats are coercive, not all threats coerce',234 at least in the sense that they actually mitigate or nullify the normal legal effects of one's contractual assent. The additional feature we are looking for here is the necessary connection between the wrongful threat and the decision on the part of its recipient to enter into the contract. There must indeed be coercion.

There appear to be at least two aspects to this requisite connection. First, there is the relatively unproblematic empirical aspect: whether the threat in fact caused or induced its recipient to manifest her assent to the contractual arrangement. This is simply a matter of causation. Second, there is the more important question of whether the recipient of the threat was indeed justified in manifesting her contractual assent in response to the pressure. This is a matter of the gravity of the threat, or the degree of pressure exerted, which in essence requires an objective enquiry into the

---

come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under section 2-615 and 2-616.

Generally, see Hillman, R., "Policing Contract Modifications under the U.C.C.: Good Faith and the Doctrine of Economic Duress" (1979) 64 Iowa L. Rev. 849.


234 Wertheimer, op. cit., 242.
adequacy or reasonableness of the alternatives presented. It is in consequence of this second aspect, moreover, that the choice prong itself becomes significantly contextual and normative in its enquiry. If the law finds that a party had a "reasonable" alternative to succumbing to the proponent's pressure, but elected to succumb nevertheless, she cannot then complain that she was wrongfully "coerced", which in law requires that a threat narrow one's options to such a degree that one is effectively denied the exercise of "reasonable" or "acceptable" choice. This is the basic tenor of the normative aspect of the choice prong, for it implicitly involves the court's judgment as to what is a reasonable or acceptable alternative in the circumstances of the particular case.

A common feature of recent Australian academic and judicial pronouncements on the law of duress, however, has been to highlight the factual aspect of the choice prong (causation) over its normative aspect ("reasonable" or "acceptable" alternative). In some cases, the latter aspect has been ignored, denied, or misconceived altogether. Duress has, for example, been judicially defined simply as illegitimate pressure that induces entry into the contract.\(^\text{235}\) Stewart has argued, too, that the normative aspect of the choice prong should not be a defining feature of duress at all; that its proper function is merely probative, for the purpose of providing or restricting relief.\(^\text{236}\) To the contrary, it is argued here that a coherent and acceptable theory and doctrine of duress must articulate clearly the precise elements and role of the choice prong itself, and that this necessarily involves our highlighting the normative conception of the choice prong over the factual one. This appears to represent the general position in the United States; although in recent times there has been some movement toward recognising the criterion under the English version of the doctrine. The relative dearth of recent authorities and literature in Australia, however, has made it difficult to assess the local position.

The factual and the normative aspects of the choice prong are


\(^{236}\) Stewart, op. cit., 438-9. Stewart does go on to suggest that the question of coercion is 'objective' and not 'subjective', which in effect encapsulates, although it conceals, the normative considerations he purports to exclude from the choice prong.
considered in turn.

4.2.1. Causation: The Fact of Coercion

It is trite law that for duress to be actionable, the coercive threat must induce the victim’s manifestation of contractual assent. The requirement is simply one of causation, and hence it tends to raise few problems in its application. In short, the element of inducement is merely a factual matter to be determined in each case.

One feature of the causation aspect of the choice prong, however, does deserve some attention. Like the victim of an actionable misrepresentation, an allegedly coerced party may enter a contract under a number of influences. To what extent, then, must the pressure coming from the other party contribute to the victim’s decision to contract? How strong must the causal connection be?

Bearing in mind that it is often very difficult to prove why a party entered into a contract, the predominant response to these questions appears to lean against the defendant, who should not be permitted to excuse his behaviour by relying on other motives which the plaintiff may have had for entering the contract. Hence, in Barton v. Armstrong for example, the Privy Council held that a plaintiff is entitled to relief if she can show that the threat was merely a cause, and not necessarily the, or the predominant, cause.

---

237 Generally, see Stewart, op. cit., 432-33; Cope, op. cit., 60-1, and the literature surveys therein.

238 Generally, see Chapter Seven.

239 For example, P may enter the agreement because she does not wish to jeopardize a long-standing business arrangement with D (cf. e.g., MacDonald, op. cit., 471, citing Macaulay’s work: “Non Contractual Relations in Business” (1963) Am. Soc. Rev. 45), or P might have entered the agreement for other business reasons, such as desiring to maintain public confidence that might be destroyed through litigation (see, e.g., Pao On, op. cit).

240 [1976] A.C. 104. In Barton v. Armstrong, the parties were directors of a company. Barton wished to remove Armstrong from control of the company and its subsidiaries. A deed was signed whereby Armstrong sold his shareholding to Barton and others at a price extremely favourable to himself. Although Barton had been induced to sign by threats from Armstrong, there were also very sound commercial reasons for him executing the deed. The Judicial Committee held that Barton was entitled to avoid the deed because ‘the threats and unlawful pressure in fact contributed to his decision to sign the documents’ (id, 120).
for her yielding to the defendant's demand. According to this view, a party is entitled to relief even where the pressure played a very small part in her decision to yield to the demand.

Nicholas Seddon, however, shows some concern regarding this approach. He suggests that the rule relating to causation in *Barton v. Armstrong* was probably coloured by the seriousness of the threats in that case (threats to murder the recipient) and that a blanket application of the rule 'appears to beg the critical question' of whether the pressure was acceptable or not. With respect, such a suggestion seems to overlook the relationship between the respective choice and proposal prongs of the two-pronged theory of duress, and the precise role played by the choice prong within that relationship. Pressure may or may not be acceptable; but only unacceptable pressure can coerce. But this is not to go further and to say that on any given occasion it will, or even that it did, in fact coerce, or in law amount to duress. It is the role of the choice prong to tell us that. However, Seddon here seems to come very close to suggesting that the mere fact of inducement—coercion *in fact*—can have a bearing on the acceptability or unacceptability of the pressure (or vice versa) and on this writer's analysis, the choice and proposal prongs are simply not linked in this particular way. Analytically, the pressure must be considered unacceptable for some reason other than the simple (legal) fact that the requirements of the choice prong

241 This approach was also adopted recently by McHugh J.A. in *Crescendo Management Pty. Ltd v. Westpac Banking Corporation* (1988) 19 N.S.W.L.R. 40, 46; cf. also, Lord Goff in *Dimskal Shipping v. I.T.F.*, op. cit., at 883:

[It] is now accepted that economic pressure may be sufficient to amount to duress [which vitiates a contract], provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract.

242 Seddon, *op. cit.*, 156.


244 It is suggested that this is symptomatic of Seddon's thesis generally, which does not make an attempt to place his factors into any theoretical framework such as the two-tiered one offered by the present writer.

245 At p. 157, *op. cit.*, Seddon says, for example, 'Where the threat was particularly coercive, this factor will tend to dominate the overall decision'.

410
have been satisfied.\textsuperscript{246} Of course, in practice it is difficult to see this

\textsuperscript{246} In all fairness to Seddon, however, his precise position is not clear, for he subsequently writes (\textit{ibid}, citing the \textit{Pao On case}) that the strength of other reasons existing for the plaintiff entering the allegedly coerced transaction may tend to show that the pressure exerted was correspondingly weak, phrasing the result this time not in terms of “acceptability”—a phrase clearly normative in connotation—but in terms of “actionability”. This is closer to the analysis presented here, as it is more consistent with the empirical nature of the causation requirement. Even so, it is perhaps advisable that we do not attempt to enunciate our \textit{theory} of duress in terms of “actionability”. Whilst this might be considered the nub of the matter for the lawyer’s purposes, one suspects that a proper theory of duress must in addition be able to explicate how coercion relates to the \textit{voluntariness} of an agreement. This has more to do with a party’s freedom and the content of her rights and entitlements than with enforceability.

Once we begin saying that courts should be able to conclude the question of inducement to contract relative to the degree of pressure exerted, this becomes tantamount to our saying that lesser degrees of pressure ought not cause \textit{P} to succumb as she did. This turns a factual matter essentially into a normative one, no matter how subjective a view we allow of \textit{P}’s personal circumstances, character, timidity, etc.

In replacing the \textit{Barton v. Armstrong} formulation, Seddon offers the following test: ‘is it more probable than not that, but for the threat, the party would not have entered into the transaction in question?’ (\textit{id}, 157.) Cf. also, Stewart, \textit{op. cit.}, 432, registering his support for the ‘but for’ test, which he assimilates with the American approach (citing Palmer, \textit{op. cit.}, 247-8). However, this is in conflict with the American position as presented by Farnsworth, \textit{op. cit.}, 258, referring back to p. 244, n. 1, and the American Law Institute’s \textit{Restatement (Second) of Contracts}, § 167 and § 175, Comment (c). The ‘but for’ test, however, is consistent with Dalzell’s interpretation of the law prior to 1940: “Duress II”, \textit{op. cit.}, 366: ‘The wrongful threat must be a substantial factor, if not the controlling factor, in inducing the agreement or payment by the victim’. Seddon notes a similar approach advocated in \textit{Whitehouse v. Carlton} (1987) 70 A.L.R. 251, at 257 (Mason, Deane and Dawson JJ.) with respect to impermissible purpose in allotment of shares. This approach also appears to approximate that taken by the English Court of Appeal in \textit{Bank of Credit & Commerce International S.A. v. Aboody} (1989) 2 W.L.R. 759, 785-6, a case involving the analogous equitable jurisdiction of actual undue influence: ‘We think that, at least in ordinary circumstances, it would not be appropriate for the court to exercise this jurisdiction in a case where the evidence establishes that on balance of probabilities the complainant would have entered into the transaction in any event’. Cf. also, Jaffey, \textit{op. cit.}, 192-3, who advocates a stronger test of causation than that laid down in \textit{Barton v. Armstrong}. Birks, \textit{op. cit.}, 182, views \textit{Pao On} as indicating that the threat must be the sole cause before economic duress will be found, but it is suggested here that the case is explicable on account of there being an adequate alternative to the allegedly coerced party in the form of an action for specific performance: see n. 269, \textit{infra}.

Now, on its face, Seddon’s suggested test of causation seems innocuous enough; for if we were to adopt a particular rule about causation which varied the current \textit{Barton v. Armstrong} formulation, the test offered by Seddon would seem to fit the bill. Clearly any burden higher than this would be unacceptable, for as Professor Birks points out, it is practically impossible for a party seeking relief to show that a threat was the reason for yielding to the proposal: \textit{An Introduction to the Law of Restitution} (1985), 181. However, such a test clearly gives the courts more evidentiary leeway to decide upon the actionability of a particular instance of wrongful pressure on account of a mere factual criterion. It is suggested, therefore, that there are some problems with too strict an adherence to Seddon’s approach. First, to the extent that the
distinctness; for some cases, especially those involving prima-facie "lawful" threats, require for their "illegitimacy" some act in the exploitation of P's pre-existing special circumstances (of no reasonable choice) which gives D's proposal greater efficacy in its application of pressure. As was seen in Chapter Four, however, exploitation itself has a "success condition" built in, that is, causation—if P was not "exploited" there could be no "threat" relative to her baseline, and hence no "coercion". However, the notion of causation in this respect is analytically trivial in terms of the articulation of a proper theory of duress. The necessary element of causation required for an act of exploitation is not what makes that act "exploitation" and hence "wrongful": as should be apparent from the discussion in Chapter Four, causation does not analytically account for the notion of unfairness residing in the act of exploitation; neither does it account for the unfairness, hence "wrongfulness" under the proposal prong, in the act of coercion.247

It is not this writer's purpose to dwell unnecessarily on the requirement of causation, however; for the criterion is relatively unproblematic in its application, and has raised few controversies in practice.248 It certainly takes us no way towards explicating the underlying

doctrine requires refined but necessarily ad hoc judgments of fact, it equally incorporates an element of uncertainty over which we have no control. The ad hoc factual element inherent in the doctrine, if given too much analytic importance, might suggest an excessive flexibility and liberality in the operation of the law of duress. (Cf. Phang, A., "Whither Economic Duress" Reflections on Two Recent Cases" (1990) 53 Mod. L Rev. 107, 113.) This could result, moreover, in creating a correspondingly excessive degree of uncertainty. Doctrines with a higher normative content at least appear to be more certain in their application, at least once the norms have been worked out. There is probably something misleading about manipulating facts (i.e., whether the alleged coerced was or was not influenced to contract, and to what extent was she influenced) to achieve a desired result. And whilst it might be as easy to "fudge" normative assessments from facts as it is to conceal or contrive the facts themselves, it would seem less difficult to conceal the errors made in the judgmental process. What is more, normative assessments are subject to appeal, whereas findings of fact ordinarily become "appeal proof".

247 Thus, Joel Feinberg, op. cit., 202, for example, in relation to coercion, considers in this context the 'further and partially independent question of exploitation'. Alan Carling, op. cit., 184, would also view exploitation and coercion as analytically distinct.

248 For example, the Restatement (Second) of Contracts, § 175, Comment (c) states: 'No special rule for causation in cases of duress is stated here because of the infrequency with which the problem arises'.

In any event, the writer does not see why the approach taken to causation in duress should not parallel that taken under the law of misrepresentation. Cf. the Restatement (Second) of Contracts, § 175, Comment (c), which states that the rule for causation in cases of
rationale of the law of duress, which seems to lie in the mitigation or nullification of the normal consequences of a party’s contractual assent. It simply is not a function of causation to make the required necessary refined distinctions between, say, tolerable “commercial pressure” and legally cognisable “duress”, despite apparent suggestions to the contrary.\textsuperscript{249} Commercial pressure, of course, can in every sense be as coercive as economic duress but wrongful it is not.\textsuperscript{250} The crucial distinction to be drawn between these forms of pressure lies not in some \textit{ad hoc} factual element, arguably no matter how strong or weak the causal connection between the pressure and inducement need be; rather, it lies in the \textit{wrongfulness} of the proposal and the \textit{acceptability} of the alternatives presented. Analytically, it is the sufficient and proper application of these implicitly normative or moralised criteria, and not the factual causation requirement, that must provide the necessary theoretical checks against excessive liberality in the application of the duress doctrine.

Accordingly, what is of greater analytical importance here is not whether the recipient of a coercive proposal manifested her contractual assent as a result of the pressures brought to bear upon her by that proposal, but whether, instead, she \textit{was justified in doing so}. Whilst coercion must necessarily be a matter of whether a party \textit{did} succumb to a coercive threat,

misrepresentation also apply to analogous cases of duress. Cf., also, \textit{Edgington v. Fitzmaurice} (1885) 29 Ch.D. 459; \textit{Holmes v. Jones} (1907) 4 C.L.R. 1692. Why, as a simple matter of public policy, should it lie in the mouth of a party who has acted wrongfully, under the proposal prong, to argue that merely because \textit{some} pressure influenced the coerced to contract, less perhaps than other factors, he should be excused from the consequences of his own wrongdoing? The presence of “other factors” might tend to suggest that the allegedly coerced had other alternatives available to her, and if these were “reasonable” her duress claim should fail under the normative arm of the choice prong, and not the factual, causation arm. (Cf. also, Ogilvie, “Economic Duress”, \textit{op. cit.}, 319.) What is more, as in the misrepresentation cases, if \textit{D} makes a coercive proposal to \textit{P}, for the purpose of influencing \textit{P}’s behaviour in an intended direction, why should we not infer from the mere fact of \textit{P}’s behaving in a manner consistent with \textit{D}’s intention that the causative connection has been established, the burden of rebuttal then shifting back to \textit{D}, who has, by definition, acted wrongfully? Cf. \textit{Gould v. Vaggelas} (1984) 157 C.L.R. 215: fraudulent misrepresentation. The rationale underlying fraudulent misrepresentation is especially close to that of duress, such that the respective tests for causation we should expect to be the same.

\textsuperscript{249} Cf. Cartwright, who, like Seddon, suggests that the courts may employ a stricter causation element so as to restrict recovery in economic duress cases: Cartwright, J., \textit{Unequal Bargaining} (1991), 168.

\textsuperscript{250} Cf. the comments of Ipp J. in \textit{Scolia Pty. Ltd v. Cote} (1992) 6 W.A.R. 475, 483 (Seaman J. concurring).
this must in turn be supplemented by the more important analytical question of whether she was indeed acting reasonably or justifiably in doing so. Despite some clear evidentiary overlap, the causation aspect of the choice prong is not necessarily co-extensive with the normative aspect,\(^{251}\) which is concerned with the non-empirical degree of the pressure exerted,\(^{252}\) as measured by the effects that a wrongful proposal or threat is judged to have had on the conditions of \(P\)'s choice.

### 4.2.2. Duress: The Judgment of Coercion

Regardless of how we might structure a theory of duress—for example, as one that focuses on the conduct of the superior party, or as one that focuses on the plight of the victim, or as one that focuses on the fairness of the resulting exchange\(^{253}\)—it should be taken as axiomatic that only coercive proposals which meet the choice prong actually coerce. There must be what Lord Scarman, in *Universe Tankships*, described as ‘pressure amounting to compulsion of the will’.

In this connection, the Privy Council, in *Pao On v. Lau Yiu Long*,\(^ {254}\) laid down the following considerations for determining duress:

> [W]hether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as recognised in *Maskell v. Horner*,\(^ {255}\)

\(^{251}\) The mere fact of the recipient of a threat succumbing to the pressure may give rise to an inference that she had no reasonable or acceptable alternative.

\(^{252}\) Although Seddon seems to treat the normative aspect of the choice prong merely as some evidence of the requisite causation: *op. cit.*, 157.

\(^{253}\) Cf. Dawson, *op. cit.* But see Ogilvie, “Economic Duress”, *op. cit.*, 319: ‘in itself, unjust enrichment provides no basis for redress: restitution of ill-gotten gains should follow the law, not be the law’.


\(^{255}\) [1915] 3 K.B. 106. *Maskell v. Horner* was a case concerning duress to goods. The plaintiff, a produce dealer, was subjected to a claim for tolls from the defendant. The plaintiff objected to paying such tolls, whereupon the defendant threatened to seize his goods and force him out of business. Actual seizure took place on one occasion. The plaintiff consulted his solicitor, and
relevant in determining whether he acted voluntarily or not.\textsuperscript{256}

From the above statement, there appear to be two aspects to the element of coercion. The first aspect is merely probative and does not provide a substantive limitation on the duress claim.\textsuperscript{257} Part of the notion of coercion is concerned with looking to evidence of the actual effect a coercive proposal had on a victim’s options and her motives for entering into the transaction in question. Evidence of protest and delay are perhaps most important here. Their main relevance, however, seems merely to provide circumstantial evidence that the causation element of the choice prong has been satisfied. The second aspect of coercion, however, is less straightforwardly empirical, and does provide a necessary substantive limitation on the duress claim. It is concerned essentially with the issue of whether a coercive proposal is regarded as grave enough to justify the victim succumbing to it.\textsuperscript{258} The presence of an adequate alternative, such as a legal remedy, becomes especially relevant here; for the law may decide that in light of the acceptable or adequate alternative it was unreasonable for the recipient of the threat to succumb to the pressure: that by submitting to the proponent’s demands she failed the “game” of bargaining: that she was the victim not of “duress”, but of mere “commercial pressure”. However, this second aspect or requirement of coercion has not been articulated clearly by acting according to his advice paid the tolls under protest. He continued to pay the tolls, protesting so regularly that the protests became somewhat of a joke. Whenever there was a dispute there was a seizure or threatened seizure of the plaintiff’s goods. It later appeared (see A.-G. v. Horner (No. 2) [1913] 2 Ch. 140) that there was no legal basis for the claim to tolls, so the plaintiff brought an action to recover the tolls he had paid during the preceding six years as paid either under a mistake of fact or under pressure of seizure of goods.

The plaintiff, on appeal, was successful establishing actionable duress to goods. ‘The payment [was] made for the purpose of averting a threatened evil and [was] made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.’ ([1915] 3 K.B. 106, 118 per Lord Reading C.J.)


\textsuperscript{257} Cf. Goff and Jones, op. cit., 245, and infra at n. 263.

\textsuperscript{258} Stewart refers to this factor as the ‘extent of the coercion’, op. cit., 463 et seq. Cf. also, Sutton, op. cit., 586: ‘There is a strong case for requiring a substantial degree of pressure to be proved before the court allows relief...’.
contemporary Anglo-Australian courts and writers,\textsuperscript{259} and in some instances it has been altogether denied by them,\textsuperscript{260} although it is well entrenched in the American duress doctrine.\textsuperscript{261} But an open enunciation of the requirement is essential to the promotion and preservation of a conceptually sound theory of duress.\textsuperscript{262} The emphasis of legally cognisable duress does not

\textsuperscript{259} In Crescendo Management Pty. Ltd v. Westpac Banking Corporation (1988) 19 N.S.W.L.R. 40, for example, McHugh J.A. treats duress merely as a matter of wrongful pressure and causation: 'The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate': \textit{id}, 46. Goff and Jones (\textit{op. cit.}, 244-6), also play down the possibility of there being a normative dimension to the choice prong. The authors submit (\textit{id}, 245) that the 'real question' is whether a particular threat coerced a person to act as she did. It must be proved that the victim was coerced in the sense that she was compelled to do something that would otherwise not have been done. If an allegedly coerced party did have an adequate remedy, they argue, but nevertheless did not invoke it, this may provide some evidence that she submitted to the demand not because of any legitimate pressure but for other reasons. Goff and Jones thus view the choice prong as largely a matter of causation only.

However, there have been notable exceptions to this general failure on the part of Anglo-Australian courts and commentators to enunciate clearly the normative aspect of the choice prong. The recent English decisions on economic duress, in particular, have begun to suggest that an allegedly coerced party must show that she was acting \textit{reasonably} in submitting to the other party's demand, and this in turn requires a normative assessment of the acceptability of the alternatives existing at the time of inducement to contract. See \textit{B. \& S. Contracts and Design Ltd v. Victor Green Publications Ltd} [1984] I.C.R. 419, at 428 per Kerr L.J.; \textit{Hennessy v. Craigmyle \& Co.} [1986] I.C.R. 461; \textit{The 'Aled'} [1989] 1 Lloyd's L.R. 138, 142, 146; \textit{Atlas Express Ltd v. Kafco (Importers and Distributors) Ltd} [1989] 1 All E.R. 641, 644. See also, Trietel, \textit{The Law of Contract} (8th ed., 1991), 365. Ogilvie (1981) 26 McGill L.J., \textit{op. cit.}, 317, suggests that the 'chief determinant' of economic duress is the availability of viable alternatives, although he treats this as a \textit{factual} (albeit objective) indicator. Even in the Australian context, Greig and Davis refer to the requirement of no practical or reasonable alternative as 'the foundation of relief' (\textit{op. cit.}, 954). Cf. also, Carter and Harland, \textit{Contract Law in Australia} (2nd ed., 1991), 442-3.

\textsuperscript{260} Cf. Rafferty, \textit{op. cit.}, 440 (citing Goff and Jones, \textit{ibid}); Stewart, \textit{op. cit.}, 438-9. Stewart (\textit{id}, 439-40) cites the earlier duress of goods cases in support of the proposition that there is judicial denial of the relevance of an alternative remedy. Dalzell, on the other hand, in his pioneering and influential work on duress ("Duress I", \textit{op. cit.}, 242-3; "Duress II", \textit{op. cit.}, 366, 367 \textit{et seq}), cites those very cases in support of the proposition that 'Duress of goods ... is [explicable] on the basis of ... wrongful threat and inadequate remedy'.

\textsuperscript{261} See Farnsworth, \textit{op. cit.}, § 4.18, 264-7; Wertheimer, \textit{op. cit.}, Chp. 15; Dalzell, "Duress I and II", \textit{op. cit.}, esp. at 367 \textit{et seq}. Williston, however, was opposed to including the inadequacy of an alternative remedy as an essential component of the duress doctrine, although he did acknowledge it as a matter for pertinent inquiry: Williston, \textit{Contracts} (rev. ed., 1937), Vol. 5, §1605, n. 2, §1620.

\textsuperscript{262} There may be pragmatic reasons as well. As Dalzell said ("Duress II", \textit{op. cit.}, 367-8):

Aside from the innate conservatism of the judiciary, there is some good reason

416
relate to coercion in the purely subjective (psychological) and empirical sense, but to coercion in the sense of responsibility-relieving intrusions into a victim’s autonomy. The writer will not deal with the fairly unproblematic evidentiary aspects of coercion in the text, but rather will offer some 

for the limitation in dealing with duress problems. For one thing, we quite justifiably like to have individuals settle their business affairs finally between themselves without litigation whenever possible, and this makes us hesitate to overturn any particular contract or payment under attack for duress. But it must be admitted that the limitation here discussed, refusing relief for duress because another remedy was available, in its effect on future business practices, will not so much restrict litigation as encourage resort to the alternative remedy, which will generally involve court action; the only difference will be that courts will be asked to intervene before rather than after compliance with the demand.

263 The evidentiary considerations laid down in *Pao On* are merely to be treated as relevant factors, they are in no way decisive, despite some writers apparently placing significant emphasis on them: see Stewart, *op. cit.*, 433-6. For example, the presence or absence of protest may be an empirical or psychological feature to be weighed up in any given case, but the normative duress enquiry cannot give too much weight to these factors. As Windley J. in *Mason v. State of New South Wales* (1959) 102 C.L.R. 108, at 143, indicated:

There is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled.... Moreover, the word ‘protest’ is itself equivocal. It may mean the serious assertion of a right or it may mean no more than a statement that a payment is grudgingly made.

See also, *Brocklebank Ltd v. R.* [1925] 1 K.B. 52, 62 *per* Bankes L.J.; *Knutson v. The Bourkes Syndicate* [1941] S.C.R. 419. Thus, the manner in which the allegedly coerced party yielded to the demand should not necessarily give rise to any inferences in favour of or against that party. As Ogilvie suggests, *op. cit.*, 298, the fact of protest may not be a significant factor in that the victim may not be the protesting type, or might consider protest superfluous, or might at the time of submission consider herself fully bound and will only question the transaction later. In *Maskell v. Horner* [1915] K.B. 106, 120 *per* Lord Reading C.J., the protest was simply ‘some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter’. See also, Goff and Jones, *op. cit.*, 243, esp. at n. 76 and accompanying text; Seddon, *op. cit.*, 156; *Bell Bros Pty. Ltd v. Shire of Serpentine Jarrahdale* (1969) 121 C.L.R. 137, 145; *B. & S. Contracts & Design v. Victor Green Publications Ltd.* [1984] I.C.R. 419. Cf. *Universe Tankships v. I.T.F.* [1983] A.C. 366, at 400 *per* Lord Scarman: ‘But none of these evidential matters [such as protest] goes to the essence of duress. The victim’s silence will not assist the bully, if the lack of any practical choice but to submit is proved’.

Perhaps worthy of some note, however, is the factor of delay mentioned by the Privy Council in *Pao On*. Most significant is the delay on the part of the allegedly coerced party is seeking to undo the consequences of the demand (See *Ormes v. Beadel* (1860) 2 De. G.F. & J. 333; *Occidental Worldwide Investment Corp. v. Skibs A/S Avanti* [1976] 1 Lloyd’s Rep. 293; *North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd* [1979] 3 W.L.R. 419, 434; *Peter Kiewit Son’s Co. of Canada v. Eakin’s Construction Ltd* [1960] S.C.R. 361). The time elapsed between the cessation of the pressure and the attempt by the victim to release herself from the consequences of her contractual assent, however, seems to be relevant only to the question of actionability. It tells us little about what it actually means to be “coerced” in a normative sense. At best, the delay factor operates purely as an empirical (evidentiary) matter: the
remarks about the normative aspects of coercion under the choice prong.

4.2.2.1. Normative compulsion: no "reasonable" alternative

As Gerald Dworkin once put it: 'It doesn't always follow from the fact that someone did something under compulsion that he was compelled to do it.' We might argue, says Dworkin, that $P$ acts under compulsion to haste with which an allegedly coerced party attempts to avoid the contract may provide evidence of her psychological condition (volition) at the time of submission to the demand.

More in a normative vein, however, is the possibility that the allegedly coerced party's delay in seeking to undo the consequences of a demand may amount to an affirmation of the resulting agreement. As Dalzell has suggested ("Duress II", op. cit., 368):

> There may have been serious wrong in a threat; but there is also something objectionable in the shift of position by [the coerced] between the time he yields to the pressure and makes promise or payment, and the time he subsequently attacks the transaction in the courts for duress.

Thus, even though coercion may have existed according to the two-pronged test for duress, the normative implications of that judgment may become no longer operative, and hence not actionable, in light of the subsequent acquiescence by the coerced. This is broadly illustrative of what the writer referred to as a "scalar" consideration or criterion in the exploitation analysis: see Chapter Four, Section 3.1.1. It is, however, likely that affirmation is not lightly to be found. See Hawker Pacific Pty. Ltd v. Helicopter Charter Pty. Ltd (1991) 22 N.S.W.L.R. 289, 304-5 per Priestly J.A.: no affirmation unless unequivocal election or intervention of estoppel, denying coerced's assertion of right to avoid contract; Sargent v. A.S.L. Developments Ltd (1974) 131 C.L.R. 634. In Maskell v. Horner [1915] 3 K.B. 106, the delay involved was 12 years, the plaintiff taking no steps to challenge the defendant's right to the tolls in court. However, as Goff and Jones remark, 'A Plaintiff who sits on his rights for 12 years is surely guilty of quite unnecessary delay, and his conduct may be regarded as evidence of acquiescence in the claim': op. cit., 243. Cf. North Ocean Shipping, op. cit.: nine months' delay subsequent to removal of builder's threat amounted to affirmation of contract; Australasian Meat Industry Employees' Union v. Frugalys Pty Ltd (1988) Q.N.T.J.B. 128; Stott v Merit Investment Corp. (1988) 48 D.L.R. (4th) 288. Even where affirmation is found, however, an act of acquiescence on the part of the coerced does not cancel or qualify our judgment about the quality of the coerced's conduct itself; rather, it counts merely to weaken or override our legal objections against it.

The notion of objectionability in unreasonable delay reinforces the point that a contract made under volitional duress is voidable, and not void, and so is good until set aside at the option of the innocent party. Consequently, relief might also be denied—but our qualitative judgment about the nature of the coercive conduct in question remains intact—if the party seeking relief has, if not affirmed the contract, otherwise acted adversely in relation to her co-contracting party, or if a third party has acquired an interest in the subject matter of the contract, or if for any other reason the parties can no longer be restored to their pre-contractual positions. By analogy with the case of fraudulent misrepresentation, the fact that the contract in question has been executed should not be a bar to rescission: cf. Seddon v. North Eastern Salt Co. Ltd [1905] 1 Ch. 326.

264 "Compulsion and Moral Concepts" (1968) 78 Ethics 227, 229.

418
recognise the nature of the reasons—i.e., $D$’s threat—for which $P$ acts, but we might at the same time deny that $P$ is compelled—acted under duress—in order to argue that these reasons are not sufficient to excuse or justify $P$’s conduct. 265 Thus, merely receiving a coercive proposal, which induces the victim’s manifestation of contractual assent, might not be sufficient. According to Wertheimer’s philosophical account, an additional component of duress must feature in our enquiry. He frames it in the following terms: 266

Given [D’s] credible coercive proposal, [P] is sometimes entitled to do what [D] demands and then be released from the normal legal consequences of his act. At other times, [P] should either stand his ground, or, if he chooses to yield, he should at least not expect to recover later on.

The main work of the choice prong, therefore, is to to capture the distinction between these cases. According to Wertheimer,

A coerces B into doing X if and only if (1) A makes a successful coercive proposal to B and (2) B is entitled to succumb to A’s proposal and then be released from the consequences of his act.... 267

If this is correct, what the law seems to be saying in duress cases is that $P$’s agreement should be invalidated only if, given the alternatives, $P$ was justified in succumbing first and then recovering later. According to this criterion, in order to constitute duress for which relief may be obtained, the allegedly coerced party must have had no other “reasonable” or “acceptable” means of immediate relief from the actual or threatened duress than compliance with the demand.

Thus, to draw on a convenient example from the context of contractual performance, if $D$ threatens to renege on a contract unless $P$ pays more than was agreed to, $P$ faces a choice between succumbing to the demand

\[\text{265} \text{ Cf. Raz, J., “Liberalism, Autonomy, and the Politics of Neutral Concern”, in French et al. (eds), Midwest Studies in Philosophy, Vol. 7 (1982), 110, who argues that to be coerced, } P \text{'s actions must be 'either justified or excused' and that } B \text{'s action is justified 'if the reasons for it, including the threat of harm if it is not undertaken outweigh the reasons against it...'.}\]

\[\text{266 Wertheimer, op. cit., 268.}\]

\[\text{267 Ibid.}\]
and trying to recover later on grounds of coercion, or refusing to give in and, say, suing at once for breach of contract. A court will not as a matter of course grant recovery to D if D succumbs to D’s demand, especially if D’s other options were not “unacceptable” or “unreasonable” in the circumstances. In addition, therefore, a court will want to hear why D was entitled to succumb first and recover later, especially if refusing to give in would save everyone involved a lot of money. It is not, on this analysis, particularly relevant to this enquiry that D felt that she had “no reasonable alternative”, for, in the absence of D’s prior knowledge, or reason to know, of D’s peculiar susceptibility to coercive pressure, there would seem to be no structural features of the physical or psychological circumstances of an individual’s choice situation that are, per se, of intrinsic normative significance. What seems to be required instead, is some assurance that D has the right, or is entitled, to succumb to D’s proposal; that D has, albeit in a weak sense, a “duty” toward D to act reasonably in succumbing to D’s proposal; that D, in a correspondingly weak sense, has a “right” to expect that D will not succumb too easily or unreasonably. Recast in this manner, the choice prong, like the proposal prong, is a thoroughly moralised criterion. It is not enough to describe the option of resisting the coercive proposal as irrational, inconvenient, imprudent, contrary to one’s interest, or unacceptable. The sense of having no reasonable or acceptable alternative or choice is simply not relevant in this purely subjective sense. P must, in addition, have had

---

268 See Wertheimer, id, Chp. 11. According to Wertheimer, it would be possible to see an individual’s choice situation either as a function of the distance between the alternatives, or as a function of their attractiveness (their valance).

269 Cf. Dalzell, “Duress II”, op. cit., 382: ‘Certainly a mere personal dislike of litigation is not likely to be held sufficient to justify the court in giving relief or in calling the remedy inadequate; the subjective test of inadequacy would hardly be carried to that point’; Ogilvie (1981) 59 Can. B. Rev. 179, 187: ‘... simply because [the victim] thinks that submission is the safest commercial gamble, there is here mere business pressure of the sort characteristic of commercial life and no judicial redress is required’. Hence, Ogilvie, “Economic Duress”, op. cit., 317, suggests that we must ask whether a party submitted for lack of alternative, or simply made a calculated business decision, with inherent risks and losses. There may be something ‘insidious’, Ogilvie argues, about permitting an alleged victim of duress to exploit her own submission to a proposal made as a result of a deliberate business choice which fails: Ogilvie, “Economic Duress”, id, 319. The notion of a “deliberate business choice” itself seems to presuppose the presence of adequate or reasonable alternatives, in which case there can be can be no duress: cf., Pao On, op. cit.

no obligation, under the functionalist ethic of bargaining, to accept $D$'s proposal, or, perhaps more accurately, $P$ must be entitled (have a right) to yield to $D$'s proposal and later be released from the normal legal consequences of her assent to contract. After all, the "rules" of the bargaining game properly admit of pressure, and in the same way that there needs to be a position of "special disadvantage" to displace the requirement of individual responsibility in unconscionable dealings, there must here be some element of "reasonableness" or "acceptability" in the conduct of the party who alleges she has been wrongfully "coerced". Assuming causation, only receiving a coercive proposal and having no reasonable or acceptable alternative, in this special sense, but to succumb to the proposal, are each necessary and jointly sufficient to establish that "$D$ coerces $P$", or that "$P$ acted under duress".\footnote{Cf. Wertheimer, op. cit., 267.}

In analytical terms, the effect of all this is to require, in addition to the normative theory needed to establish whether $D$'s proposal was coercive (a threat as opposed to an offer), an independent normative theory to determine when the pressure brought to bear on $P$ is sufficiently grave to entitle $P$ to submit to $D$'s coercive proposal. As Professor Atiyah framed the issue: to what extent can 'society ... legitimately require people to stand up to threats when they are made, rather than to submit and litigate afterwards'?\footnote{Atiyah, P., "Duress and the Overborne Will Again" (1983) 99 L.Q.R. 353, at 356. This statement was recently adopted as correct by Ipp J. in Scolio Pty. Ltd v. Cote (1992) 6 W.A.R.}

---

\footnote{Cf. Wertheimer, op. cit., 267.}

The development of this normative aspect of the choice prong is perhaps best viewed in historical terms. As Professor Farnsworth notes in the United States context, the standard has shifted over the years: Farnsworth, \textit{Contracts} (1982), \textit{op. cit.}, 264; cf. also, Farnsworth (1982) U.A.L.R. Law Journal, \textit{op. cit.}, 223-9. Recall in this connection, for example, the approach taken at the time of Blackstone, where the common law largely controlled the availability of relief for duress by imposing the 'stubbornly objective requirement' (Farnsworth, \textit{ibid}) that a threat must have been sufficient to overcome the will of 'a person of ordinary firmness' (Blackstone, \textit{op. cit.}, 131; cf. \textit{Skeate v. Beale} (1940) 11 A. & E. 983). The standard then shifted to a more subjective one, requiring only that the particular victim was deprived of her 'free will and judgment': cf. the first \textit{Restatement of Contracts} (1932), § 492(b). Because of difficulties in assigning meaning to the notion of "free will", the standard then shifted back to yet another criterion, under which the threat must have left the particular victim 'no reasonable alternative': cf. \textit{Restatement (Second) of Contracts}, § 175(1). According to this criterion, in order to constitute duress for which relief may be obtained, the allegedly coerced party must have had no other reasonable means of immediate relief from the actual or threatened duress than compliance with the demand.

\footnote{Atiyah, P., "Duress and the Overborne Will Again" (1983) 99 L.Q.R. 353, at 356. This statement was recently adopted as correct by Ipp J. in Scolio Pty. Ltd v. Cote (1992) 6 W.A.R.}

422.
'When is it] permissible for a victim of duress to reopen a question which has apparently been closed by his submission to the coercion'? 273 These sorts of question, of course, ostensibly increase the complexity of our understanding of the choice prong, for they reinforce the modern view that the legal conception of coercion does not depend merely on the application of straightforward empirical or psychological criteria; although the enquiry may include considerations of P’s individual circumstances and characteristics as these objectively affect her choices, and are sufficiently known by D.

4.2.2.1.1. What constitutes a "reasonable" alternative?

Ordinarily, a person who makes a voluntary choice of available avenues cannot revive a rejected one under a claim of duress. 274 In order to nullify the claim, however, the alternative available means to avert the pressure must indeed be "inadequate" or "unreasonable". 275 And whilst it is not easy to state in advance what will amount to an adequate or reasonable alternative, it has been suggested that ‘commercial morality and practice’ will provide a guide. 276 For example, where a threat is one of minor vexation only, a party might reasonably be expected simply to ignore it or to tolerate it as an alternative to assenting to the proposed contractual arrangement. 277 Similarly, where the "threat" involved is not independently unlawful, and

273 Atiyah, P., "Economic Duress and the ‘Overborne Will’", op. cit., 202. In a similar vein, Dalzell ("Duress II", op. cit., 368) justifies the enquiry into the gravity of the pressure thus:

A better reason for the limitation is that the victim who first surrenders to the threat and later seeks to annul the transaction for duress is asking the court to disregard and set aside his own acts, done with the deliberate intent that the other party should perform and rely on them, after there has been such reliance.


275 If an alternative is not "practical" for the victim, then it is not "adequate": Dalzell, "Duress II", op. cit., 378.


277 But whether this is so must turn on all the circumstances of the case at hand. Cf. Restatement (Second) of Contracts, § 175, Comment (b); authorities listed by Farnsworth, op. cit., 267, at n. 15.
the demand not exorbitant, then submission to the pressure may itself be considered a "reasonable" alternative.278

In general, a "reasonable" or "adequate" alternative usually involves considering the alternatives provided by the law, although we must also consider extra-legal alternatives if any are present.279 The presence of a legal or practical mechanism by which successfully to deflect a threat weakens a party's right to complain about the result if she chooses not to use it in the first place.280 When P can receive adequate protection against the wrong if

278 This sort of case would probably fail under the proposal prong as well. See the Drowning Person example in Section 5.1, and n. 309, infra.

279 Most extra-legal alternatives will involve our considering the acceptability of substituted performance or substituted goods. See Sosnoff v. Carter, 568 N.Y.S.2d 43 (1991); Austin Instrument v. Loral Corp, op. cit.: "[A] mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate": at 535 per Fuld C.J.; Rose v. Vulcan Materials Co., 194 S.E.2d 521 (1973): other suppliers of stone not available; King Constr. Co. v. W. M. Smith Elec. Co., 350 S.W.2d 940 (1961): other suppliers of cranes not available; Tri-State Roofing Co. v. Simon, 142 A.2d 333 (1958): other roofing subcontractors available. Generally, see Halsen, op. cit., 672-3. The possibility of substituted performance, of course, is especially diminished where a situational monopoly exists, such as was the case in Smith v. William Charlick Ltd, op. cit.

280 Again, this becomes apparent in historical terms. Recall in this connection Blackstone's assertion that a fear of battery is no duress, nor are threats to one's property, for in those cases 'a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life or limb': see Section 2.3.1., above.

Stewart, however, argues that even if an effective and expeditious remedy were available, say by way of interlocutory injunction, this should not preclude relief for actionable economic duress if the coerced party submits to the demand rather than chooses to defuse the threat by resort to legal proceedings (op. cit., 440). He cites the American decision of Marotta v. Lattington Harbour Development Co., 187 N.Y.S. 2d 348 (1959), in which the plaintiff was denied damages on the ground that it could have avoided the loss by paying the sum demanded and recovering it in an action based on economic duress. Stewart then comments: 'The possibility of P being denied relief no matter which remedy is sought on the ground that the other remedy could have been chosen, is quite stunning in its absurdity.... It hardly lies in the mouth of D, who has by definition employed illegitimate pressure for personal advantage, to complain that P might have relieved the pressure in a different way' (ibid). Whilst this comment may obtain with respect to the causation aspect of the choice prong, it is certainly contrary to the preponderance of recent Anglo-Australian and American case law on the subject. There is something equally objectionable about an allegedly coerced party attempting to revive an alternative that was the product of deliberate (voluntary) business choice: cf. Pao On. Cf. also, Atiyah, P., An Introduction to the Law of Contract (4th ed., 1989), 289: 'A party should not, in general, hoodwink the other by pretending to submit to the threats made to him, and then challenge his conduct later'.
she does not succumb to D’s coercive proposal, the legal system has provided an alternative which it may reasonably expect P to use.\textsuperscript{281} The limitation probably finds its closest analogue in the mitigation principle under the law of damages.\textsuperscript{282} According to that principle, a party cannot claim losses which would not have been incurred had she taken reasonable steps following the other party’s breach.\textsuperscript{283} Given the consequences of an affirmative judgment of duress, there is a similar justification in the present context for requiring some minimal degree of individual responsibility, on the part of the allegedly coerced party, in exercising her (albeit wrongfully constrained) volition in the face of a coercive proposal. This stance may, for example, be defensible under the second limb of functionalism, expounded in Chapter Three. Despite the pressure being not of kind reasonably to be expected merely as a bargaining strategy or technique (under the first limb of functionalism), such pressure may be tolerated in law, especially where there are reasonable extra-legal alternatives available to the recipient, so as to further or promote some broader collective good, such as not overburdening the courts with duress claims.

In order to be “adequate”, “acceptable” or “reasonable”, an existing

\textsuperscript{281} On one of the rare occasions when the Supreme Court of the United States made pronouncements on the law of duress it said this:

Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate.

\textit{Hartsville Oil Mill v. U.S.}, 271 U.S. 44 (1925). In the earlier decision of \textit{Radich v. Hutchins}, 95 U.S. 210, 213 (1877), the Supreme Court also said this:

To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary ... there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.


\textsuperscript{282} Cf. Jaffey, op. cit., 190-1. Farnsworth, however, notes that even if the modification proposed by the party making the threat is more favourable to the victim than any substitute arrangement open to the victim on the market, the victim is not expected to succumb in order to avoid the loss: op. cit., 265, n. 9. Cf. also, id, § 12.12, n. 32.

alternative should at least be as effective, practicable and efficient a means of protection against the wrong as the action or remedy based on the duress itself. It is highly probable, however, that judges will vary in their interpretation of what constitutes an adequate or reasonable alternative, although the uncertainties introduced here are an inevitable result of any judicial process. The English Court of Appeal, for example, took a very strong line in *Hennessy v. Craigmyle & Co. Ltd*, and simply failed to apply the “reasonable alternative” test. In that case, an employee faced with summary dismissal agreed to give up his rights to bring his dismissal before an industrial tribunal in exchange for a redundancy payment. The court held that the agreement was not procured under economic duress. Sir John Donaldson M.R., with whom the other members of the court agreed, opined that the applicant indeed had

a very clear alternative, namely, to complain to an industrial tribunal and draw social security [payments] in the meanwhile. It may have been a highly unattractive alternative, but nevertheless it was a real alternative. Economic duress can only provide a basis for avoiding a contract if there was no real alternative.

It did not matter, in addition, that the applicant was not aware of his right to draw social security. Other English decisions, however, have appeared not to be so draconian in their application of the “alternatives” criterion.

Now, there appears to be a variety of potential legal alternatives open to the recipient of a coercive proposal, including specific performance and


286 *Id*, 468.

287 A contrary position may create incentives for parties not to apprise themselves of their legal rights when coercive proposals are made. Cf. Halson, op. cit., 671.


injunctive relief. The courts have, however, taken a fairly pragmatic approach to the question of such available alternatives, for access to legal mechanisms and compensation is not always possible or practical, and even when possible, P may have a legitimate belief that compensation or relief is not forthcoming, especially when P has been advised of the discretionary nature of the aforementioned equitable remedies. What is more, the mere availability of a legal or equitable remedy may not afford adequate relief simply because of the delays, expense and uncertainty involved in seeking and securing the alternative offered.

This leads us to an additional point. Whilst the normative criterion of the choice prong is clearly the subject of an objective enquiry, whatever is considered to be a “reasonable” alternative must take account of all the attendant circumstances, including subjective ones, such as the victim’s personal circumstances and characteristics, including, perhaps, her

---


291 See, e.g., Miller v. Eisele, 168 A. 426 (1933), which involved the stock market crash of 1929. When the plaintiff decided to settle first and sue later, the courts held that he had done so under duress, that Miller should not have been required to ‘rely on his questionable remedy against the brokers’ (id, 432).

292 In Universe Tankships, for example, the trial judge, Parker J. ([1981] I.C.R. 129, 143), noted that the plaintiffs had been advised that their prospects of obtaining an injunction to prevent the blacking of their ship were minimal. And in Jones (David) Ltd v. Federated Storemen & Packers Union (1985) 14 I.R. 75, at 81-2, Waddell J., in the Supreme Court of New South Wales, remarked that the courts are loath to grant interlocutory relief in a common law action where the dispute between the parties is industrial in nature and where the appropriate resolution is by application of principles of industrial law.

293 See Dalzell, “Duress II”, op. cit., 367-82; Palmer, op. cit., 266-7. In North Ocean Shipping, Mocatta J. (op. cit., 1182-3) noted that the plaintiffs might have claimed damages in arbitration proceedings against the defendants ‘with all the inherent and unavoidable uncertainties of litigation’. In view of this, his Honour though it unreasonable to hold that they should have taken such a course. Cf. also, Pao On, op. cit., 635 (per Lord Scarman); Mason v. State of N.S.W., op. cit., 145 (per Windeyer J.); The ‘Aler’ [1989] 1 Lloyd’s L.R. 138, 146-7 (per Hobhouse J.).

294 These might include any or all of the following: the victim’s age, sex, capacity, health, background, relationship of the parties, availability or receiving of independent advice. Cf. authorities listed by Farnsworth, op. cit., 266, at n. 13; Shanley & Fisher, P.C. v. Sisselman, 521 A.2d 872 (1987); Stiegall v Stiegall, 397 S.E.2d (1990); Eymard v. Terrebonne, 560 So.2d 887 (1990). Cf. also, the Restatement (Second) of Contracts, § 175, Comment (c): ‘Threats that would suffice to induce assent by one person may not suffice to induce assent by another. ... Persons of a weak or cowardly nature are the very ones that need protection; the courageous can
reasonably held personal beliefs about what alternatives she thought she had available to her in order to avert the pressure, especially as $D$ knows, or has reason to know, of these personal beliefs and circumstances. This feature tends to give duress its contextual flavour. Thus, in *Williams v. Bayley*,295 for example, the father’s natural affection for his son made him especially susceptible to coercive proposals that he could not reasonably be expected to ignore.296 Likewise, the extremely parlous financial position of the plaintiff creditors in *D. & C. Builders Ltd v. Rees*297 made them especially susceptible to threats of nonpayment by their debtors.298 Often, too, where one party has commitments to third parties,299 faces ‘disastrous’ or ‘serious and immediate’ consequences as a result of the materialisation of a threatened breach of contract,300 or is otherwise in pressing need of having her contract

usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims’ infirmities’. Unlike the consideration of the circumstances of an allegedly coerced party for the purpose of considering whether a threat is wrongful (exploitative) under the proposal prong, there seems to be no parallel knowledge requirement regarding the enquiry under the choice prong. Arguably, an egg-shell-skull-victim rule should apply.

295 (1866) L.R. 1 H.L. 200.

296 Cf. also, *Public Service Credit Union v. Campion* (1984) 75 F.L.R. 131: guarantee extracted from father following threat to prosecute son; *Mutual Finance v. John Wetton & Sons Ltd*, op. cit.: coerced’s brother liable to prosecution, and coerced’s father also in poor health, likely to result in father’s death if coerced’s brother (father’s second son) prosecuted for forgery; *Kaufman v. Gerson*, op. cit. A similar American case is *Great American Indemnity Co. v. Berryessa*, 248 P.2d. 367 (1952).


298 But cf. *Hackle v. Headley* (1881) 8 N.W. 511. Farnsworth notes that most recent American decisions will find duress on a showing of particular necessity: op. cit., 266, authorities at n. 11.


performed, she may be left without an adequate remedy given the time frame involved or the absence of market substitutes.

As a corollary of the need objectively to consider the personal circumstances and characteristics of the recipient of a coercive proposal, we might, on occasion, be justified in expecting more of some parties than of others. A consumer with limited financial resources, for example, may reasonably be entitled to succumb to a threatened breach of contract or threat of civil proceedings while resisting the alternative of litigating or defending the matter in court. If the recipient of a coercive proposal is a commercial player, however, with the resources behind her to support or defend a legal claim, it may be more realistic to say that such an alternative is at least as effective, practicable, and efficient as manifesting her contractual assent first and seeking to recover later.

In any event, as the American Law Institute’s Restatement (Second) of Contracts asserts, ‘Whether the victim has a reasonable alternative is a mixed question of law and fact, to be answered in clear cases by the court’. It is suggested that the recent English enunciations of the duress doctrine indicate that is movement in Anglo-Australian law toward a parallel statement of principle.

---

losses would ensue to shipowners if threats were carried out.


303 As Dalzell put it ("Duress II", op. cit., 378): ‘There is good authority ... that the adequacy of the remedy is dependent partly on the financial position of the victim of the threat’.

304 As Ogilvie reminds us, however, the distinction between commercial and consumer players is only an approximate one. One can readily conceive of situations in which one commercial player is inferior in bargaining strength to the other. The distinction between a large and small businesses thus may seem appropriate. In any event, the entire context of the particular bargaining relationship needs to be considered: Ogilvie, “Economic Duress”, op. cit., 312.

305 Restatement (Second) of Contracts, § 175, Comment (b).
5. CONCLUSION

We began with an enquiry into the permission limits of bargaining pressure, exerted by coercive means. It has not been the writer's primary intention to offer a definitive catalogue of all the factors and considerations that may feature in the duress enquiry. Seddon has provided a useful list elsewhere.\textsuperscript{306} Instead, the principal burden of this chapter has been to suggest that whatever all the relevant factors and considerations may be (and these are clearly still being worked out by the courts and the commentators), we cannot usefully view legally cognisable coercion, duress, within a theoretical vacuum. The chief criticism the writer would level at Anglo-Australian commentators who have ventured into the field of duress so far, is that no one seems to have developed a conceptually sound theoretical framework, at least for the purpose of thinking about duress problems.

Drawing upon philosophical sources, this writer hopes to have supplied an appropriate analytical (legal) framework in the form of a two-pronged theory of duress. This theory is designed to strike a proper balance between our concern with the rights and responsibilities of the respective contracting parties, and also to provide an appropriate theoretical structure within which the many factors identified by Seddon, amongst others, can intelligibly and usefully be organised. Responsibility-relieving coercion—duress—amounts to this: $D$'s alleged coercion will mitigate or nullify $P$'s responsibility for the normal legal consequences of her manifested contractual assent when, and only when, $D$ has made a coercive proposal ("threat"), as defined relative to an appropriately fixed baseline consisting of $P$'s positive and negative rights and entitlements, and when $P$ is also justified in succumbing to $D$'s coercive proposal rather than electing some alternative course of action reasonably open to her. $P$'s normative baseline is fixed according to her "reasonable or justifiable expectations", an amalgam of actual and judicially prescribed expectations that are reasonable, as these are linked to the standard canons of propriety in dealing, which include the "rules" of the bargaining game as determined under functionalism,

\textsuperscript{306} Seddon, "Compulsion in Commercial Dealings", in Finn, P. D. (ed), Essays on Restitution (1990), 138-163.
prevailing in a relevant community at a relevant point in time.

Despite an apparent judicial emphasis on the opprobrious conduct of the allegedly coercive party, the principal practical and theoretic effect of the two-pronged theory of duress is to ensure that the proper enquiry remains bifocal. Coercion or duress has to do with the freedom of both parties to the relation or dealing. Consequently, we must consider the conduct, circumstances, rights, expectations, entitlements and personal characteristics or circumstances of both the coercer and the coerced in determining the outcome of a duress claim. Understandably, however, our emphasis here is clearly on the strength of the allegedly coercive party, who by his conduct wrongfully created or manipulated a situation of vulnerability in the other party. The proposal prong, accordingly, does most of the work in cases of contractual duress.

Notwithstanding this feature of the doctrine, however, if D does propose to make P worse off relative to P’s rights and entitlements, as reflected in P’s baseline, there is then the further question of whether P is entitled to succumb to D’s proposal and then rescind her agreement. Duress is not established merely because the act is wrongful. It must also be coercive, both in its quality and its effect upon the other party. It is clear, therefore, that even given D’s wrongful conduct, P is not absolved of all responsibility in the resultant bargaining process, for under the rules and ethos of bargaining, P must, in the circumstances, behave reasonably in submitting to D’s proposal. This shift of focus is not very strong though, for the enquiry at this point is usually relatively unproblematic. The “reasonable alternative” criterion is almost always dismissed in practice on the ground of inadequacy. Furthermore, when D does propose to violate P’s rights unless she benefits him, then it is generally quite easy to justify releasing P from the normal legal consequences of her manifested contractual assent. For if P is released, the burden typically shifts back to D, who has, ex hypothesi, acted wrongfully. The empirical fact of causation, therefore, should raise a rebuttable presumption against D: that in submitting to D’s proposal, P had no acceptable or reasonable alternatives open to her.

Few doctrines have, in recent times, undergone such rapid and radical changes as duress, which has evolved, and continues to evolve, primarily as
a product of our attempt to deal with the enormous breadth and subtleties of coercive behaviour in modern commercial and consumer dealings. Obversely, few doctrines have seemed to struggle so unsuccessfully for an underlying rationale and for sound theoretical conceptualisation. Gone, however, are Blackstone's limitations, the preconceived categories and linguistic battles. And less in number are the attempts to state all the necessary and sufficient conditions of a duress claim. We are left today with a general and open-textured requirement of "illegitimacy", or "unconscionability", which has tended greatly to enlarge the instances of conduct brought within the doctrine's constabulary ambit.

5.1. At the Intersection of Duress and Unconscionable Dealings

It has been noted in the course of this chapter that many proposals, in particular those to unpleasantly exercise strict legal rights to back up a demand to benefit the right holder, or a third person at his direction, in some way, draw their "illegitimacy" from the very fact that the exercise of the legal rights is exploitative of the allegedly coerced's peculiarly vulnerable state relating to choice, or is "unconscientious". Especially in the case of prima facie "lawful" threats, the doctrine of duress is heavily parasitic on the ideas expressed through unconscionability, in particular, the idea of a misuse of one's superior strategic opportunities or power relative to another. It becomes at times difficult, therefore, to distinguish the outer limits of the more active end of the unconscionable dealings jurisdiction, and the more passive end of the doctrine of duress. The doctrine of economic duress could easily have developed as a specific manifestation of unconscionable dealings in equity, at least as the potential operation of that jurisdiction has judicially been described in this country; in particular, if we equate the "special disadvantage" criterion with the conception of "no reasonable choice".307

How, then, do we distinguish or rationalise the two doctrines: duress and unconscionable dealings? The *modus operandi* differ in each case:

---

307 Both features are, in the final analysis, that which displaces the requirement of individual responsibility under unconscionable dealings and duress, respectively.
Duress involves an identifiable "threat", a conditional promise to move someone below her normative baseline comprising that person's positive and negative reasonable expectations, while unconscionable dealings need not. Unconscionable dealings can cover passive forms of exploitation, while duress can never do so. Take for example the paradigmatic though extreme "Drowning Person" example above. If $P$ says to $D$, a life guard, "save me and I will pay you $100,000" (assume this to be an exorbitant fee, whether or not $D$ is actually duty-bound to save $P$),\footnote{This important fact is that $P$ chooses or demonstrates a preparedness to save $D$.} by not ensuring that $P$ pays a fair value for $D$'s services, $D$ may be condemned, in morals and possibly law, for knowingly exploiting $P$'s situation of distress or need to (passively) accept an exorbitant fee. This is clearly unconscionable dealings' territory. But as soon as $D$ sees $P$ drowning off a deserted beach and says to $P$, "I will not save you unless you pay me $100,000", assuming $D$ has a duty to save $P$, and to save $P$ at fair value,\footnote{This seems to be a necessary inclusion, for given $P$'s imminent prospect of drowning, $D$'s proposal at fair value, despite its possible failing to qualify as a "threat" under the proposal prong, may itself be considered a "reasonable" alternative for $P$ (under the choice prong), in which case $D$'s "threat" cannot have the necessary effect of creating an unfair choice situation for $P$ (i.e., a situation of "no reasonable choice").} this begins to look more like a "threat" and hence seems to qualify for duress's constabulary function.\footnote{There is no doubt that the case would be coercion (duress) if $D$ was responsible for $P$'s predicament in the first place, such as if $D$ threw $P$ into the water; but on the analysis offered in this chapter, it does not seem to matter who was initially responsible for $P$'s plight, so long as $P$ has a right to $D$'s beneficial interference as this is recorded in the content of $P$'s normative baseline against which $D$'s proposal is assessed.} Can the essential difference between duress and some instances of unconscionable dealings merely be a matter of who initiates the transaction in terms of a proposal, thereby giving it a "coercive" air? Does the distinction lie simply in how one party goes about exploiting another?

This is not a strongly analytical or substantive distinction. Indeed, it appears to be a distinction without a difference. But it does at least demonstrate how the expanded duress doctrine appears to be encroaching upon unconscionable dealings' traditional territory, such that there is today a clear overlap of potential scope of application shared between two
jurisdictions. Accordingly, whilst clearly a case of unconscionable dealing,\textsuperscript{311} could a case involving a person “threatening” to commit suicide, with a view primarily to manufacturing the false atmosphere of crisis required to apply pressure and to manipulate an infatuated ex-lover’s beneficial motivations toward that person, nevertheless also be supportable on the ground of duress, or actual, nonrelational undue influence?\textsuperscript{312} It is precisely this apparent overlap in jurisdiction that seems to be giving contemporary Australian courts their difficulty in distinguishing between unconscionable dealings and “undue influence” (read “duress”), as was most recently demonstrated by Brennan J.’s judgment in \textit{Louth v. Diprose}.\textsuperscript{313}

Perhaps one solution to this apparent overlap in jurisdictions is that offered by Professor Eisenberg, in his famous article about the limits of the bargain principle.\textsuperscript{314} According to Eisenberg, despite their appearance of “coercion”, cases like “The Drowning Person”\textsuperscript{315} are perhaps best resolved under the unconscionable dealings doctrine, because duress is usually concerned with a person whose distress was caused by a wrongful act or threat of the promisee.\textsuperscript{316} If this is the case, then \textit{Smith v. William Charlick Ltd} should be decided today under unconscionable dealings and not duress; duress should be confined to acts, proposals-hence-threats, that are somehow independently wrongful. Under the modern expanded doctrine of duress, however, Eisenberg’s distinction is not a very convincing one. For as has been borne out of the discussion above, the “wrongfulness” of an act, and hence its coerciveness in the manifestation of a “threat”, often qualifies as such merely on account of some peculiar circumstances of \(P\), for which \(D\) was

\begin{itemize}
\item \textsuperscript{312} This category of undue influence is elaborated in the following chapter.
\item \textsuperscript{314} Eisenberg, M., “The Bargain Principle and its Limits” (1982) 95 Harv. L. Rev. 741, esp. at 754-63.
\item \textsuperscript{315} Cf. Eisenberg’s more elaborate “The Desperate Traveler” example, \textit{id.} at 755. In Eisenberg’s example, however, it is the party in distress who initiates the transaction.
\item \textsuperscript{316} \textit{id.}, 755.
\end{itemize}
not responsible, but which D nevertheless consciously exploits to bring coercive pressure to bear upon P. All D does here is to give P “a choice” that P would otherwise prefer not to have to make: the “no reasonable or acceptable alternative” part, like the “special disadvantage” criterion in unconscionable dealings, was ready-made in P, so that D did not additionally have to create those circumstances (as D might have done, for example, by pushing P into the water, knowing that P cannot swim and that there are no other potential rescuers).

There seems, in the final analysis, to be no logical escape from the obvious doctrinal overlap, except perhaps for the rather artificial and historically arbitrary one offered by Eisenberg above. The fact is, modern law seems to take an exceptionally broad view of coercion, and includes any exploitation of unfair advantage within it. For the sake of doctrinal purity, if nothing else, we might nevertheless wish to say that cases like Smith v. William Charlick Ltd, Williams v. Bayley, and Louth v. Diprose are all extremes forms of unconscionable dealing. Despite its counter-intuitiveness, such a suggestion can be supported on the writer’s previous analysis. Howbeit, the courts have not previously seemed concerned with overlaps in doctrinal application.\(^{317}\) It is the writer’s thesis, however, that any possible dual applications should principally owe their existence to the breadth or uniqueness of the facts of the case at hand, which ultimately attract the relevant doctrines, and that mergers can be none-too-satisfactory where they occur at the doctrinal level itself.\(^{318}\)

The precise relationship between unconscionable dealings and undue influence, and duress and undue influence, are considered in Chapter Six. While there are points of significant divergence amongst the various doctrines, there are also points of mutual relation that often make it difficult to delineate precisely the point of transition where one jurisdiction merges into the next. There appears to be no clear lines of demarcation along the doctrinal spectrum; merely dominant shades of application, marked by a

\(^{317}\) See Chapter Four, n. 240.

smudging effect at the points of transition, which can be taken to represent the nodes of possible dual application. The outer (upper) limits of one doctrine seem to be in a symbiotic relationship with the inner (lower) limits of the next. This has certainly been modern duress’s story; particularly as it has tended to feed off unconscionable dealings’s traditional staple.