# Teaching Contract Vitiation in Australia: New Challenges in Subject Design

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**Abstract**

*This article considers new challenges that potentially confront designers of contract-law syllabi in Australia, particularly in relation to assisting formative learners of the law to organize their conceptual knowledge of various factors or events that might work to 'vitiate' a contractual relationship apparently formed at law. Having recently prepared a new contract-law subject incorporating 'vitiating factors' within its purview, the authors describe the approach that they took to the design and presentation of that particular component of the course. Many, if not most, of the factors were presented as responding to particular (and quite familiar) forms of pre-contractual bargaining behaviour that subject an otherwise rational jural agent to an improper reason for intentional entry into a lawful contract. None of the vitiating factors, the authors decided, could be adequately explained in terms of single-party 'defective consent' alone. But no sooner had the new course been delivered than the High Court released its decision in Thorne v Kennedy. The majority of the judgments in that case immediately rendered descriptively inadequate at least part of the conceptual account that the authors had built for their learners in the subject. This article describes how that occurred and what ramifications might follow for the design and delivery of contract-law courses in Australia in the future, at least in relation to so-called 'vitiating factors'.*

## I Introduction

Every teacher of contract law must, at some juncture in the syllabus, after dealing with the principles by which legal contractual status is effectively assumed by parties who objectively intend as much — offer and acceptance, certainty and completeness, consideration, intention to be bound, and the like — introduce the learner to various reasons that the law recognizes as sufficient to *dispense from* the normal legal consequences of the assumption of obligation that has, at least in most cases, already formally occurred between the parties involved. Such reasons are variously dubbed: 'vitiating factors', 'excuses', 'exculpatory factors', 'invalidating

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circumstances (or conditions)', 'pleas in avoidance', 'defences', 'unjust factors', and the like.[1]

Recently, at the University of Queensland, we have had both opportunity and reason to reflect on how best to organize the conceptual knowledge of our formative learners in contract law, including in relation to the place of so-called 'vitiating factors' within the province of that subject. This has been part and parcel of a general overhaul of the law curriculum in our School, as we began, in 2017, to migrate away from a traditional 'lecture–tutorial' mode of legal education to a more intensive, small-group, 'seminar' style of delivery, whereby students are both encouraged and enabled to participate more actively in the learning process than was possible under the previous model.

Thankfully, at our University, we are also afforded the educational luxury of being able to teach contract law non-superficially to students across two successive semesters. The initial course, taught in the very first semester of the student's legal education, is titled 'Principles of Contractual Agreement'. It deals with the *means* by which jural agents effectively assume legal contractual commitments toward each other (and perhaps subsequently modify those commitments by cognate means), before turning to the question of the *content* and *extent* of those commitments so assumed (or modified). In other words, the first course introduces the learner to the principles of *contract formation*, as well as the law governing the identification, interpretation and, nowadays, 'regulation' (statutory control) of those rights and obligations that resulted from the process of formation and which constitute the contract's 'terms' or 'content'.

In the following semester, students enrol in a compulsory sequel course, 'Principles of Contractual Liability', which simply picks up, in a purely linear fashion, from where the Principles of Contractual Agreement course left off. The second course assumes that contract formation has successfully occurred (and also that no problems exit in relation to identifying and interpreting the terms, more or less), and it proceeds to examine the 'liability' side of the contractual relationship. We begin by considering the concepts of performance and breach, as well as the various ways in which (or reasons for which) a valid contractual relationship might be 'discharged', that is, ended *in futuro*. Assuming a liability event such as an unexcused breach or an accepted repudiation, we then turn to examine the concept of *enforcement* (ie, remedies such as damages, debt and specific performance), before finally introducing students to what is the opposite of enforcement: *relief*. This brings us to the topic of 'vitiation', whereby a formally valid contract might subsequently be disavowed and f for some reason that the law, equity or statute recognizes as sufficient to

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[1] Throughout our discussion, we will refer to the reasons underlying these different factors as 'exculpatory'. In doing so we hope to avoid the question of whether these different factors function as justifications or excuses for the defendant's refusal to perform the contract; cf Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Thinking in Terms of Contract Defences' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing, 2017) ch 1, 11–14.

have rendered the transaction defeasible, typically at the election of the party adversely affected by the reason. Most of the reasons for this sort of relief appear, at least at first blush, to concern various 'defects' in the 'consent' that was brought to the impugned transaction by the relief-seeking party. This makes sense in the context of a facilitative institution — contract — that exists to give normative force to a voluntary or consensual relationship of exchange that the parties outwardly intend to have legal effect. But there are always two parties (at least) to such a 'consensual' jural relationship, and a legal order that gave special weight to the consent of one contracting party only would be a potentially unjust legal order — of which more later.

Difficult choices confront the law teacher when it comes to assisting his or her learners to make sense of the universe of reasons that the law recognizes as sufficient to dispense from legal contractual obligation that parties have already objectively assumed. This is hardly assisted by the non-uniform treatment of 'contract vitiation' in leading textbooks in the field, which we suspect may well be mirrored in the treatment that the topic receives in the classrooms of law schools around Australia as well. Taking some of those textbooks as evidence of possible ways of approaching the teaching of contract vitiation to early-stage law students (Part II below), we discuss (in Part III) some of the 'discrimina' that the subject designer might want to bear in mind when contemplating how best to order and present the subject matter of contract vitiation within the contract-law syllabus more widely (if indeed contract is the course within which that subject matter happens to be taught[2]). In Part IV, we describe our own approach to the teaching of vitiation within our Principles of Contractual Liability course. Most importantly (in our view), that approach is one that attempts to achieve consistency between the law's treatment of contract vitiation and the intellectual, justificatory and institutional forms of order that are presupposed by the classical 'liberal' conception of contract, which is the context of that treatment (certain statutory modifications aside). In a nutshell, and assuming contractual capacity, that conception constrains us (for the most part) to conceive of contract vitiation not simply in terms of deficiencies in personal consent *simpliciter*, but rather as a dual-sided 'corrective justice' relationship between *two* legal agents of full age, where the contractual 'consent' on both sides is equally engaged whenever the law is deciding whether to disappoint the contractual expectations of one contracting party in order to respect (by restoring) the contractual

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[2] We are aware that some law schools teach or have taught contract vitiation outside of the contract-law syllabus, hiving it off instead to an alternative course on the law of obligations or equity. Doubtless a case can be made for this, as many of the vitiating factors traditionally taught in contract-law courses are not confined to bargain transactions but extend to other voluntary or consensual arrangements or transactions as well (gifts, trusts, wills and the like). We do not engage in any larger taxonomical debates here (eg, as to whether there is or ought to be a law of 'autonomous unjust enrichment', for example), but merely ponder the question of how, to the extent that contract vitiation is currently taught within a dedicated 'contract law' subject in Australia, that topic should best be understood and presented within the confines of that particular area of inquiry. Some of our conclusions, however, might well have implications for larger taxonomical debates.

autonomy of the other contracting party. Although this approach to the topic has been put under stress by High Court's recent decision in *Thorne v Kennedy* ('*Thorne*')[3] (Part V), we ultimately conclude (in Part IV) that this, on its own, does not suffice to unravel our prior decisions concerning course design. On the contrary, it provides us with a 'teachable moment': an opportunity to agitate our early-stage law students into the engaging in the cognitive skill of reflecting critically on the current state of the law and articulating educated opinions about it.

## II How is Contract Vitiation Currently Taught in Australian Law Schools?

The short answer to this question is that we (the authors) do not know for sure. We suspect that the treatment of exculpatory reasons by those entrusted with facilitating the learning of the modern student of contract law in Australia varies from law school to law school, according to the personal predilections or inspired judgements of curriculum committees, or of the individual teaching staff involved, either currently or historically,[4] but we are not actually in possession of the detailed syllabi of contract-law courses from around the country, at least as they currently stand.[5] Our suspicion, rather, is founded on a *proxy* for such syllabi, namely, a selection of respected textbooks on the law of contract. Granted, this is not a particularly scientific survey or process,[6] but a number of those works are likely to feature as prescribed or recommended reading for students enrolled in university-degree programs for law in Australia. They are also likely to influence both teacher and student in relation to the subject as a whole, not to mention, of course, that some of them would have been written (or edited) by the teacher or teachers of the actual course(s) in which the relevant text is prescribed or recommended.

Opening the pages of the aforementioned texts, one notices immediately the considerable (but certainly not complete) uniformity in approach and sequencing of topics among authors when it comes to elucidating the principles of contract formation. It is otherwise, however, when one turns to the question of the *vitiation* of contractual obligation. There, the uniformity of treatment diminishes considerably. By way of example, the editors of *Chitty*[7] deal with significant exculpatory doctrines

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3 (2017) 91 ALJR 1260.

4 Prior institutional decisions can, of course, affect the individual teacher's ability to design and deliver a subject as she or he pleases. Many law-school curricula are already bound and determined well before the teacher comes to the subject at a particular institution, and so the opportunities for modification by the individual are naturally limited, at least until the next cycle of 'curriculum review' comes around, as it inevitably does.

5 One of us is in possession of all the Australian law-school contract-law curricula from the early 1990s, although we suspect that things would have moved on significantly since then, as the law certainly has!

6 For a more systematic discussion of contract-law 'defences' as they have been dealt with by leading treatise writers through the ages, see Kit Barker, 'What Is a Contractual Defence (and Does It Matter)?' in Dyson, Goudkamp and Wilmot-Smith, above n 1, ch 2, especially 22ff.

7 HG Beale (ed), *Chitty on Contracts* (33rd ed, Sweet & Maxwell, 2018).

in Part 2 of Volume 1 of that work ('General Principles'), Part 2 being dedicated to 'Formation of Contract'. So, for example, Chapter 6 deals with common mistake, Chapter 7 with misrepresentation, and Chapter 8 with duress, undue influence and unconscionable bargaining (including inequality of bargaining power). What is unique (and perhaps unusual) about this treatment is that, while the factual phenomena that attract each of the doctrines mentioned usually occur prior to the parties reaching contractual agreement, legally speaking none of those phenomena (other than certain kinds of fundamental mistake) actually affects the *formation* of the impugned contract at all. Without explanation, the decision to deal, inside that part of the work, with exculpatory doctrines that do not affect the *source* of contractual obligation is perhaps a puzzling one.

All the other texts that we reviewed, and which are written or edited by United Kingdom-based authors, deal with the subject matter of exculpation from contractual obligation separately from the formation principles. Furmston,[8] for example, provides a standalone chapter on mistake (Chapter 8), and then one that gathers together the independent doctrines of misrepresentation, duress and undue influence (Chapter 9), which he introduces as 'three reasons why a contract may be invalid'.[9] *Treitel*[10] simply presents separate chapters on mistake (Chapter 8), misrepresentation (Chapter 9), and duress, undue influence and unconscionable bargains (Chapter 10). *Anson*[11] arranges exculpatory reasons around a grouping of 'factors tending to defeat contractual liability' (Part 3), each such 'factor' then comprising the subject matter of a chapter dedicated to that grouping: incapacity (Chapter 7); mistake (Chapter 8); misrepresentation and non-disclosure (Chapter 9); duress, undue influence and unconscionable bargains (Chapter 10); and illegality (Chapter 11).

Closer to home, the Australian contract textbook writers that we surveyed likewise deal with the exculpatory doctrines of law and equity (as they affect contracts) independently of the principles of contract formation. Greig and Davis,[12] for example, offer separate chapters on each of misrepresentation (Chapter 14), mistake (Chapter 15) and 'abuse of a dominant position' (Chapter 16), the latter rubricizing such doctrines as duress, undue influence and unconscionable contracts. John Carter's text on *Contract Law in Australia* (currently in its sixth edition),[13] contains a part (Part V) on 'vitiating factors', itself comprising individual chapters on contracts induced by misleading conduct (under both the general law and statute: Chapters 18 and 19, respectively)), contractual mistake (Chapter 20), duress (Chapter 22), undue influence (Chapter 23), and

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8 Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (17th ed, OUP, 2017).

9 Ibid 343. The curiosity here is that none of those doctrines render a contract *invalid*, merely defeasible (voidable). If the contract were truly 'invalid', then affirmation by the victim of the misrepresentation, duress or undue influence would not be possible, which is contrary to how each of those exculpatory doctrines works.

10 Edwin Peel (ed), *Treitel on The Law of Contract* (14th ed, Sweet & Maxwell, 2015).

11 J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (30th ed, OUP, 2016).

12 DW Greig and JLR Davis, *The Law of Contract* (Law Book Company, 1987).

13 JW Carter, *Contract Law in Australia* (7th ed, LexisNexis, 2018).

unconscionable conduct and unfair terms (Chapter 24). Paterson, Robertson and Duke[14] dedicate a part (Part XI) of their principally student-oriented text to 'vitiating factors', but they then arrange those factors around various taxonomical subcategories of 'misinformation' (enclosing the doctrines of mistake (Chapter 31) and misrepresentation (Chapter 32), and the statutory law relating to misleading or deceptive conduct (Chapter 33)), 'abuse of power' (gathering together the principles governing relief for duress (Chapter 34), undue influence (Chapter 35), unconscionable dealing (Chapter 36), third-party impropriety (Chapter 37), and unconscionable and unjust conduct under statute (Chapter 38)). The Australian edition of *Cheshire and Fifoot Law of Contract*[15] contains a part (Part IV) on 'excuses', which houses standalone chapters on each of misrepresentation and misleading conduct (Chapter 11), mistake (Chapter 12), duress (Chapter 13), undue influence (Chapter 14), unconscionable conduct (Chapter 15), incapacity (Chapter 17), and illegal contracts (Chapter 18).

Across the ditch in New Zealand, the leading text on the law of contract by Burrows, Finn and Todd is currently in its fifth edition.[16] Previous editions of that work simply presented a series of discrete chapters on each of mistake (Chapter 10), misrepresentation (Chapter 11), duress, undue influence and unconscionable bargains (Chapter 12), illegality (Chapter 13), and contractual capacity (Chapter 14). In the fifth edition, however, Chapter 12 has been retitled 'Exploitation', and the authors explain in the opening paragraph of that chapter that the subject matter that follows is, broadly speaking, about 'the attempted exploitation of one contracting party by the other', which is a problem that '[t]he courts have been familiar with … for a long time', and that they (the courts) 'have developed three particular doctrines to deal with it',[17] namely, duress, undue influence and unconscionable bargains.

Turning briefly to North America, the Canadian offerings that we surveyed also deal with exculpation from legal contractual obligation separately from the creation of such obligation. The sixth edition of the late Gerald Fridman's text, *The Law of Contract in Canada*,[18] simply presents separate chapters on such doctrines as mistake (Chapter 7), misrepresentation (Chapter 8), and duress, undue influence and unconscionability (Chapter 9). They are not, for example, arranged into a separate part or segment of the work according to some connective theme. John McCamus's text on *The Law of Contracts*,[19] in contrast, contains a

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14 Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (5th ed, Lawbook Co, 2016).

15 Nick Seddon and Rick Bigwood, *Cheshire & Fifoot Law of Contract* (11th Aust ed, LexisNexis, 2017).

16 John Burrows, Jeremy Finn and Stephen Todd, *Law of Contract in New Zealand* (5th ed, LexisNexis, 2016). A sixth edition of the work has recently been published, but at the time of writing it was not available to us.

17 Ibid 396.

18 GHL Fridman, *The Law of Contract in Canada* (6th ed, Carswell, 2011).

19 John McCamus, *The Law of Contracts* (2nd ed, Irwin Law, 2012).

distinct part (Part Three) on 'vitiating factors', comprising a miscellany of legal and equitable exculpatory events: misrepresentation (Chapter 10), duress, undue influence and unconscionability (Chapter 11), illegality (Chapter 12), mistake (Chapter 13), and frustration (Chapter 14). The somewhat idiosyncratic and enigmatically structured text on *Canadian Contract Law* by Angela Swan and Jakub Adamski[20] assigns discussion of the law of misrepresentation and mistake to a chapter dealing with 'interpretation and risk allocation' (Chapter 8), while doctrines such as capacity, unconscionability and undue influence are gathered together in a chapter on 'the control of contract power' (Chapter 9). Duress is treated only in connection with so-called 'going-transaction adjustments' (contract modifications) inside a chapter dealing with the question of which promises the law will enforce (Chapter 2). And south of the Canadian border, the late Allan Farnsworth's masterly work on *Contracts*[21] contains a part (Part II) on the 'enforceability of promises', within which there are separate chapters on 'The Bargaining Process: Offer and Acceptance' (Chapter 3) and 'Policing the Agreement' (Chapter 4). Inside the latter chapter discussion is found on such matters as personal incapacity (part B), behaviour (or 'abuse of the bargaining process' (part C)), which includes treatment of American law (at that time) relating to misrepresentation, duress and undue influence. There is also a part E dealing with 'contemporary controls' such as unconscionability and consumer legislation. The law of contractual mistake is parsed later in the work, in a chapter on 'Failure of a Basic Assumption: Mistake, Impracticability and Frustration' (Chapter 9). Also, the American Law Institute's *Restatement (Second) of Contracts*[22] — which, while not a textbook, presumably has an influence on the teaching and development of contract-law syllabi — has separate chapters discussing mistake (Chapter 6) and misrepresentation, duress and undue influence (Chapter 7). Those chapters are not arranged into a separate part of the text. The chapter on misrepresentation, duress and undue influence introduces all three as factors that impair 'the integrity of the bargaining process'.[23]

The diversity in approach to the organization and presentation of 'vitiating factors' in the abovementioned texts itself presents a challenge for subject designers, particularly for someone who is new to the teaching of contract law and wanting to create a meaningful learning experience for those who are the intended beneficiaries of the exercise. Presumably those who write the textbooks have reasons for organizing the relevant subject matter as they do, but we are struck by how few authors bother to explain the anatomy or structure of their overall work. We suspect that it might be the same for teachers of contract law in relation to the courses they present

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20 A Swan and J Adamski, *Canadian Contract Law* (3rd ed, LexisNexis, 2012). One of us (Bigwood) reviews this book at (2014) 55 CBLJ 313 and makes various observations about its interesting, but highly unusual, anatomy. A fourth edition of the work has recently been published, but at the time of writing it was not available to us.

21 E Allan Farnsworth, *Contracts* (Little, Brown & Co, 1982).

22 American Law Institute, *Restatement (Second) of Contracts* (1981).

23 Ibid ch 7 (Introductory Note).

to students, at least in relation to the various factors or events that function to dispense from legal contract obligation in some way. We say 'in some way' because there is no reason to think that all exculpatory reasons in contract law function in the same manner and for the same reason, even though the 'explainer' of the reasons may have assembled them under a single tag or theme, such as 'vitiation'. Lumping all such reasons together with no (or inadequate) explanation as to their (inter)relationship, if any, strikes us as a deficient way to support student comprehension of the subject matter as a whole. In our view, there are a number of informing distinctions that should be drawn at the outset of the subject-design exercise in relation to contract vitiation. We turn to these now.

## III Contract Vitiation: Some Preliminary Vital Discrimina

To the extent that 'contract vitiation' is still legitimately taught inside a contract-law syllabus in Australia (and not, say, via a more generic 'obligations'-style undergraduate subject), our first challenge as the designers and deliverers of the second of the contract-law offerings at our institution lay in deciding what, exactly, belonged to the realm of 'contract vitiation' and what did not. We found this to be a slightly tricky inquiry, not least because of the diversity of considerations needing to be weighed in the assessment. First, we had to be confident in our own minds as to what, exactly, was denoted by 'contract vitiation'. We took this phrase to signify that a contract made (or at least attempted to be made) had somehow been marred or qualitatively spoiled, or made bad, defective or ineffectual in some way; the contract (or attempted contract) had been invalidated, impaired or destroyed by some reason that the law recognizes as effective for that purpose. A 'vitiating factor' must — at least according ordinary language [24] — somehow render the relevant contractual relationship (or attempted contractual relationship) 'impure' or 'faulty', or generally adversely affect the *juristic quality* of what is asserted to be a jural act that alters the normative status of its participants.

Assuming that denotation to be more or less accurate, 'taxonomical' questions arose concerning where various 'vitiating factors' sat (or ought to be seen as sitting) along a possible spectrum of recognized exculpatory reasons: Which reasons belonged together and which did not? Did all vitiating factors render the contract 'defective' or 'impure' in the same manner? If not, should that affect our instructional scaffolding and design decisions?[25]

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[24] See, eg, the definition of 'vitiate' in the *Shorter Oxford English Dictionary* (5th ed, OUP, 2002) vol 2, 3549: 'Make incomplete, imperfect, or faulty; mar or spoil the quality of … Contaminate the substance of; make bad, impure, or defective … Invalidate; make ineffectual; *spec.* destroy or impair the legal validity or force of.'

[25] For example, one might consider both 'mistake' and 'misrepresentation' to vitiate agreement by reason of 'asymmetric information' for example ('misrepresentation' being simply 'caused' rather than 'spontaneous' mistake), but then it is clear that mistake and misrepresentation do not always 'vitiate' the contract in the same way. Some (fundamental) forms of mistake result in no contract arising at all, whereas causative misrepresentation simply supplies a reason to rescind a contract that clearly has been formed under the normal rules of contract formation.

Inevitably, considerations besides taxonomy drive the sequencing of subject matter within a contract-law (or any other) course, including the need to appropriately moderate the 'cognitive load' of one's students — the idea that instruction must be adapted to the expertise of the learner.[26] Some topics, for example, may logically (or taxonomically) belong to an early stage of a subject being taught but, owing to the complexity of the topic (say), may nevertheless be better postposed for treatment at a later juncture, when the learner is better equipped cognitively to manage the level of detail, difficulty or intricacies involved.[27]

Returning to textbooks as proxies for possible contract-law syllabi in this area, one encounters occasional examples of 'over-inclusion' within the universe of 'vitiating factors' (at least as we would prefer to understand them). McCamus, for instance, mentioned above, groups together, all as 'vitiating factors', the divers phenomena of misrepresentation, duress, undue influence and unconscionability, illegality, mistake and frustration, when every student of contract law will quickly come to appreciate that illegality and frustration, for example, function to excuse non-performance of contractual obligation in very different ways, and for quite different reasons, than do the other exculpatory categories enumerated in McCamus's cluster. They have nothing to do, for example, with 'defective transactional consent', which presents a reason for exculpation that is internal to the contractual relationship.[28] To be sure, illegality and frustration are (at least in part) external reasons for not enforcing a contractual relationship that is affected by either (or both) of those reasons. And while *illegality* certainly bears upon the jural quality of the agreement struck between the parties — either in its formation, performance or enforcement — and so is naturally accommodated by the ordinary connotations of the term 'vitiation', frustration has nothing to do with the *juristic quality* of the parties' legal contractual relationship at all. Parties affected by a frustrating event (other than supervening illegality, at least) are, by operation of law, excused from performing their executory contractual obligations not because those obligations are somehow invalidly, impurely or unjustly acquired or held, but rather because it would, in the light of the supervening, 'radically different', circumstances, be

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26 See generally Centre for Education Statistics and Education, *Cognitive load theory: Research that teachers really need to understand* (September 2017) <https://www.cese.nsw.gov.au//images/stories/PDF/cognitive-load-theory-VR_AA3.pdf>.

27 So, for example, in our own contract-law offerings at the University of Queensland, although we introduce the student to the concept of 'mistake' in the very first class of the Principles of Contractual Agreement course (via *Tamplin v James* (1880) 15 Ch D 215 (CA)), we actually teach the detail of the legal phenomena of contractual mistake much later in subject — along with other 'vitiating factors' taught in the Principles of Contractual Liability course. We do this even though we believe that much of the law relating to contractual mistake belongs to the principles governing contract formation (offer and acceptance and certainty, especially), but we consider the mistake cases to be just too 'heavy going' for students who are very new to the study of law, and so we wait until they are cognitively better equipped to handle the material later into their course of study.

28 That is to say, the contract has been vitiated by some factor internal to the parties' own relationship inter se (such as intra-relational consent or behaviour), and not by some factor that has impacted that relationship from the outside (such as illegality or frustration).

unjust now to hold them to an obligation, or set of obligations, to which they never objectively intended to be bound: '*Non haec in foedera veni*. It was not this that I promised to do.'[29] In other words, frustration properly belongs in the realm of 'discharge' of a contract rather than with its 'vitiation', and that is where we chose to locate it in our own course.

But even within the other (internalist) vitiating factors that McCamus identifies — misrepresentation, duress, undue influence, unconscionability and mistake — important reasons might remain for treating each or some of them as quite distinct justifications for dispensing from legal contractual obligation. For although they all appear, at least at first blush, to share in common an underlying curial concern for the quality of the inter-partes consent brought to a transaction by the relief-seeking party, the impurity (if found) in that consent does not function in the same way across all of the various exculpatory categories. As a result, different vitiating factors have different effects upon the affected transaction. For example, certain types of contractual mistake, such as fundamental common mistake, cross-purposes-style mutual mistake and *non est factum*, function essentially to determine whether the assent that was signalled to the impugned transaction was effective to operate as a *source* of legal contractual obligation in the first place — that is to say, to determine whether the consent brought to the transaction was capable of functioning as an effective offer or (as the case may be) acceptance, with the consequence that any failure of consent in that regard is a denial of the creation of legal contractual obligation altogether, the alleged 'contract' being adjudged void *ab initio*.[30] In these types of cases, 'vitiation' effectively means that there has been a contractual 'failure to launch'. In other cases, though, such as misrepresentation, duress, undue influence and unconscionable dealing, the consent manifested by the relief-seeking party *is* sufficient to function as an effective offer and acceptance, and hence as a source of legal contractual obligation; however, any obligation so assumed is treated as defeasible *after the event*, at the election of the defective-consent-giving party (and subject to various defences on the other side), the affected contract being 'voidable' rather than void *ab initio*.

Needless to say, the formal validity of a contract is no mark of its *justness* inter se. But even within the world of 'valid-but-defeasible' contracts it is possible that the consent that was brought to an impugned transaction may be regarded as defective or unjust in differential ways, and for differential reasons, as between the standalone categories of misrepresentation, duress, undue influence, unconscionable dealing and personal incapacity (for example), such that some sort of exercise in sub-classification is possible, or desirable, or even necessary. Indeed, if consent were seen to be compromised in the self-same way across all of those

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[29] *Davis Contractors v Fareham Urban District Council* [1956] AC 696, 729 (Lord Radcliffe).

[30] For a lucid explanation of this, see P Benson, 'The Unity of Contract Law' in P Benson (ed), *The Theory of Contract: New Essays* (CUP, 2001) 141ff. One of us also cashes out the distinction between 'assent' and 'consent' in relation to the 'bindingness' of contractual obligations in R Bigwood, *Exploitative Contracts* (OUP, 2003) 89–90.

various grounds of relief, there would presumably be no need to maintain separate doctrinal categories at all; and yet the law, quite rightly in our view, has resisted significant proposals to amalgamate or collapse some, many or all of the doctrines that have traditionally regulated the quality of party-consent brought to an objectively concluded contract.[31]

All this may seem trite, but it nevertheless underscores the point that there are important taxonomical choices needing to be made in the presentation of the subject matter of 'vitiating factors', both in the textbook and in the higher-education classroom. The choices, no doubt, can be difficult and, at times, contentious. We were reminded of this recently in Australia when the High Court published its decision in *Thorne* in late 2017.[32] There, a wife challenged both a pre-nuptial and a post-nuptial financial agreement entered into between herself and her husband some four years prior to the couple's separation in 2011. Although the wife knew from the outset of the parties' first meeting that she would have to 'sign paper' so as to protect the husband's assets in favour of his adult children, and had received and fully understood independent legal advice before entering into the impugned transactions, she only entered into the agreements because, some 11 days before the wedding was scheduled to occur (her family having already arrived in Australia from overseas, the invitations having already been sent out, the dress having already been made, and the wedding reception having already been booked), the husband told her that, unless she signed, the wedding would be called off.[33] The pre-nuptial agreement was signed a mere four days before the marriage occurred, and the post-nuptial one was signed a month or so later. After the couple separated, the wife claimed that she should be relieved of the normal consequences of having assented by signing the impugned agreements, as that assent, it was alleged, was the product of duress, undue influence and/or unconscionable dealing (there being no relevant defences to relief available on the husband's side). In a plurality judgment of five and two

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31 Of course, an infamous judicial attempt to rationalize various exculpatory doctrines of contract law in terms of a legal response to 'inequality of bargaining power' is to be found in Lord Denning's judgment in *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326, 337–9. For other, non-judicial attempts, see A Phang, 'Undue Influence — Methodology, Sources and Linkages' [1995] *Journal of Business Law* 552; D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *Law Quarterly Review* 479; A Phang and H Tjio, 'The Uncertain Boundaries of Undue Influence' [2002] *Lloyds Maritime and Commercial Law Quarterly* 231, 232–34, 241–43; A Phang and H Tjio, 'Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisited' (2003) 11 *Restitution Law Review* 110, 117ff; D Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 *Law Quarterly Review* 403; British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief* (September 2011) < http://www.bcli.org/sites/default/files/2011-09-28_BCLI_Report_on_Proposals_for_Unfair_Contracts_Relief_(FINAL).pdf>; Marcus Moore, 'Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects for Finding a Unifying Principle for Duress, Undue Influence and Unconscionability' (2018) 134 *Law Quarterly Review* 257. The Court of Appeal of the Republic of Singapore, in a 'coda' to its judgment in *BOM v BOK* [2018] SGCA 83 (29 November 2018), refused (at [158]ff) to assimilate undue influence and (a 'broad doctrine' of) unconscionable dealing under a so-called 'umbrella doctrine'.

32 *Thorne* (2017) 91 ALJR 1260.

33 Compare *Engle v Carswell* [1995] 5 WWR 301, where on similar but distinguishable facts, the result went the other way.

single judgments, the High Court unanimously held that both financial agreements were voidable on the ground of 'unconscionable conduct' (or unconscionable dealing): that the husband had, effectively, unconscientiously exploited the wife's 'special vulnerability', namely, her situational inability at the relevant time to exercise 'free agency' with respect to the husband. This inability seriously affected her capacity to make a worthwhile judgement in relation to her decision to enter into the impugned agreements. The Court, however, was then fractured as to whether *Thorne* was also a case of undue influence and/or duress, and, if one of undue influence, as to whether undue influence had been established on the facts.[34] Accordingly, no clarification was ultimately provided on the precise conceptual and practical demarcation between 'duress' and 'undue influence'. Neither was it resolved whether common-law duress claims are (or ought to be) confined to threatened or actual *unlawful* conduct, with lawful-pressure cases belonging instead to some equitable exculpatory category such as undue influence or unconscionable dealing.

Judging at least by our survey of the selection of contract-law texts mentioned earlier, more thought seems to have gone into the organization and presentation of subject matter in some cases than in others. With the exception of those writing from a restitutionary or 'unjust enrichment' perspective (for whom 'taxonomy', it seems, is core business[35]), the authors or editors of leading contract-law texts vary greatly in their taxonomization of subject matter, at least in relation to the so-called 'vitiating factors'. (Again, we suspect that this applies equally to the designers and deliverers of contract-law curricula around the Anglo-Commonwealth as well.) The spectrum ranges from those who demonstrate little to no strategy around the organizational choices made, with each 'factor' or 'doctrine' simply being presented as the subject of an atomistic chapter among the totality of chapters comprising the work (eg, *Treitel* and Fridman), to those where the author(s) have clearly thought deeply about the anatomy of their work (eg, Farnsworth and Swan and Adamski). Most contributions lie somewhere in between, with attempts being made at least to cluster exculpatory categories within distinct parts dedicated to 'factors tending to defeat contractual liability' (eg, *Anson*) or 'vitiating factors' (eg, Carter and Paterson, Robertson and Duke). Some

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[34] The plurality of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ held it to be a case of 'actual undue influence', rather than 'duress' (as the primary judge had held: see *Thorne* [2015] FCCA 484 (4 March 2015) [94]–[96] (Judge Demack), although the jurisdictional demarcation between the two is not particularly clear. In a separate judgment, Gordon J held that there was no undue influence, essentially because the wife had entered into the impugned transactions with her eyes open and her will or 'free agency' had not, metaphorically speaking, been 'overborne'. Her Honour said nothing about duress. The remaining judge, Nettle J, would have treated the case as one of duress, but for a decision of the New South Wales Court of Appeal in *Australia and New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 holding that duress should be limited to threatened or actual unlawful conduct only. In the end, though, his Honour found it unnecessary to decide the issue. He also said nothing about undue influence.

[35] Compare P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1; Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

authors even reduce 'vitiating factors' to what they perceive to be meaningful phenomenological subcategories such as 'misinformation' and 'abuse of power' (eg, Paterson, Robertson and Duke).

Now, in our experience, decisions regarding the taxonomization of 'vitiating factors' are contingent and perspectival (including whether they should be taught within the standard contract-law curriculum or outside it). This is hardly surprising, given that anyone who proffers an interpretative account of an area of the law — any area of the law — is bound to have operated, self-consciously or otherwise, according to a system of normative belief or legal comprehension beyond the raw data (case law) being ordered and explained. That, we suspect, is inevitable. But from the standpoint of responsible andragogy, it would be better if authors' or educators' reasons for the taxonomical decisions made were adequately communicated to the intended learners, and we do not always see that occurring (other than is a superficial way), at least within our sampling of standard contract-law texts from around the Commonwealth — even in those works whose anatomy strikes us as sufficiently idiosyncratic as to require it.

An interesting feature of the surveyed contract-law texts, however, is just how frequently certain of the vitiating factors are collocated in representation of the relevant law. For example, there would appear to be considerable consensus that, at least for the purposes (presumably) of organizing conceptual knowledge so as to aid comprehension of the applicable law, the exculpatory doctrines of duress, undue influence and unconscionable dealing (or unconscionable bargain) somehow, or for some reason, belong together. A number of authors deal with them either in a collective chapter (eg, *Chitty*, *Treitel*, *Anson*, Greig and Davis, Fridman, McCamus, and Burrows, Finn and Todd) or as a distinct subcategory within a larger cluster of related law (eg, Paterson, Robertson and Duke). As to why they are perceived to belong together, this is not always meaningfully explained; but clearly many writers see them under the rubric or through the lens of a curial concern for 'abuse of a dominant position' (eg, Greig and Davis), 'abuse of the bargaining process' (eg, Farnsworth), 'abuse of power' (eg, Carter and Paterson, Robertson and Duke), or 'exploitation' (eg, Burrows, Finn and Todd). The authors of *Anson* present their collocation of duress, undue influence and unconscionable dealing/bargain simply in terms of 'three vitiating factors based on the improper conduct of one party, the vulnerability of the other, or a combination of the two'.[36] However, and with respect, it is difficult to see how *just* the 'improper conduct of one party' with respect to another's vulnerability could ever adequately explain the operation of an exculpatory doctrine, as presumably such doctrines are not simply one-sidedly punitive. Nor could an exculpatory doctrine be explained *just* by 'the vulnerability of the other [party]', as presumably the doctrines follow the contours of 'corrective' justice rather than 'distributive' justice (of which more in Part

[36] Beatson, Burrows and Cartwright, above n 11, 374.

IV below).[37] In our view, the only plausible explanation of significant exculpatory doctrines such as duress, undue influence and unconscionable dealing must be bilateral, or dual-sided in nature — a properly weighted 'combination of the two'.

## IV How We Teach Contract Vitiation in Our Own Course

> 'Why should you expect the [rules] ... of the game to be different from the game itself?'[38]

For what it is worth, and considering the various discrimina mentioned in Part III above, the following essentially[39] describes our own approach to teaching contract vitiation to early-stage law students at the University of Queensland. With the exception of 'illegality' (which we teach as a separate topic on vitiation after canvassing 'internalist' vitiating factors), we begin by clustering the various factors that might vitiate a contractual relationship around the concept of 'legally responsible consent'. This, we apprehend, is likely to draw little or no dissent. Given that contracts are, at their conceptual core, 'voluntary' or 'consensual' legal relationships, any circumstance, condition or conduct that undermines the genuineness of the consent brought by either or both of the parties to a dealing or encounter must, *ex necessitate*, strike at the very heart of any legal relationship that resulted from the dealing or encounter. Unsurprisingly, then, the law tends to emphasize not what constitutes or defines a 'valid' contractual consent but rather its opposite: circumstances or conditions that *defeat* or *weaken* the force of what would *otherwise* be valid and binding consent.[40]

More controversial, perhaps, is the question of whether defective consent alone suffices to explain the vitiation of a bargain transaction; or must something more, such as superior-party misconduct in relation to the procurement or receipt of the consent also be shown? In general, we think so (at least where the relevant vitiating factor does not operate to prevent

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37 For a nice statement of the corrective justice account of contract law (with a predictably Kantian hue), see EJ Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chicago-Kent Law Review* 55.

38 K Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, 1930) 150.

39 Space does not permit complete coverage in this description. We shall mostly limit the discussion to significant exculpatory doctrines like misrepresentation, duress, undue influence and unconscionable dealing. Obviously, vitiating factors that are sourced in parliamentary authority, such as ss 18 and 20–22 of the *Australian Consumer Law* (governing 'misleading or deceptive conduct' and 'unconscionability', respectively), are not limited in the way that those that are creatures of the common law and equity are constitutionally constrained.

40 Hart, for example, argued that since contract is what he called a 'defeasible concept', it is to be 'defined through exceptions and not by a set of necessary and sufficient conditions whether physical or psychological': HLA Hart, 'The Ascription of Responsibility and Rights' (1949) 49 *Proceedings of the Aristotelian Society* 171, 189. For this reason, Hart argued, a court is *bound* to make reference to the 'extremely heterogeneous defences and the manner in which they respectively serve to defeat or weaken claims in contract': at 176; and that 'the positive looking doctrine "consent must be true, full and free" is only accurate as a statement of the law if treated as a compendious reference to the defences with which claims in contract may be weakened or met': at 177.

the formation of the alleged contract itself). As traditionally conceived, most of the vitiating factors — or, rather, the legal or equitable doctrines that administer them — are essentially concerned with and attracted by distinct forms of pre-contractual conduct that subject, actively or passively, the relief-seeking party to an improper motive for intentional entry into a lawful contract: improper pressure, misleading causative statements, naked exploitation, unfair persuasion, and the like. In terms of the textbook treatments of the subject matter mentioned earlier, then, we would align our approach to that of authors such as Farnsworth, who rubricized many of the exculpatory doctrines in this area under the banner of 'policing' the parties' agreement for (among other things) behaviour constituting an 'abuse of the bargaining process'. In other words, the law apprehends that there are 'acceptable' and 'unacceptable' ways of influencing another person to contract with you, and most of the relevant exculpatory doctrines in this field assist us to understand (and hopefully then to predict) where the line is to be drawn in relation to particular types of frequently encountered (and indeed expected) bargaining behaviours: threats, puffs, bluffs, shading the truth, disguising intentions, nondisclosure, pressing for advantage, and the like. On this view, we maintain, the various exculpatory doctrines that govern the means by which contractual relationships are formed, and in particular provide for transaction avoidance in the event of imperfect formation, are designed to deter one party (D) from failing to obtain the other party's (P's) legally responsible contractual consent. D's failure to obtain P's legally responsible consent may result in a type of transactional *injustice* against P that warrants rescission of the transaction.

Given the centrality of consent to the interpersonal justice of a contractual relationship, it made sense for us to organize vitiating factors around the various ways in which transactional consent might be compromised. In order to qualify as 'genuine' or 'responsible' consent, we took it as axiomatic that a party who signified contractual assent must have (in addition to possessing legal capacity) been operating from a minimal baseline of information and liberty which the law regards as both necessary and sufficient for 'voluntary' or 'autonomous' human action.[41] Problems with contractual consent generally arise either because one of the contracting parties lacked information that was material to his or her transactional decision-making (or perhaps the cognitive capacity to process such information that was readily available), or else he or she lacked the ability to act sufficiently 'freely' in relation to his or her decision to enter into contract in question. At least to accommodate the learning needs of early-stage law students, then, we considered it useful to cluster the subject matter of 'vitiation' under the heads of 'information problems' and 'volition problems'. The former encloses (primarily) the exculpatory categories of 'mistake' and 'misleading conduct inducing contract formation' (both misrepresentation and the *Australian Consumer Law*

[41] Aristotle, for example, in *Nicomachean Ethics* (trans T Irwin, (Hackett, 1985) 1110ff described both 'ignorance' and 'force' as the two forms of involuntariness.

protections), while the latter comprises (again, primarily) the exculpatory doctrines of duress and undue influence. Cases of 'special disadvantage' or 'serious disequality' more generally, which might straddle both informational and processing problems, as well as volitional deficiencies (eg, pressing need), is dealt with separately by reference to the equitable jurisdiction to relieve against an 'unconscionable dealing'. We also engage separately with the emergent phenomena of 'statutory unconscionability', as well as the various legal, equitable and statutory solutions available to deal with 'third-party impropriety' (surety problems, essentially).[42]

Also axiomatic to our approach to subject design in this area was the premise that any proper comprehension of stated-assisted transaction avoidance must be grounded in the relevant institutional setting that is the *context* of the law's superintendence: that any legal approach to *contract* vitiation must reflect the basic intellectual, justificatory and institutional forms of order presupposed (here) by the classical liberal conception of *contract*, at least where and to the extent that that conception has not been statutorily modified in Australia. This implies an acknowledgement that the nuances of transaction avoidance may vary depending on the social practice within which the impugned transfer of value occurred, so that even though many of the exculpatory doctrines discussed in the course apply equally to non-contractual transfers of value (such as gifts) as to contractual ones, there is no reason to think that the doctrines always operate identically across each setting (although sometimes they do).[43] This potentially complicates the approach to the vitiation of contracts in contrast to gifts, say.[44] Whereas the finality of a gift transaction might focus more

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42 The development of the law of undue influence in England has been affected (we think for the worse) by the fact that many prominent decisions have concerned sureties: eg, *Barclays Bank plc v O'Brien* [1993] 4 All ER 417; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 ('*Etridge*'). Perhaps in part due to the development of a *sui generis* 'wives' special equity' doctrine, Australian law allows for a clearer taxonomic distinction between straightforward cases of undue influence (in which the party seeking to enforce the contract exercised the influence in question) and those which involve another party (usually a creditor) to the transaction that is tainted by undue influence: *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. The clearer demarcation between the two types of case is also partly attributable to Australia's more mature doctrine of unconscionable dealing, which also functions to capture cases involving sureties: *Amadio* (1983) 151 CLR 447.

43 For example, it is well known that undue influence operates differently in equity in relation to *inter vivos* transactions than it does in probate law with respect to testamentary dispositions. See, generally, Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617. Also, in relation to *inter vivos* transactions, undue influence might operate slightly differently in relation to contracts (or transactions 'of purchase') than with gifts. See, eg, *Johnson v Buttress* (1936) 56 CLR 113, 135–6 (Dixon J) ('the matters affecting [the transaction's] validity are necessarily somewhat different'). See also Hugh Beale, 'Undue Influence and Unconscionability' in Dyson, Goudkamp and Wilmot-Smith, above n 1, ch 5, 98–99 (on the significance of 'disadvantageous transactions').

44 In addition to the differences between gifts and contracts requiring possible application adjustments in relation to undue influence (see above n 44), it is also occasionally suggested that the unconscionable dealing jurisdiction may be more liberally applied in relation to gift transactions as opposed to contracts: see, eg, *Wilton v Farnworth* (1948) 76 CLR 646, 649 (Latham CJ), 655 (Rich J); *Scott v Wise* [1986] 2 NZLR 484, 492–3 (Somers J), quoted in *Dark v Boock* [1991] 1 NZLR 496, 502 (Heron J); *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [192] (Hargrave J). See also, more generally, P Watts, 'Restitution — A

squarely on the question of the 'voluntariness' of the 'motive' that produced the impugned one-way transfer of value, gifting as a social practice lacks the 'game' element of the free competitive bargaining that we generally associate with the interest structure of those who participate within the contract institution. Genuine liberty of contract presupposes freedom to succeed as well as to fail, and that tactical practices like 'pressing for advantage' and 'enriching oneself at the expense of another' are all in the name of the contracting 'game' — they are 'defining characteristics' or 'endemic features' of bargaining and of bargains,[45] if not the principal point of negotiating toward an outcome 'where something of value is at stake'.[46] The law's approach to contract vitiation must, it seems to us, take this significantly into account, at least in the absence of a clear statutory override (such as in the case of consumer-protection legislation, for example).

Taking the liberal conception as the launch-point for our discussion of the vitiation of contracts, it is emphasized that, subject to capacity and legality, we are each free as formal jural equals to engage in transfer and exchange, and to enlist others in the pursuit of our own ends (just as they are free to enlist us likewise), and it is generally no business of the state to second-guess the wisdom of transactions that result from the exercise of this (inter)personal freedom, whether they be contracts or gifts. This injunction, it is said, applies no matter how 'improvident, unreasonable, or unjust' the particular transaction may appear to be.[47] The common law, including equity, does not exist to assist, officiously or paternalistically, those of full age 'who repent of foolish undertakings' or regretted dispositions.[48]

But as is well known, 'formal equality' is not 'actual equality'. For a variety of reasons, both constitutional and situational, people occasionally find themselves seriously mismatched *vis-à-vis* others in particular social and transactional encounters. And although, according the liberal conception, no objection can be taken to the mere existence of (even very serious) inequality of bargaining power between actors per se,[49] the law can nevertheless be expected to make it harder for power-holders to use their unofficial interpersonal power by ensuring that such power is only used consistently with the injunction against using free and equal moral agents 'merely instrumentally' for personal gain. For failure to secure a

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Property Principle and a Services Principle' (1995) *Restitution Law Review* 49, 58–9; D Nolan, 'The Classical Legacy and Modern English Contract Law' (1996) 59 *Modern Law Review* 603, 610–12.

45 PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (LBC, 1987) 110.

46 EH Norton, 'Bargaining and the Ethic of Process' (1989) 64 *New York University Law Rev* 493, 530. The analogy of negotiation to 'game' is perhaps best suggested in H Raiffa, *The Art and Science of Negotiation* (Belknap Press, 1982). See also PH Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, 1979) 5–6.

47 *Brusewitz v Brown* [1923] NZLR 1106, 1109 (Salmond J).

48 *Nichols v Jessup* [1986] 1 NZLR 226, 235 (Somers J).

49 See, eg, R Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 224–7; EJ Weinrib, 'Right and Advantage in Private Law' (1989) 10 *Cardozo Law Review* 1283; *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 183 (Dillon LJ).

person's consent before taking resources from him or her is always (legal authorization aside) a failure to respect that person's status as a 'freely choosing, rationally valuing, specially efficacious moral personality'.[50]

On this view, it is unsurprising that courts have consistently renounced any suggestion that a contract might be vulnerable to rescission (or a state-imposed enforcement disability) just because it happened to represent the outcome of (even very serious) 'inequality of bargaining power',[51] or that 'good conscience' somehow 'require[s] parties to contractual negotiations to forfeit their advantages, or neglect their own interests'.[52] Were the vitiating doctrines of (or relating to) contract law to operate in a purely redistributive fashion, this would effectively destroy self-ownership of natural advantages (like negotiation skill and position), thereby undermining deeply held convictions about individual rights in a free society.[53] In such a society, fundamental considerations of liberty constrain us to view private-law relationships primarily in terms of 'rights' rather than 'advantages'.[54] And, of course, there being at least two parties to a contractual relationship, the transactional liberty of *both* participants in the exchange encounter must be taken adequately into account when formulating just principles governing state interference with objectively concluded bargain transactions. At least in the case of the typical synallagmatic contract, the decision to invalidate a contract will always affect both plaintiff and defendant as rights-holders. Once the contract is validly formed, there must be some rationale beyond the defective consent of the plaintiff that is capable of defeating the defendant's right to the performance of the contract. Clear statutory authorization aside, neither party's situation can ever be viewed in isolation. Ordinarily, there will be insufficient reason for disappointing the contractual expectations of one contracting party, D, unless D ought to bear some agency-responsible 'blame' for the other party's, P's, inability to bring a fully responsible consent to the impugned transaction. That P's contractual assent happened to result from some substantial impairment of bargaining capacity or opportunity cannot alone plausibly provide the reason, since, on the liberal conception, this would simply fail to respect D's freedom (to order, as best D fit, D's affairs through co-operative private exchange with P), which freedom is as much at stake as P's equivalent liberty in legal contractual settings. To say that D 'deserves' to lose a contractual benefit derived from P is thus generally not a conclusion that the quality of P's will or judgement or consent did not for some reason pass legal or equitable muster, but rather an evaluation of both D's and P's *behaviour*, and the *risks* that each can fairly be taken to have assumed (including as to each other's strategic or

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50 Charles Fried, *Right and Wrong* (Harvard University Press, 1978) 29. Compare also JG Murphy and JL Coleman, *Philosophy of Law* (Westview Press, rev ed, 1990) 173–4.

51 *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 183 (Dillon LJ).

52 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 [11] (Gleeson CJ).

53 Robert Nozick thus argued that a justification for personal skills need not be given — some qualities are simply possessed: Nozick, above n 49, 224–7.

54 See generally Weinrib, above n 49.

tactical bargaining behaviours), within the context of the impugned transaction at hand. In other words, a contract is only susceptible to invalidity where the defendant has acted unjustifiably or improperly in inducing the plaintiff to contract with the defendant.[55]

Certainly, when we initially conceived our Principles of Contractual Liability course, we took this to be a descriptively accurate account of the law, at least as judged by how the vast majority of the exculpatory doctrines of law and equity were expressed and applied by Australian courts in relation to contracts. For in each situation where a particular doctrine applied, there was, typically, not only a 'defective consent' on P's side of the impugned transaction, but also an agency-responsible failure, on the part of D, to meet some applicable standard of conduct or norm of interpersonal treatment that allowed us to say that any consent produced in violation of that standard or norm cannot be treated as 'fully legally responsible' on the part of P *vis-à-vis D*, the beneficiary of that consent. The applicable standard or norm might, for example, be one of 'truth-telling' (eg, misrepresentation or statutory misleading conduct), 'rights-respecting' (eg, regular duress), 'trust-maintenance' or 'avoiding conflicts of interest and duty in limited-access arrangements' (eg, Class 2 undue influence),[56] or 'taking reasonable precautions toward the avoidance of a foreseeable risk of ignorance, error or third-party imposition' (eg, the *Garcia*-style 'special equity' in favour of 'volunteer wives'[57]). Moreover, the failure to meet the applicable standard or norm of conduct could be considered 'wrongful' regardless of whether it happened to be accompanied by a predatory or exploitative state of mind on the part of D; duress and undue influence, for example, like misrepresentation, can be 'wholly innocent'.[58] All that matters is that D's conduct was genuinely 'agency responsible' in the sense that it relevantly related to *choices* that D made, or was capable of making, ex ante entry into the impugned transaction, such that it fairly lay within D's power to have made things *otherwise* than what they in fact became the result of D's enjoyment of

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55 On duress and unconscionability as the 'proposing [of] a wrong', see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, 2nd ed, 2015) 97. Writing in the context of promises (rather than contracts), David Owens argues that a promise is invalidated only where it is induced by conduct that wrongs the promisor (ie, the conduct will only invalidate the promise where it breaches a right of the promisor): 'Duress, Deception, and the Validity of a Promise' (2007) 116 *Mind* 293.

56 See generally Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35 (reprinted [2004] *New Zealand Law Review* 215); Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375; Robert Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171.

57 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (Gaudron, McHugh, Gummow and Hayne JJ).

58 See, eg, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (duress found even without knowledge of the effect of the coercer's conduct on the victim's choice conditions); *Allcard v Skinner* (1887) 36 Ch D 145; *Lloyds Bank Ltd v Bundy* [1975] QB 326, 342 (Sir Eric Sachs) (Class 2 undue influence does not depend on 'any wrongful intention on the part of the person who gains the benefit'); *Cheese v Thomas* [1994] 1 All ER 35, 43 (Sir Donald Nicholls V-C) (influential party did not act 'morally reprehensibly').

interpersonal power over P.[59] Provided that such agency-responsibility existed on D's part, it is always possible to say that an *exercise*, by D, of interpersonal power over P, for D's own gratification, has occurred; for in every such case, D, actively or by omission, subjects P to an *improper reason* (or motive) for *intentional action*, namely, entry into the impugned transaction — a reason or motive from which, being inconsistent with responsible human action, P ought to have been free. Regardless of D's accompanying mental state, D inevitably exercises, for him- or herself, an *excessive* degree of personal autonomy resulting from the parties' relationship; and P is thus inevitably 'victimized' by D's privileging his or her own interests while using P 'merely instrumentally', thereby violating P's general 'right' (ie, 'legal immunity') not to have resources (or value) transferred away from him or her, under the colour of a formally 'valid' contract, without P's fully legally responsible consent.

Given the various ways in which D may subject P to an improper reason for assenting to a contract that D desires, it made sense for us to try to explain most of the vitiating factors associated with contract rescission precisely in terms of the varying ways in which the Ds of this world might 'exercise interpersonal power' over the Ps of this world for that purpose. At least as they apply to regular contracts,[60] the exculpatory doctrines of law and equity ultimately regulate against the abuse of interpersonal power affecting consent rather than the impairment of personal consent *simpliciter*, and each doctrine appears to be attracted by a specific manifestation of such abuse, which both explains and justifies their continued intellectual and practical separation rather than collapse or amalgamation.

Some doctrines, such as misrepresentation and duress, are clearly designed to regulate against D exercising power over P by actively altering P's decision-making environment in such a way that P is motivated (induced) to do as D desires. With misrepresentation, D introduces a false factual statement into the parties' pre-contractual negotiations upon which, consistently with D's actual or putative intention when making the statement, P relies. That the false statement was contrary to the law's universal norm of truth-telling when it comes to pre-contractual assertions of fact implies that D has necessarily motivated P to act by presenting her

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[59] For a lucid account of agency responsibility in this sense, see J Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, especially 99–101. See also A P Simester, 'Agency" (1996) 15 *Law and Philosophy* 159, especially 177–81.

[60] We merely speculate, but do not conclude, as to whether different principles of vitiation might legitimately apply to different types of contract, or across different contractual settings. For example, in *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35, the High Court seemed to suggest that, in relation to lawful contractual activity, the unconscionable dealing doctrine might be applied more leniently outside the context of a so-called 'arm's length commercial transaction' (ibid 68 [161]). That possibility, however, is not explained or developed in the case. In *Thorne* (2017) 91 ALJR 1260, in contrast, the High Court was prepared to apply the ordinary doctrines of law and equity (duress, undue influence and unconscionable dealing) to financial agreements entered into under Part VIIIA of the *Family Law Act 1975* (Cth) as if they were just regular contracts rather than ones sanctioned by the Family Court under the Act as a qualification to that court's statutory jurisdiction.

with an *unacceptable* reason for doing what D desired, regardless of the quality of mind that happened to accompany the false statement: D should have found out the truth before speaking a falsity. Moreover, given that P is generally under no responsibility to investigate the veracity of factual statements made to him or her for the purpose of inducing entry into a contract,[61] D's misleading conduct is inconsistent with 'voluntary' (hence legally responsible) action on the part of P. Accordingly, any transaction so concluded ought to, in the absence of a relevant defence available to D, be treated as voidable as against D. (Obviously, the law's protection to those injured by false causative statements in commercial contexts has been expanded extensively since the enactment of s 52 of the *Trade Practices Act 1974* (Cth), now s 18 of the *Australian Consumer Law*.)

With duress, D manipulates P's decision to enter into a contract by exercising *coercive* power over P, that is, by proposing to make P *worse off* relative to P's existing entitlements or legal protections in P's favour (eg, under criminal law, tort law or contract law) unless P agrees to D's particular demand. When successful, it can be seen how, by duress, D has motivated P to do as D desires through *fear* of unwanted consequences: P would prefer to abandon one right (ie, whatever it is that D has demanded, which P would prefer to retain) in order to protect another right or protected freedom (eg, P's right to bodily, proprietary or economic integrity), which P perceives to be the lesser of the two evils comprising the choice conditions that D has created for P. Provided that D's application of pressure reduced P's options to the point of P having 'no reasonable alternative' than submission to D's demand, and P did in fact submit (at least partly, if not substantially) for that reason, then D must be treated as having motivated P's entry into the impugned contract (or contract modification) by presenting P with an *unacceptable* reason for doing what D desired. D has, through the application of illegitimate pressure, denied P a fair opportunity to exercise P's normal capacities when entering into a voluntary or consensual legal relationship. Of course, the standard case of duress involves D threatening P with a consequence that is not D's to dispense, because the threat, if implemented, would be unlawful. But duress is not necessarily limited to such cases, as D may exercise duress by conditionally proposing to exercise his or her own *lawful* rights, liberties or powers in a manner unwelcome to P or to P's disadvantage, so as to 'exploit' P's peculiar vulnerability to being pressed in the circumstances. Whether such cases properly belong with the common-law duress doctrine or, rather, are better administered under the 'unconscionable dealing' or 'undue influence' jurisdictions (for example) is something that we briefly explore with our students through lens of the New South Wales Court of

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[61] See, eg, *Redgrave v Hurd* (1881) 20 Ch D 1, 14, 17 (Jessel MR), 22–3 (Baggallay LJ); *Smith v Land & House Property Corporation* (1884) 28 Ch D 7, 17 (Bowen LJ). The position appears to be identical in relation to misleading conduct caught by s 18 of the *Australian Consumer Law*: *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, 95 (Lockhart J; Burchett J and Foster J agreeing).

Appeal's decision (and recommendations) in *Australia and New Zealand Banking Group v Karam*.[62]

Next off the doctrinal rank for discussion in the course is undue influence, which, as an exculpatory category, has become rather elusive in recent years, and for no apparent good reason. As with misrepresentation and duress, undue influence has traditionally been conceived of as being rooted in the principle 'that a transaction to which consent has been obtained *by unacceptable means* should not be allowed to stand'.[63] Regarding the *nature* of those unacceptable means, however, the equitable jurisdiction to relieve against an *inter vivos* transaction induced by undue influence is significantly more nuanced than those other two doctrinal categories, each of which regulates a distinct and circumscribed form of unacceptable transaction-inducing behaviour. Although some undue influence cases appear to regulate *coercive* conduct (albeit by lawful means),[64] the paradigm case of undue influence is not one of 'duress' or 'fear', but rather of 'unfair', 'improper' or 'unacceptable' *persuasion*.[65] D generally exercises *persuasive* power over P by giving P arguments or reasons that appeal to P's (self-perceived) interests or principles, so that P *prefers* to do what D desires over P's status quo (or over some alternative course of action available to P). Generally, persuasion cannot be seen as an unacceptable reason for human action, except when it results from 'one party [D] occup[ying] or assum[ing] towards another a position naturally involving an ascendancy or influence over that other [P], or a dependence or trust on [P's] part'.[66] 'One occupying such a position', it has been said, 'falls under a duty in which *fiduciary characteristics* may be seen':[67] 'It is … [D's] duty to use his position of influence in the interest of no one but … [P] who is governed by … [D's] judgment, gives him his dependence and entrusts him with his welfare.'[68]

It is generally necessary, therefore, to distinguish between cases of undue influence that are 'relationship-independent' and those whose existence depends precisely on the establishment of a pre-contractual relation of the nature just described. In the first category of case — often referred to as 'Class 1' undue influence — P is induced to contract (or to confer some other benefit upon D) within the context of a regular arm's-length relationship or encounter. There is nothing 'special' about these cases at all. Actual wrongdoing in the manner or coercion (or perhaps unconscionable dealing) can be established, such that it is arguably

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62 *Australia and New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 (Beazley, Ipp and Basten JJA).

63 *R v Attorney-General for England and Wales* [2004] 2 NZLR 577 [21] (emphasis added).

64 See, eg, *Mutual Finance Ltd v John Wetton and Sons Ltd* [1937] 2 KB 389; *Robertson v Robertson* [1930] QWN 41; *Langton v Langton* [1995] 2 FLR 890; *Bank of Scotland v Bennett* [1997] 1 FLR 801.

65 Compare American Law Institute, *Restatement (Second) of Contracts* (1981) §177(1); *Etridge (No 2)* [2002] 2 AC 773, 794–5 [6]–[7] (Lord Nicholls); American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) 204.

66 *Johnson v Buttress* (1936) 56 CLR 113, 134–5 (Dixon J; Evatt J agreeing).

67 Ibid 135 (emphasis added).

68 Ibid.

unnecessary nowadays for the law to recognize such cases as manifesting an independent exculpatory category (or at least to refer to them as somehow involving 'undue influence'). The other category of case, however — typically dubbed 'Class 2' undue influence — is *sui generis*. The cases here involve a completely separate principle (or set of principles) directed at avoiding non-consensual or unauthorized conflicts of interest or duty in relationships or arrangements that, generically or specifically, involve 'trust and confidence' (or 'trust and dependence').[69] The law's focus is not on 'influence' at large, but rather on an influential capacity that derives from the concession, by one party, of control or authority to the other party, or from the reposing of special trust by one party in the other.[70] 'Undue influence' here entails the use (or indeed mere *possible use*), whether active or passive, of influence that the law expects to be exercised solely in the interests of the party subject to the influence, rather than in pursuance of an inconsistent personal interest on the part of the other party within the scope of the influential relationship or encounter. Undue influence is 'unacceptable', therefore, and hence responsibility-relieving on the victim's part, because, regardless of *how* the influence was (or might have been) exercised in the particular case (pressure, advice, argument, pleading, intercession, misrepresentation, or whatever), it basically involves a *conflictual* use (or possible such use) of a special influential capacity on the part of D. For long-standing reasons of public policy, the fact that the impugned benefit appears inconsistent with the maintenance of the 'trusting' relationship between the parties has been seen as reason enough to call on D to show free and informed consent, and to divest D of the impugned benefit if she or he is unable to do so. The jurisdiction can thus be seen to possess a distinctive *prophylactic* element, expressed primarily through the way in which the so-called 'presumption' of undue influence has traditionally operated in such cases. To be sure, as soon as the right combination of circumstances (ie, 'risk') is found to exist — opportunity (ie, fiduciary influence), incentive (ie, the impugned benefit), and epistemological uncertainty (ie, serious detection and evidentiary problems) — equity indulges in a presumption that self-interest and temptation have operated in the particular case — that what was feared has materialized (or at least that it may well have done so). It then calls upon the benefiting party to satisfy the court otherwise.

The classic case that we taught along these lines is the 1936 decision of the High Court in *Johnson v Buttress*.[71] There, at least according to four of

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69 See, generally, R Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171; *Johnson v Buttress* (1936) 56 CLR 113, especially 123 (Latham CJ), 134–5 (Dixon J; Evatt J agreeing); 143 (McTiernan J).

70 Typically, this is found '[e]ither because [D] is or has become an adviser of [P] or because he has been entrusted with the management of [P's] affairs or everyday needs or for some other reason', and so 'is in a position to influence [P] into effecting the transaction of which complaint is later made': *Goldsworthy v Brickell* [1987] Ch 378, 401 (Nourse LJ). Compare also *Tulloch (deceased) v Braybon (No 2)* [2010] NSWSC 650 (8–11, 30 March, 17 June 2010) [51] (Brereton J).

71 (1936) 56 CLR 113.

the five members of the bench in that case, the challenged *inter vivos* conveyance was set aside not because the claimant (the deceased donor's executor) could establish Class 2 undue influence as an affirmative conclusion on the evidence before the court, but rather because the donee could not satisfy the court that undue influence *had not* occurred in the context of an 'antecedent relation of influence' that could be shown to have existed between the parties to the impugned transaction. As Latham CJ put it in his judgment, 'the transaction … [could not] stand by reason of the *general policy* of the law directed to *preventing the possible abuse* of relations of trust and confidence'.[72]

Turning to the equitable (and parallel statutory[73]) jurisdiction to relieve against 'unconscionable conduct' (or an 'unconscionable dealing'), here we find that the parties were, ex ante entry into the impugned transaction, and in contrast to Class 2 undue influence situations, at arm's length; however, they were not, for some reason inherent in P, or because of the particular circumstances in which P happened to find him- or herself relative to D, not on an equal footing. Here, typically, D as the ascendant party 'exercises power' over P not by *creating* a problem with P's autonomy as such (like in misrepresentation or duress cases, for example), but rather by *working with* or *knowingly taking advantage of* a disabling condition or circumstance that D found, at least to some extent, 'ready-made' in P, which condition or circumstance rendered P vulnerable to merely instrumental utilization at the hands of D. There are, of course, cases such as *Louth v Diprose*[74] where D can be found to have actively manipulated P's 'special disadvantage' (ie, P's serious inability 'to make a judgment as to his own best interests'[75] in relation to the proposed transaction), but the minimal sufficient condition and conceptual core of unconscionable dealing as a form of human behaviour is simply that D, as a rational agent, chose not to respond to the subjectively known substantial possibility that P was, by reason of his or her 'special disadvantage', unable to act fully legally autonomously relative to D in the proposed transaction inter se. The paradigmatic case of unconscionable dealing, then, simply involves D transacting with P without sufficient regard for P's autonomy interests in the transaction subsequently called into question, *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*')[76] being a representative example of such behaviour. P is, in this sense, subjected to an improper reason for intentional action essentially through D's *omissive conduct* — through D's operative failure adequately to administer to P's disabling condition or circumstance before taking a benefit from P (eg, by ensuring the receipt of competent advice for P, or by fully disclosing or explaining the transactional risks to P, or by correcting known erroneous assumptions in relation to the proposed transaction, or, perhaps, in jurisdictions beyond

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72 Ibid 123 (emphasis added)
73 See *Australian Consumer Law*, s 20.
74 *Louth v Diprose* (1992) 175 CLR 621.
75 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J).
76 (1983) 151 CLR 447.

New Zealand and Australia, by ensuring that P receives commensurate value in return for whatever moved from P as consideration in the exchange relationship).

In contrast to misrepresentation, duress and undue influence, then, it seems that unconscionable dealing is incapable of occurring 'innocently', or even 'negligently'; it depends on proof of nothing short of *naked exploitation*: that D's decision not to respond to P's known special disadvantage was deliberate in the manner demanded by an exploitation claim[77] (although this would seem to belie the successful invocation of the doctrine in *Amadio* itself).

## V A '*Thorne*' in the Side of Our Subject Design?

No sooner had we finished teaching the law relating to contract vitiation in the manner described above than the High Court delivered its decision in *Thorne*, mentioned earlier. One of the effects of that decision (according, at least, to the majority of the judges in the case) was immediately to render descriptively inaccurate at least part the account of the law that we had just presented to our students, namely, that the major exculpatory doctrines of contract law — though especially misleading conduct, duress, undue influence and unconscionable dealing — are best understood in terms of the distinct *behavioural* phenomena that attract each doctrine and which explain their continued practical and intellectual separation. For not only is undue influence presented in *Thorne* as a single concept not having different 'forms' or expressing different principles across the traditional classes of case administered by the doctrine (the 'presumption' of undue influence, consequently, being explained as a garden-variety 'standardized inference' rather than a policy-inspired procedural rule directed to 'prophylaxis' rather than genuine proof), it is also rationalized very differently from its equitable sibling, unconscionable dealing, despite both doctrines continuing to be described as 'closely related'.[78] According to the majority of the judges in that case, undue influence is an exculpatory reason that responds to the claimant's serious inability to act as a 'free agent' when assenting to an impugned transaction, whereas unconscionable dealing is rationalized, as the High Court has confirmed on many previous occasions, as a defendant-sided, wrongful-conduct-based ground of relief.[79] Moreover, the liberal references by all of their Honours in *Thorne* to writings from the 'restitution' or 'autonomous unjust enrichment' branch of the legal academy,[80] including the American Law Institute's *Restatement of the Law*

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77 Cf JL Hill, 'Exploitation' (1994) 79 *Cornell Law Review* 631, 680 and 684ff; *Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35, 68 [161].

78 *Thorne* (2017) 91 ALJR 1260, 1272 [39] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

79 Ibid 1270 [32], 1271 [34]–[35], 1272 [39]–[40], 1276 [59], 1276–7 [62] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); 1281 [86], 1282 [91], 1282–3 [93] (Gordon J).

80 This includes: P Birks and N Y Chin, 'On the Nature of Undue Influence', in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) ch 3; W Swadling, 'Undue Influence: Lessons from America?' in C Mitchell and W Swadling (eds), *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart Publishing, 2013) 111.

*Third, Restitution and Unjust Enrichment*,[81] leaves us wondering whether other exculpatory categories, such as duress, mistake and innocent misrepresentation, might eventually encounter the same fate. Were that to happen on a grand scale, then it would certainly be arguable that the subject matter of 'contract vitiation' belongs not to 'contract law' at all, but rather to some standalone legal department designed to house all of the various reasons where the law might respond in the manner of disgorgement of an unjust gain.

That speculation aside, we presently find ourselves, in the wake of *Thorne*, perplexed and unable to explain to our students why, exactly, such a disjunctive rationalization between undue influence and unconscionable dealing is, or ought to be, a plausible version of the law in this area in this country. Certainly, the relevant judges in *Thorne* do not supply a credible reason for the differential treatment to which we can refer our learners; and as matters now stand, undue influence is rationalized very differently from prior formulations of the jurisdiction in Australia, including by the High Court itself (of which more shortly), not to mention current articulations by senior courts and judicial committees abroad.[82] Still, Gordon J in *Thorne* even went so far as to state that it 'may now be taken to be accepted in Australia' that the two doctrines are separated by reason of the different foci of their respective inquiries,[83] citing in support of that proposition a nineteenth-century English case, *Tate v Williamson*,[84] and a 1995 article by unjust enrichment scholars Birks and Chin,[85] who in turn relied (in part) on obiter dicta of two former members of the High Court, Mason J and Deane J, in *Amadio* in 1983. The relevant passages from their Honours' judgments, respectively, are these:

> [Under the doctrine of undue influence] … the will of the innocent party is not independent and voluntary because it is overborne. [Under the doctrine of unconscionable dealing] … the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is

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81 American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011). In Nettle J's judgment, several references are made to J Edelman and E Bant, *Unjust Enrichment* (2nd ed, Hart Publishing, 2016). One of those authors, of course, sat as a member of the plurality in *Thorne*.

82 Certainly, in the United Kingdom, undue influence is unambiguously rationalized as responding to an improper or acceptable use of influence affecting the transactional consent of the relief-seeking party, and not simply in terms of a defect transactional consent *simpliciter*. See, eg, *Etridge* [2002] 2 AC 773, 795 [7], [8], [10], 796 [13], 800 [32] (Lord Nicholls), 816 [93] (Lord Clyde), 822 [107] (Lord Hobhouse), 842 [159]–[160] (Lord Scott). Compare also *R v Attorney-General for England and Wales* [2004] 2 NZLR 577, 584 [21]; *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51 (30 June 2003) [29]. It is perhaps notable that the Court of Appeal of the Republic of Singapore recently refused to endorse the impaired-consent approach to undue influence, rejecting Birks and Chin, above n 80, Mason J in *Amadio*, and *Thorne* on this point: *BOM v BOK* [2018] SGCA 83 (29 November 2018) [151] and [171].

83 *Thorne* (2017) 91 ALJR 1260, 1281 [86].

84 (1866) LR 2 Ch App 55, 61.

85 Birks and Chin, above n 80, 58–9

> placed and of the other party unconscientiously taking advantage of that position.[86]
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> Undue influence … looks to the quality of the consent or assent of the weaker party … Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.[87]

Does *Tate v Williamson*, and the above-quoted dicta, provide credible precedential support for the divergent rationalizations of undue influence and unconscionable dealing endorsed by both the plurality and Gordon J in *Thorne*? Indeed, one of the seminar exercises that we set for students in our Principles of Contractual Liability course before *Thorne* was decided was to ask them to 'critically discuss' the above-quoted dicta from Mason J's and Deane J's judgments in *Amadio*. The hope, of course, was that our students would, in the light of the case law we had been considering to that point in the course, see that the distinction drawn, if it is to be capable of withstanding analysis, is in need of much greater exposition than their Honours offered in that case. In fact, the *Amadio* dicta are endorsed in *Thorne* quite without reflection or dissective analysis, including of the antecedent authorities upon which the propounded distinction purports to rely. In that regard, the precedential foundations of Mason J's and Deane J's dicta are, with respect, less than compelling. First, Mason J cited no authority at all for the contrast that he drew in the first passage quoted above; it is simply asserted. Deane J, however, did enlist authorities in support of a consent-focused conception of undue influence: *Union Bank of Australia Ltd v Whitelaw*,[88] *Watkins v Combes*[89] and *Morrison v Coast Finance Ltd*.[90] But even a cursory survey of those authorities at the pinpoints provided by his Honour discloses a rather different notionalization of undue influence than the subject dicta would suggest. To be sure, in *Whitelaw*, at the page referenced by Deane J, Hodge J defines 'undue influence' as 'the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free voluntary acts'.[91] And in Watkins, at the pages referenced, *Isaacs J mainly quotes from* Lord Shaw in *Poosathurai v Kannappa Chettiar*,[92] but nothing that Lord Shaw said in that case seems to reinforce the distinction that Deane J advances in *Amadio*; on the contrary, his Lordship there speaks of it having to 'be established that the person in a position of domination *has used that position* to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid', and that a burden of

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86 *Amadio* (1983) 151 CLR 447, 461.
87 Ibid 474 (citations omitted).
88 [1906] VLR 711, 720 (Hodge J).
89 (1922) 30 CLR 180, 193–4 (Isaacs J).
90 (1965) 55 DLR (2d) 710, 713 (Davey JA).
91 [1906] VLR 711, 720 (emphasis added).
92 (1919) LR 47 IA 1; 43 Madras 546.

proof is cast upon the ascendant party to show 'that *no domination was practised* so as to bring about the transaction'.[93] These, we respectfully suggest, are not the locutions of a purely consent-focused conception of undue influence. Granted, the third case that Deane J cited in his dicta in *Amadio — Morrison v Coast Finance Ltd* — does support the distinction drawn; but there Davey JA, at the page referenced, merely asserts the contrast between 'undue influence' and 'unconscionable bargain' as an unsubstantiated and undeveloped obiter remark, and even in Canada it has been acknowledged in the academic literature that 'there is little evidence in the decided cases to support it'.[94]

As for Gordon J's reliance on *Tate v Williamson* as evidence in support of the acceptance of a plaintiff-sided conception of undue influence in Australia, this too seems problematic. Not only is *Tate* not a domestic authority, it is also a classic 'fiduciary' case (as was the English law of undue influence at that time). With respect, this makes it difficult to see how what was said in *Tate* could possibly sustain a purely consent-oriented account of the equitable jurisdiction as expounded in *Thorne*. As Lord Chelmsford LC famously stated in *Tate* (on the page referenced by Gordon J in *Thorne*):

> The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, *and this confidence is abused*, or the *influence is exerted to obtain an advantage at the expense of the confiding party*, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.[95]

This is, of course, of a piece with the account of Class 2, 'relational' undue influence presented and applied by the majority of their Honours of the High Court in *Johnson v Buttress*, which, arguably, contained the leading pronouncements on the equitable jurisdiction to relieve against an executory or concluded transaction on the ground of 'undue influence' as it was expounded in this country immediately prior to *Thorne*. And yet for some reason not disclosed in *Thorne* itself, the policy-driven approach of the *majority* of the judges to undue influence in *Johnson*, directed (in Lathan CJ's words) 'to preventing the *possible abuse* of relations of trust

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93 Emphasis added.

94 Robert W Clark, *Inequality of Bargaining Power: Judicial Intervention in Improvident and Unconscionable Bargains* (Carswell, 1987) 110. Still, the distinction was repeated (more or less) by La Forest J (obiter) in *Hodgkinson v Simms* [1994] 3 SCR 377, 406: 'undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction'.

95 (1866) LR 2 Ch App 55, 61 (emphasis added).

and confidence',[96] is simply bypassed without mention. We sense that *Thorne* represents a departure from *Johnson* without purporting to be an overruling; on the contrary, throughout the judgments of both the plurality and Gordon J in *Thorne*, lip serve is paid to *Johnson* as if the current description of the law continues to be based on that earlier precedent. However, that Dixon J (Evatt J agreeing) in *Johnson* described the basis of the equitable jurisdiction to be 'the prevention of an *unconscientious use* of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter'[97] seems rather discordant with an account of undue influence that emphasizes *only* the quality of the 'will' or the freedom of the 'agency' brought to the impugned transaction by the claimant, as the majority of the judges do in *Thorne*.

Also bypassed without specific mention in *Thorne* are the dicta of other members of the High Court on previous occasions (not to mention of senior courts overseas[98]) that belie the dicta of Mason J and Deane J in *Amadio*; and yet, Mason J's and Deane J's dicta seem to prevail in *Thorne* despite their precedential frailty. For example, in *Louth v Diprose*,[99] Brennan J, after quoting the relevant passage from Deane J's judgment in *Amadio* (above), stated that '[a]lthough the two jurisdictions are distinct, they both depend upon the effect of influence (presumed or actual) *improperly brought to bear* by one party to a relationship on the mind of the other whereby the other disposes of his property', and that '[g]ifts obtained by unconscionable conduct and gifts obtained by undue influence *are set aside by equity on substantially the same basis*.'[100] And in *Tanwar Enterprises Pty Ltd v Cauchi*,[101] Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ described the 'governing equitable principle' that unites cases of both 'alleged undue influence and catching bargains' as one that is 'concerned with the *production by malign means* of an intention to act'[102] (although this may well overstate the level culpability actually required on the part of an undue influencer, as transaction-avoiding undue influence may be well-intentioned in fact).

Finally, if the *Thorne* majority is right about the plaintiff-sided personality of undue influence, then why does such a rationalization not also follow for unconscionable dealing (except, of course, that the High

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96 *Johnson v Buttress* (1936) 56 CLR 113, 123 (emphasis added).

97 *Johnson v Buttress* (1936) 56 CLR 113, 134 (emphasis added). In the course of his judgment in *Johnson*, McTiernan J (at 143) approved of Sir George Turner V-C's account of undue influence in *Billage v Southee* (1852) 9 Hare 534, 540; 68 ER 623, namely, that '[t]he jurisdiction is founded on the principle of *correcting abuses of confidence*' (emphasis added).

98 See above n 82.

99 (1992) 175 CLR 621.

100 Ibid 627 (emphasis added). Academic opinion around the same period in Australia also tended to discount the persuasive power of Mason J's and Deane J's dicta in *Amadio*. See, eg, IJ Hardingham, 'Unconscionable Dealing' in PD Finn (ed), *Essays in Equity* (Law Book Company, 1985) 18; AJ Duggan, 'Unconscientious Dealing' in P Parkinson (ed), *The Principles of Equity* (Law Book Company, 1996) 381–2, 417–18 (arguing that the distinction advanced by Mason J and Deane J in *Amadio* is 'unconvincing' and 'strained').

101 (2003) 217 CLR 315.

102 Ibid 325 [23] (emphasis added).

Court has been portraying that exculpatory doctrine as conduct-centred for decades)? At one point in the plurality's judgment in *Thorne*[103] their Honours suggest that a party who is subject to 'undue influence' (in the consent-oriented way perceived by their Honours) is *also*, for that reason, in a position of 'special disadvantage' for the purposes of the separate unconscionable dealing jurisdiction (the complaint under that jurisdiction only being realized if an act of exploitation should actually follow upon the non-disadvantaged party becoming sufficiently aware of the opportunity (for interpersonal exploitation) that his or her special position of advantage afforded). But if 'undue influence' is sufficient to constitute 'special disadvantage', and thus to vitiate a transaction, why does it not follow that proof of 'special disadvantage' also suffices to vitiate a transaction? Since 'special disadvantage' is itself defined by reference of a legal threshold of serious impairment of personal autonomy — that 'the disabling condition or circumstance is one *which seriously affects the ability of the innocent party to make a judgment as to his own best interests*'[104] — then why does it not logically follow that special disadvantage should, like consent impaired by reason of undue influence, equally suffice to warrant correction of a transaction that can be shown to have resulted from the mere existence of an autonomy-impairing special condition or circumstance?

Perhaps reasons are available in answer to these questions, although none are supplied in *Thorne* itself. It is true that unlike cases in which unconscionable dealing is established, relief may be granted in 'Class 2' undue influence cases without any direct proof of unconscientious use. But it is important to pay attention to the rationale for dispensing with a requirement of direct proof. The historical basis of relief in Class 2 undue influence cases, as we have already argued, is a generic policy-based presumption that the influence of the ascendant party has been abused or misused: Class 2 undue influence actually regulates against the *mere risk* of a morally objectionable conduct and not the materialization of morally objectionable conduct itself. Moreover, if undue influence cannot be explained by reference to an unconscientious use of an advantageous bargaining position (or 'abuse of a dominant position', as it is sometimes expressed)[105], then why can unconscionable dealing not also be re-explained simply in terms of a 'non-voluntary transfer of value' warranting reversal on basic restitutionary or 'autonomous unjust enrichment'-style principles (as some within that school have been inclined to argue)?[106] For ourselves, from the standpoint of the liberal conception of contract at least,

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103 *Thorne* (2017) 91 ALJR 1260, 1272 [39]–[40]. Deane J in *Amadio* (1983) 151 CLR 447, 474 is cited (*Thorne* (2017) 91 ALJR 1260, 1272 [39]) in support of this proposition, but nowhere does Deane J say this explicitly in the passage indicated.

104 *Amadio* (1983) 151 CLR 447, 462 (emphasis added).

105 Greig and Davis, above n 12, ch 16.

106 Hence Birks and Chin, above n 80, 89–91, were ambivalent about the defendant-sided nature of unconscionable dealing (or 'exploitation of personal disadvantage', as they called it). Birks himself eventually went on to roll unconscionable dealing into his strict-liability category of 'non-voluntary transfer': Peter Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria University Press, 2002) 48, 66–8.

and the intellectual and institutional forms of order that that conception presupposes, it is difficult to see how recognizing as 'exculpatory' mere states of affairs like 'excessive dependence', 'markedly sub-standard judgmental capacity', or 'undue influence' (*Thorne*-style) avoids ultimate collapse into a Denning-esque doctrine of 'inequality of bargaining power' and, ultimately, an instrument of distributive justice. We do not deny that inequality of bargaining power is a legitimate concern; interference with transactions for that reason may well be a legitimate option available to parliaments in the enactment of consumer protection legislation (say). We doubt, however, that it would be an appropriate standalone doctrine for Her Majesty's judicial officers to adopt, regardless of their seniority, in the administration and development of the unwritten law of Australia.

## VI Conclusion: The Way Forward?

One of the key responsibilities of a law teacher is to create opportunities for his or her learners to effectively organize and apply conceptual knowledge within the particular legal area under study. The immediate challenge posed by the High Court's recent decision in *Thorne* to the authors' prior attempt, for teaching purposes, to arrange and present the exculpatory doctrines of (or relating to) contract law is whether that attempt should now be abandoned or modified in the light of what was said in that case about significant 'vitiating factors' of common law and equity. It is not, of course, possible simply to ignore the decision, no matter how much one may find aspects of it to be precedentially deficient and unhelpful to the orderly development of the law. The highest court in the land has spoken, and the law of undue influence (especially) in Australia is now as it is described in the relevant judgments in *Thorne*, which must be respected. Students must, therefore, be made aware of the decision.

But the fact remains that many aspects of the majority judgments in *Thorne* are difficult to comprehend and to accept, for both teacher and learner alike. In particular, unless the disjunctive rationalizations of undue influence and unconscionable dealing necessitated by those judgments can be adequately explained and supported by credible reasons, the law in this area now presents, as least to our minds, as unprincipled. Also, given that *Johnson v Buttress* was not overruled in *Thorne*, it is, at least on our reading of the respective authorities, impossible to reconcile, in a credible manner, the later articulations of the law relating to undue influence in *Thorne* with the earlier exposition of the equitable jurisdiction by the majority of the members of the High Court in *Johnson*. And so, rather than attempting the impossible, and potentially abandoning (or significantly modifying) the prior design decisions made in our Principles of Contractual Liability course, our approach going forward will be to use the *Thorne* decision as what educationalists sometimes call a 'teachable moment' [107] — an opportunity in the natural development of the law student toward attainment of the capacity to evaluate the validity of ideas, or to make

[107] Robert Havighurst, *Human Development and Education* (Longmans, Green, 1952) 7.

rational and informed value judgements based on internal evidence and external criteria, and to demonstrate as much in classroom interaction and assessment tasks.[108] Our role, particularly as students begin to mature in their ability to manage their own learning, is to present the law as it is and to assist the learner not only to make sense of what has been presented to him or her in classroom discussions and accompanying readings, but to also hold an educated view about the state of law as he or she finds it. This is not, of course, to say that our students must agree with our personal assessments of the law when they are proffered (as they sometimes are) — the aim here is to teach law students *how* to think, not *what* to think — but likewise they should begin to become comfortable with the idea that not even the highest court in the land is beyond their respectful critical reflections.

[108] See generally Lorin W Anderson and David R Krathwohl (eds), *A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom's Taxonomy of Educational Objectives* (Allyn and Bacon, 2001).