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Defendant-sided unjust factors

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This paper will examine the structure of the defendant-sided unjust factors, by which I mean duress and undue influence. The paper first argues that undue influence is based on abuse of deferential trust placed in the defendant and duress on an illegitimate threat leading to the claimant's lack of consent. The paper distinguishes undue influence from the unconscionable bargains doctrine. The paper then models the effect of that on the claimant's intentional agency by reference to Michael Bratman's influential theory of intention. It suggests that while mistake can be modelled by way of the failure of a condition on his intention, meaning that the claimant's intention does not cover the facts as they actually turn out to be, defendant-sided factors are based on the defendant's having improperly inveigled himself into the claimant's practical reasoning. It suggests that this happens either by way of the defendant's illegitimate structuring of the claimant's choice or by way of the claimant's deferring his judgment to that of the defendant. The claimant's intentions have, in philosophical language, agential authority, but the claimant was 'in the grip of a norm'; the essay explores what this concept might be.

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INTRODUCTION

This paper models how duress and undue influence as vitiating factors in contract and unjust enrichment affect the structure of the claimant's intentional agency. Peter Birks, before his conversion to a legal grounds approach, coined the phrase 'defendant-sided unjust factors' to refer to these actions,[1] because the defendant needs to do something to, for example, influence the claimant. Over the course of 30 years, Michael Bratman has built up a philosophical theory of how intention works and how we as agents go about planning what we do and why, and it has proven both prominent and highly influential in the philosophy of action. This paper therefore seeks to model the effect of duress and undue influence on the basis of his theory. That theory is conceptual and analytical rather than justificatory, so we assume rather than prove that there is a convincing theoretical rationale for reversing a transaction where our autonomous agency is impaired.

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1. PBH Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, rev edn, 1989) ch 5.

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In a previous paper, to which this is intended to be a companion, I relied on Michael Bratman's views in an effort to model the structure of both the failure of consideration claim and the mistake claim in terms of how the claimant's intentional agency is affected. These claims might be referred to as 'claimant-sided' because, for example, to recover a mistaken payment requires nothing to be proven about the defendant except that he was the payee. Essentially, I argued that both claims are dependent on an unfulfilled condition to either a collective intention (failure of consideration) or individual intention (mistake).[2] The model I developed is consistent with the view, adopted both here and in the earlier essay, that the reason why we give relief in such cases is that we would otherwise – in Aruna Nair's language – not be respecting the payor as a 'self-legislating actor' following his own 'rationally determined norms'.[3] One of those norms is that I pay what I owe, but by leaving the mistaken payment in, for instance, the payee's hands, the law leaves me in effect in the position of paying what I do not owe. My intention does not cover the case as it actually turned out to be. In this paper, I claim that the defendant-sided unjust factors cause the payor not to follow his own rationally determined norms, because he is acting, as we see, 'in the grip of a norm'; there are problems in the way in which the payor decides on what to do, which are caused by the defendant's actions.

In the first section, we examine the different claims in doctrinal terms. We adopt a doctrinal explanation of the claims in terms of illegitimate pressure and lack of practical choice in the case of duress, and abuse of deferential trust in the case of undue influence. In neither action is wrongdoing required. The lack of clarity, particularly with respect to whether undue influence is based on a fiduciary trust rationale looking at the quality of the claimant's consent or pure wrongful exploitation of power, justifies an extended discussion. This is important because if undue influence, for instance, is better justified as wrongdoing, the model developed in the second half of the paper is unhelpful. That model examines how the claimant's agency is affected. If, however, undue influence is premised on wrongdoing, the claimant's agency is not the focus of the action. The second section models the claims' operation, drawing on the philosophy of action and the metaphysics of agency and gets us past old debates about whether we 'really' consent. When, after all, I pay under pressure of a threat to kill, it is common to say that I really do consent. Both causes of action can be conceptually modelled in terms of problems in end-setting by the claimant; the claimant acts on the basis of attenuated reasoning about what to do, which does not, because of the defendant's actions, take into account all the appropriate reasons for action. What makes the two actions different is the differing way in which the defendant's actions cause this to occur.

1. TWO DEFENDANT-SIDED CLAIMS

The two claims we examine, as stated earlier, are duress and undue influence. Others would include unconscionable bargains; this is largely omitted here because the doctrine has not taken deep root in England, where it is rarely relied on and limited

2. D Sheehan 'Mistake, failure of consideration and the planning theory of intention' (2015) 28 Can J L & Juris 155; for an explanation of why analysing unjust enrichment actions in terms of Bratman's theory is useful, see at 155–156. See also C Webb 'Intention, mistakes and resulting trusts' in C Mitchell (ed) *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010) p 315.

3. A Nair '"Mistakes of law" and legal reasoning: interpreting *Kleinwort Benson v Lincoln City Council*' in R Chambers, C Mitchell and J Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) p 373.

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to cases of morally reprehensible conduct. In Australia, it has been encouraged by legislation such as s 20 Australian Consumer Law, but may nonetheless be in retreat in that jurisdiction.[4] We divide this section into different subsections. The first examines how undue influence works doctrinally before examining its rationale, and in particular the relationship between presumed undue influence cases and fiduciary duties, and between undue influence and unconscionable dealing, which is complicated due to uncertainty as to the effects of *RBS v Etridge* (*no 2*).[5] The second subsection examines duress.

(a) Undue influence

Birks and Chin argue that undue influence is concerned with impaired consent and not what they call 'wicked exploitation'.[6] This dichotomy is misleading; the defendant-sided cases such as undue influence are concerned with both. Many undue influence cases also involve three parties, either because A has unduly influenced B to make a transfer or provide a benefit to C or because B transfers to A, who then transfers to C.[7] Those cases are very frequent and often involve a family member – usually the husband or male partner – influencing another family member who subsequently wishes to resist enforcement of a mortgage or guarantee by the third-party bank. They concern two problems: first, what counts as undue influence; but secondly, how C is affected by A's exercise of his influence, and what degree of notice C must have of that influence to be precluded from enforcing his rights. While some notice is required so as to make sure that banks are not unduly affected by the dynamics of the relationship between A and B and thereby potentially deterred from lending, it says nothing about the nature of undue influence, which is the primary focus of the paper.

We are, however, concerned to disentangle the case-law explaining the doctrine's operation, and how it should be distinguished from similar and related doctrines. This is important because traditionally we have divided undue influence into two categories – actual and presumed undue influence – derived from *Allcard v Skinner*.[8] As Spark points out, however, after the centrally important decision in *RBS v Etridge* (*no 2*), they are both based on the same facts;[9] *Etridge*, it is worth pointing out, is a case (or several conjoined cases) concerned with the three-party structure raised above, but it is also the leading case on what counts as undue influence as between A and B. We argue that both categories of undue influence are based on protecting a trust relationship. The relationship between the parties is vital, as we see in the second subsection below, where we

4. D Capper 'The unconscionable bargain in the common law world' (2010) 126 Law Q Rev 403. On the requirements in Australia, see *Kakavas v Crown Melbourne Pty Ltd* [2013] HCA 25, (2013) 87 ALJR 708; R Bigwood 'Still curbing unconscionability: *Kakavas* in the High Court of Australia' (2013) 37 Melbourne U L Rev 463.

5. [2001] UKHL 44, [2002] 2 AC 776.

6. PBH Birks and N Chin 'On the nature of undue influence' in J Beatson (ed) *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1991) p 57.

7. For discussion, see P Ridge 'Third party volunteers and undue influence' (2014) 130 Law Q Rev 112.

8. (1876) 36 ChD 145.

9. G Spark *Vitiation of Contracts* (Cambridge: Cambridge University Press, 2013) p 251; C Mitchell et al (eds) *Goff and Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 8th edn, 2011) paras 11.06–11.07 (hereinafter *Goff and Jones*).

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examine the dividing line with unconscionable dealings. In the first, we disentangle the different categorisations of undue influence as a means to allow us to move forward, but even here it is hard to avoid references to different types of relationships.

(I) UNDUE INFLUENCE BASICS

Actual undue influence requires the complainant to prove that the defendant unduly exercised his influence. Lindley LJ in *Allcard v Skinner* talked of 'unfair and improper conduct … coercion … cheating, and generally, though not always, some personal advantage obtained'.[10] Historically and by contrast, the rationale in presumed undue influence cases was the protection of fiduciary relationships.[11] There are, in the modern day, two factors that must be proven to raise the presumption; Lord Nicholls said in *RBS v Etridge* (*no 2*)[12] that the complainant must have reposed trust and confidence in the other party and the transaction must be not readily explicable by the parties' relationship.[13] The 'not readily explicable' criterion replaces the former criterion that the transaction be of manifest disadvantage to the claimant, a criterion that had already been removed prior to *Etridge* in actual undue influence cases.[14]

Etridge also led to doubt being cast on the typology of presumed undue influence. *BCCI v Aboody*[15] had previously provided a list of relationships presumed to generate a capacity to influence – class 2A cases. The court in that case also held that the claimant might prove that the capacity to influence existed outside those cases – class 2B cases. Class 2A cases include, for example, doctor–patient,[16] parent–child[17] and solicitor–client.[18] Class 1 cases were cases of actual undue influence. The list of relationships in class 2A, as Lord Chelmsford said in *Tate v Williamson*,[19] is not closed. In *Etridge*, Lord Hobhouse said that the class 2B presumption was not a useful forensic tool;[20] Lord Scott argued that while 2A was useful in identifying particular relationships where the presumption of an ability to influence arose, 2B does no more than recognise that evidence of an ability to influence or dominate shifts the burden of proof to the defendant to show that he did not exercise influence.[21] The shift in the burden of proof remains important, though. As Mujih explains,[22] 2A and 2B cases as Lord Scott describes them are logically distinct. In that sense the distinction remains, and indeed the House provided no decisive authority for the abandonment of the 2A/2B distinction;[23] it is the distinction between classes 1 and 2B that will blur. Essentially, in class 1 the

10. (1887) 36 Ch D 154 (CA) 181.
11. *Re Coomber* [1911] 1. Ch 723; *Tufton v Sperni* [1952] 2 TLR 513; *Johnson v Buttress* (1936) 56 CLR 113.
12. [2001] UKHL 44; [2002] 1 AC 773 at 798.
13. [2002] 1 AC 773 at 796.
14. *CIBC v Pitt* [1994] 1 AC 200.
15. [1990] 1 QB 923.
16. *Re CMG* [1970] Ch 574.
17. *Lancashire Loans Ltd v Black* [1934] 1 KB 380, but not (always) the other way round; see *Hogg v Hogg* [2007] EWHC 2240.
18. *Markham v Karsten* [2007] EWHC 1509.
19. (1866) 2 Ch App 55.
20. [2001] UKHL 44, [2002] 2 AC 773 at 822.
21. Ibid, at 842–843.
22. E Mujih 'Over ten years after *RBS* v *Etridge* (*no 2*): is the law of undue influence in guarantee cases any clearer?' (2013) 27 Int'l Company & Com L Rev 57 at 60–61.
23. R Bigwood *Exploitative Contracts* (Oxford: Oxford University Press, 2003) p 387.

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claimant must prove the abuse of a relationship. In class 2B, he proves a propensity to influence and the burden of proof shifts to the defendant to show that it was not exercised. Class 2A cases involve an additional presumption of something proven in 2B cases, that being the presence of a capacity to influence.[24] Lord Nicholls put it[25] that the law adopts a protective attitude towards certain types of relationship and the complainant need not therefore prove that he actually reposed trust and confidence in the other party. Lord Nicholls denied that the 2A presumption was rebuttable.[26]

The need for the transaction to be 'not readily explicable' is explained as raising a presumption that the influence was exercised; it would be absurd if every gift by a child to a parent were deemed suspect unless proven otherwise.[27] However, even substantively fair transactions should be able to be rescinded for undue influence if it emerges from the scope of the party's influence.[28] Typically, however, as Lord Nicholls said, presumed undue influence cases occur when one party puts trust in another to look after his interests and the latter in fact prefers his own interests,[29] which will usually lead to an unfair outcome.[30]

For Chen-Wishart, it is all to do with inferences from the evidence.[31] This is strengthened by the comments of Lord Scott in the decision of *Li Sau Ying v Bank of China*.[32] For him, the message from *Etridge* was that concentration on the presumption was liable to send parties astray and distract from 'whether the evidence justifies a conclusion that the impugned transaction was procured by undue influence'. In all cases, Chen-Wishart argues, the court will look at the motivation of the claimant, the relationship between the parties and whether there was independent advice.[33] The importance of such advice is that it may indicate that influence was not exercised. Chen-Wishart therefore holds clearly to the relational justification for undue influence. What is important is that the defendant has used the relationship improperly to obtain something he should not have. The relationship helps distinguish undue influence from unconscionability, where the defendant takes advantage of a special disability vis-à-vis himself of the claimant, but where the language of morally reprehensible behaviour and predation would make it a wrong.[34] It is to this that we now turn.

24. Ibid, p 431.
25. [2001] UKHL 44, [2002] 2 AC 773 at 797.
26. Ibid, at 780; see, in favour of a rebuttable presumption, *Goff and Jones*, above n 9, para 11.46.
27. [2001] UKHL 44, [2002] 2 AC 773 at 798–800.
28. Bigwood, above n 23, p 455.
29. *RBS* v *Etridge* (*no 2*) [2001] UKHL 44, [2002] 2 AC 773 at 795.
30. It may be that the fact a transaction is substantively unfair can provide evidence that there was a procedural problem with the agreement.
31. M Chen-Wishart 'Undue influence: beyond impaired consent and wrongdoing towards a relational analysis' in A Rodgers (ed) *Mapping the Law* (Oxford: Oxford University Press, 2007) p 201 at pp 220–222; P Ridge 'Undue influence and wills' (2004) 120 Law Q Rev 617 at 618–619.
32. [2004] HKCFA 80, (2004) 7 HKCFAR 579 at [30].
33. M Chen-Wishart 'Undue influence: vindicating relationships of influence' [2006] 59(1) Current Legal Probs 231 at 264.
34. Bigwood, above n 23, pp 398–399. For Swain, it is both defendant- and plaintiff-sided: W Swain 'The unconscionable dealing doctrine: in retreat?' (2014) 31 J Cont L 255.

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(II) DISTINCTION FROM UNCONSCIONABLE DEALING

The important question to ask in determining the rationale for undue influence is whether it is concerned with the claimant's consent or the defendant's conduct. For Enonchong, it is about wrongdoing;[35] for Birks and Chin, it is about impairment of consent. The cases are also split. In *Hammond v Osborn*,[36] it was said the defendant need not have been at fault. Osborn helped an increasingly frail Hammond out over 18 months. He claimed that to thank him, Hammond had said to sell £300,000 worth of investments and keep the proceeds. That left Hammond with a large tax bill and too little to live on, so the presumption of undue influence arose.[37] In *RBS v Chandra*,[38] however, fault does appear to have been needed. Patten LJ talks of unconscionability, for the defendant to have notice of the conduct and that the cases were 'replete with references to abuse of trust, exploitation and domination of the injured party. All of these characterise some conscious act of wrong-doing on the fiduciary's part.'[39]

Chen-Wishart has rightly argued that the debate on undue influence has ossified into a bipolar one, but that any one-dimensional view of undue influence must fail.[40] She suggests that both sides of the argument are in one way or another concerned with the quality of the complainant's consent and that there are hints of this in the case-law. In *Contractors Bonding v Snee*,[41] Richardson J said that undue influence 'is directed at conduct within a relationship which justifies the conclusion that the disposition or agreement was not the result of a free exercise of the disponer's will. The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another from victimisation.'[42]

Both Chen-Wishart and Bigwood[43] correctly find the key in fiduciary law, and references to the fiduciary-like nature of liability can be found in some of the wrongdoing cases such as *Chandra*. Confusion abounds, however, and in part this is because of the current debate as to the shape of fiduciary liability. Leaving modern debate as to the nature of fiduciary liability to one side, it is nowadays unusual in England to equate relationships of influence with fiduciary relationships. In line with this, Enonchong[44] argues that to place the rationale here is to misunderstand the law, saying they are quite different ideas and relationships. For Enonchong, it demonstrates confusion with the

35. N Enonchong *Duress, Undue Influence and Unconscionable Dealings* (London: Sweet & Maxwell, 2006) para 9.005; *Goff and Jones*, above n 9, para 11.09 describes this as the dominant view.
36. [2002] EWCA Civ 885; Chen-Wishart, above n 33, at 235.
37. *Goff and Jones*, above n 9, para 11.14.
38. [2011] EWCA Civ 192.
39. Ibid, at [26–27]; a discussion of the split in case-law between 'wrongful' and 'non-wrongful' or 'impaired consent' explanations of undue influence can be found in J Elvin 'The purpose of the doctrine of presumed undue influence' in P Giliker (ed) *Re-examining Contract and Unjust Enrichment* (Leiden: Brill, 2007) p 231.
40. Chen-Wishart, above n 31, pp 202–203.
41. [1992] 2 NZLR 157.
42. Ibid, at 165; B Allan 'Trust me: I'm your husband: undue influence and *Royal Bank of Scotland v Etridge (no 2)*' (2006) 11 Otago L Rev 247 at 251.
43. Bigwood, above n 23, p 380; see also *Johnson v Buttress* (1936) 56 CLR 113 at 135, per Dixon J; *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113; *Haskew v Equity Trustees* (1919) 27 CLR 287; and M Haughey 'The fiduciary explanation for presumed undue influence cases' (2012) 50 Alberta L Rev 129. In England, see Re Coomber [1911] 1 Ch 723; Re Craig [1971] Ch 9511.
44. Enonchong, above n 35, paras 10.001, 14.054.

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doctrine of abuse of confidence.[45] That doctrine states that in the absence of competent independent advice, a transaction between a principal and fiduciary cannot be upheld unless the latter has disclosed all relevant information and that the transaction was a fair one.[46] However, as Enonchong describes it, it seems an amalgam of the fair dealing principle and duty–duty or client–client[47] conflicts; it is doubtful that a standalone doctrine can be found separate from these well-recognised fiduciary doctrines; certainly it is not much discussed in the literature under this label. In any case, abuse of confidence is not inconsistent with the proposition that the rationales of fiduciary relations and relations of influence – although different – are branches of the same underlying concern.

In Flannigan's view, fiduciary duties are imposed to maintain the integrity of trusting relationships.[48] He and others, such as Bigwood, who draw on this fiduciary rationale distinguish between vigilant trust and deferential trust. The distinction fits well. Vigilant trust refers to the fact that the law keeps watch to ensure that the management of financial affairs, for example, by the fiduciary is done properly and removes incentives to behave wrongly. Deferential trust refers to cases where the complainant defers in some way to the judgment of the defendant rather than making his own mind up.[49] For Chen-Wishart what happens – chiming well with the basic idea of deferential trust – is that the complainant lets her guard down and trusts the other to look after her interests,[50] and this affects the quality of her consent. For example, in *Thompson v Foy*[51] it was said that the critical question was whether the influence had affected the complainant's free volition, and in *Drew v Daniel* whether the donor's will was the 'offspring of someone else's volition' or where the party's will was overborne.[52] This is reminiscent of what Bratman calls 'acting in the grip of a norm',[53] to which we will have recourse in the next section. None of this, however, necessarily implies wrongdoing. In *Allcard v Skinner*, the influence that the Mother Superior had over the nuns was deemed problematic and easily abused, but nobody ever suggested that she acted wrongfully. The single overriding idea, therefore, is that the integrity of trusting relationships be maintained.[54] The relationship carries with it the potential for intentionally or otherwise diverting assets,[55] or as Flannigan calls it, the potential for abusing a limited access arrangement.[56]

45. Ibid, para 14.013; *Goff and Jones*, above n 9, paras 11.29–11.30 arguing that presumed undue influence is different from self-dealing. *RBS* v *Etridge* (*no 2*) [2001] UKHL 44, [2002] 2 AC 773 at 820–822 includes a discussion of abuse of confidence.

46. *Demerara Bauxite Co. Ltd v Hubbard* [1923] AC 673, PC; CIBC v Pitt [1994] 1 AC 200 (HL) at 209, per Lord Browne-Wilkinson.

47. See *Moody v Cox* [1917] 2 Ch 71.

48. R Flannigan 'The fiduciary obligation' (1989) 9 Oxford J Legal Stud 285 at 297.

49. Ibid, at 286–287; Bigwood, above n 23, pp 410–423.

50. Chen-Wishart, above n 33, at 253.

51. [2010] 1 P&CR 16.

52. [2005] EWCA Civ 507; see also *de Wind v Wedge* [2008] EWHC 514; *Bridgewater v Leahy* (1998) 194 CLR 457 (HCA) 470; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127; *Union Fidelity Trustee Co. of Australia v Gibson* [1971] VR 573; *Dunbar Bank v Nadeem* [1998] 1 All ER 876; *Morley v Loughnan* [1893] 1 Ch 723; and *Bank of Montreal v Stuart* [1911] AC 120. On overborne wills, see *ANZ Banking Group v Alirezai* [2004] QCA 6 at [100], per Wilson J.

53. See eg M Bratman 'Anchors for deliberation' in C Lumer and S Nannini (eds) *Intentionality, Deliberation and Autonomy* (Aldershot: Ashgate, 2007) p 187.

54. Flannigan, above n 48, at 297.

55. Ibid, at 296; Bigwood, above n 23, pp 407–408.

56. R Flannigan 'The core nature of fiduciary accountability' [2009] 3 NZ L Rev 375 at 402.

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Bigwood, however, argues that *RBS v Etridge* (*no 2*) in fact eviscerated the fiduciary rationale and began a process of integration with other exculpatory factors,[57] such that it is now difficult to distinguish them. For Bigwood, the extension of undue influence in *Etridge* to wider arm's length power–vulnerability cases starts a process – illegitimate in his view – of merger with unconscionable bargains doctrine.[58] Maddaugh and McCamus, though, point to *Etridge* as the major support for their claim of a fiduciary link,[59] and it is worth noting that the link with abuse of confidence or other fiduciary doctrines made in *Etridge* rather supports this. The differences in academic opinion are reflected in *Etridge* itself. Lord Nicholls talks of the need for the defendant to have preferred his own interests to those of the complainant,[60] a very fiduciary way of putting the matter. He talks of abuse of confidence and of relationships of trust and confidence,[61] the latter again a very fiduciary way of putting things, and which remains the most commonly applied test for the presence of a relationship of influence. Lord Hobhouse even talks of 'fiduciary or analogous' relationships.[62] Despite all this 'fiduciary-like' or 'fiduciary-lite' talk, Lord Nicholls argues – with respect, wrongly - that there is no single touchstone of liability to undue influence.[63] Lord Nicholls' explanation of undue influence veers between mutually exclusive justifications in that he extends the scope of relational undue influence to include the power–vulnerability and wrongful exploitation cases,[64] which cannot be explained in the same way. Such cases are better dealt with by the doctrine of unconscionable bargains – at least as understood in the Antipodes.[65]

In *Kakavas v Crown Melbourne Pty Ltd*,[66] Kakavas was a gambling addict and high roller who repeatedly visited the defendant casino and argued that the casino dealt with him unconscionably by preying on that addiction. The High Court of Australia elucidated the major components of the Australian unconscionable dealings doctrine. The High Court required a special disadvantage, and decided that a predilection for gambling alone was not such a disadvantage that a casino would be disentitled from taking advantage of, at least in the absence of other factors, perhaps obvious intoxication.[67] The court also required proof of a predatory state of mind, which entails knowledge of the weakness on the claimant's part. Mere inadvertence or heedlessness is insufficient.[68] This makes the doctrine, as understood in Australia, rather narrow. In

57. R Bigwood 'From *Morgan* to *Etridge*: tracing the (dis)integration of undue influence in the United Kingdom' in J Neyers et al (eds) *Exploring Contract Law* (Oxford: Hart Publishing, 2009) p 379.
58. Bigwood, above n 23, p 414.
59. PD Maddaugh and J McCamus *The Law of Restitution in Canada* (Toronto: Carswell, 2nd edn, 2004) para 26:400.
60. [2001] UKHL 44, [2002] 2 AC 773 at [9].
61. Ibid, at [10–11]; *Spong v Spong* (1914) 18 CLR 544; fiduciary duties are described in this way by Millett LJ in *Bristol & West BS v Mothew* [1996] 4 All ER 698, CA 711.
62. [2001] UKHL 44, [2002] 2 AC 773 at [104]; but see P Ridge 'Uncertainties surrounding undue influence: its formulation, application and relation to other doctrines' [2003] NZ L Rev 329 at 338.
63. [2001] UKHL 44, [2002] 2 AC 773 at [11].
64. Ibid, at [11].
65. R Bigwood 'Ill-gotten contracts in New Zealand: parting thoughts on duress, unconscionable dealing and undue influence: Kiwi style' (2011) 42 Victoria U Wellington L Rev 83 at 104.
66. [2013] HCA 25, (2013) 87 ALJR 708.
67. Ibid, at [30], [135].
68. Ibid, at [161].

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England, the advantage-taking must be such as to have been morally reprehensible, which is equally narrow in its terms.[69] It is also easily rationalised as wrongdoing,[70] and there are suggestions that damages (or equitable compensation) be available.[71] Bigwood rightly argues that those subject to undue influence are exposed to the defendant dominant party in a fundamentally different way than in unconscionability cases. Their decision making capacity is in part surrendered to the dominant party in a way that is not the case in the unconscionable dealing scenario.[72] For Bigwood, the objective of undue influence is focused on how the claimant's transactional assent was acquired within the context of a relationship;[73] it is relational undue influence, concerned with improper persuasion, and inimical to free agency in ways explored in the next section.[74] This is so in both classes of undue influence.[75] Exploitation of power vis-à-vis the defendant should be dealt with through a separate doctrine.

(b) Duress

There are three types of duress: duress to the person, where threats are made against the claimant or members of his family; duress to goods, where the threat is to damage property; and economic duress.[76] The crux of duress lies in one party making a threat,[77] inducing another with no practical alternative to manifest contractual assent.[78] The essential structural feature is that there is both a proposal prong and a choice prong. We take these in turn.

(I) PROPOSAL PRONG: ILLEGITIMACY

In economic duress, the need for illegitimate pressure was set out by *The Universe Sentinel*.[79] This was subsequently confirmed by *AG v R*, where the Privy Council decided that the illegitimacy of the pressure was one of two elements of duress,[80] the

69. Capper, above n 4, at 408–410; *Goff and Jones*, above n 9, paras 11.58–11.64; *Multiservice Bookbinding v Marden* [1979] Ch 84; *Alec Lobb Garages Ltd v Total Oil (GB) Ltd* [1983] 1 WLR 87.

70. See *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; *Bridgwater v Leahy* (1998) 194 CLR 457; J Edelman *Gain-Based Damages* (Oxford: Hart Publishing, 2002) pp 60–62.

71. *Boustany v Pigott* (1995) 69 P&CR 298 (PC); *Harrison v Schipp* [2001] NSWCA 13 at [97–101], [123], per Giles JA; Australian Consumer Law s 227, as enacted by Sch 2 Competition and Consumer Act 2010.

72. Bigwood, above n 65, at 114; in the transactional disadvantage cases (Birks, above n 1, pp 208–216), there may well be no surrender at all of decision-making capacity. Salvage cases (Birks, above n 1, pp 304–306) work on the same principle of a fair sum for salvage or rescue operations and courts will strike down exorbitant charges.

73. Bigwood, above n 23, p 382.

74. Ibid, p 374.

75. Ibid, p 389.

76. Enonchong, above n 35, ch 5.

77. But it need not be a threat; see *Borelli v Ting* [2010] UKPC 21, where there were no threats as such, but by opposing a scheme of arrangement to fund the company's liquidation, Ting left the liquidators no reasonable alternative but to accede to his demands. H Beale et al (eds) *Chitty on Contracts* (London: Sweet & Maxwell, 31st edn, 2012) para 7.130 (hereinafter *Chitty*).

78. *Universe Tankships Ltd v Monrovia* [1986] AC 366 (HL) 400; *Chitty*, above n 77, para 7.005.

79. [1983] 1 AC 366.

80. [2003] UKPC 22.

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other being compulsion of the will. There are two aspects of this prong – first the nature of the pressure and secondly the nature of the demand it supports. On the first it is clear that threats to do something illegal are always illegitimate. Threats to act lawfully may also be; blackmail, for instance, involves a threat to do a lawful thing. It is worth mentioning in this context that tortious wrongdoing is not necessary for there to be duress – although it may be present in many cases.[81] The controversy lies around threats to break a contract.[82] McKendrick and Bigwood say correctly that a threat to break a contract is always illegitimate, but others suggest that it must be in bad faith,[83] or that a threat made in the belief that it was commercially reasonable is not illegitimate.[84]

The question, Burrows argues, is whether the court should protect the old or the renegotiated bargain.[85] Spark argues that there is only one case that specifically holds that a threatened breach of contract is not necessarily illegitimate: *DSND Subsea Ltd v PGS Offshore Technology*.[86] PGS was awarded a contract to help develop an oilfield. Subsea work was subcontracted out to DSND. Disputes arose, with DSND being unwilling to engage in installation work until other related matters concerned with insurance, should something go wrong, were concluded. That refusal to carry out the installation, while a breach of contract, was not deemed by Dyson J to be illegitimate,[87] but the precedential value of the case is lessened by two factors. It was at first instance, but more importantly it was obiter, as Dyson J also held that there were reasonable alternatives open to PGS.[88] In other cases where there is a threatened breach of contract there has usually been liability.[89] For Spark, there may genuinely be cases where the contractor cannot perform, but where frustration is unavailable.[90] Halson has argued in the same vein that in cases of threats to break a contract are legitimate if the variation is reasonably related to the cost consequences to the performing party.[91] Both Spark's and Halson's points seem to confuse two different elements of duress. As a threat to break a contract always involves a threat to disregard the complainant's rights, it should always be seen as illegitimate. If not, contractual rights appear of lesser importance.

81. Ibid, at [16] (Lord Hoffmann); *The Universe Sentinel* [1983] 1 AC 366, where the action was not tortious because of the operation of the Trade Union and Labour Relations Act 1974; The Evia Luck [1992] 2 AC 152, where the action took place in Sweden and was not therefore actionable as a tort in England.

82. E McKendrick 'The further travails of duress' in A Burrows and A Rodger (eds) *Mapping the Law* (Oxford: Oxford University Press, 2007) p 181 at p 188; Bigwood, above n 23, p 340.

83. See eg PBH Birks 'The travails of duress' [1990] LMCLQ 341 at 344; see to the contrary N Tamblyn 'Bad faith and causation in economic duress' (2011) 27 J Cont L 140 at 150–151.

84. *Goff and Jones*, above n 9, para 10.90.
AS Burrows *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011) p 275.

85. [2000] BLR 530; See also *Chitty*, above n 77, para 7.039.

86. [2000] BLR 530 at [134].

87. Ibid, at [136].

88. See eg *B&S Contracts and Designs Ltd v Victor Green Publications Ltd* [1984] ICR 419, but see Griffiths LJ at 425 and Kerr LJ at 428 to the effect that not every unwilling submission to a variation of a contract will be under duress; *Atlas Express Ltd v Kafco Ltd* [1989] QB 833.

89. Spark, above n 9, p 223; see also *Chitty*, above n 77, paras 7.041–7.044; *Goff and Jones*, above n 9, para 10.43.

90. A Halson 'Opportunism, economic duress and contractual modifications' (1991) 107 Law Q Rev 649 at 663.

91. (1924) 34 CLR 38.

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Where there is no threat to breach the claimant's rights, there might be, as in *Smith v Charlick*,[92] a threat not to contract with the claimant in the future, which may be unproblematic.[93] In *Smith v Charlick* itself, the Australian Wheat Harvest Board threatened to cut off supplies of flour to a miller. The refusal to supply was not a breach of any existing contract. The demand made was for the payment of additional surcharges to which the board was not entitled. The High Court of Australia said that the surcharge could not be recovered because refusing to deal is not economic duress per se. It is also often asserted that mere commercial pressure will not suffice,[94] but it is vague as to what this means, and few cases have been successful.[95] In *Alf Vaughan & Co Ltd v Royscot Trust*,[96] the claimants went into administrative receivership; the receivers wanted to sell the business as a going concern. However, to do so they were forced to pay £82,000 to the defendants, who had threatened to terminate the hire purchase agreements and repossess a number of vehicles. Their threat to do so was not illegitimate, as there was nothing amounting to unconscionable behaviour,[97] although the judge did not elaborate on what might amount to unconscionability.

Bigwood argues correctly that the key is whether the defendant's rights are used for a proper purpose,[98] and we have seen that *AG v R* decides that the nature of the demand supported by the threat is an important aspect of illegitimacy. The soldier signed a confidentiality agreement under threat of being returned to unit ('RTU' in military jargon). For a serving SAS member, as he was, this was usually considered to be a punishment. The Privy Council held that the Ministry of Defence could legitimately believe that someone who refused to sign was unsuitable for the SAS and so the threat of RTU was justified. There was no duress. Take blackmail as well, which is Bigwood's example. A party is at liberty to report another to the police, but that liberty cannot be used to extract money; it is not what the liberty is for. It is, he argues, wrongful to assert our strict legal rights to secure advantages with which those rights have no intrinsic connection. While these threats may be 'lawful', strictly speaking, they are nonetheless exploitative.[99]

92. It may be objectionable in some cases where there is only one, or there are very few, suppliers, as this might be seen as abuse of a dominant position. For a comparison of economic duress with relevant competition law rules, see P Akman 'The relationship between economic duress and abuse of a dominant position' [2014] LMCLQ 99.

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94. *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50; *Deemcope Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44; *The Siboen and the Sibotre* [1976] 1 Lloyds Rep 293 at 336, per Kerr J.

95. K Mason, J Carter and G Tolhurst (eds) *Mason and Carter's Restitution Law in Australia* (Sydney: Butterworths, 2nd edn, 2008) para 525.

96. [1999] 1 All ER (Comm) 856; the unconscionability test is also used in *Harrison v Halliwell Lantau* [2004] EWHC 1316.

97. Ibid, at 863; *Borelli v Ting* [2010] UKPC 21, [32].

98. Bigwood, above n 23, p 317.

99. R Bigwood 'Coercion in contract' (1996) 42 U Toronto L J 207 at 232.

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(II) CHOICE PRONG: IMPAIRMENT OF CONSENT

We saw earlier in the context of undue influence that there is talk of overbearing the will – this idea of the overborne will, or compulsion of the will as it is described in *AG v R*, is also found in the duress cases,[100] as is the idea of vitiation of consent.[101] Even under the most extreme duress, however, the claimant intends to do as he does, so the language is not entirely apposite. In *Haines v Carter*, therefore, William Young J said that there did not have to be a complete absence of free will.[102] Rather, what is important is the absence of practical choice, also referred to in *AG v R*. If the law finds that the complainant had a reasonable alternative open to him, he cannot really complain if there is no relief and chooses not to avail himself of it.[103] Other discriminators such as a requirement to protest[104] or bad faith[105] have also been canvassed, but should not be required. One does not need to protest to have no choice, and one does not need to be in bad faith to coerce. Just as in the other vitiating factors, a decision must be taken whether duress is concerned with impairment of the consent of the complainant. For Spark, it is a question of impairment of consent,[106] not wrongdoing or absence of intent as indicated by an overborne will. Spark justifies this in part by noting that the effect of duress is to render the contract voidable. What this means is that there is some consent, just consent that we deem ineffective.

2. INTENTIONAL ACTION AND PRACTICAL REASONING

We have seen how the two causes of action work and how each depends on the acts of the defendant in changing the way we make a decision. This section aims to show how that is reflected analytically in the exercise of our agency. As we saw earlier in the introduction, the paper accepts a justification of these claims in terms of autonomy and infringement of our autonomy. Defendant-sided unjust factors reflect the fact that autonomy and sociality go together. Being autonomous is a skill that we acquire and exercise only in social environments where we can trust other people to support it.[107] We explore the way in which this social interactivity is reflected in a particular agent's planning and end-setting. This is important. Michael Bratman's theory is based on a view of ourselves as planning agents. We plan what we want and intend to do and we do so on the basis of our stable valuings about what is important to us as individuals.

100. See *AG v R* [2003] UKPC 22; this was rejected in *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40; *The Evia Luck* [1992] 2 AC 152; PS Atiyah 'Economic duress and the overborne will' (1982) 98 Law Q Rev 197.

101. *Atlas Express Ltd v Kafco Ltd* [1989] QB 833 at 839 (Tucker J); *Pao On v Lau Yiu Long* [1980] AC 614 (HL) at 635–636 (Lord Scarman); *The Siboen and The Sibotre* [1976] 1 Lloyds Rep 293; *The Atlantic Baron* [1980] 2 Lloyds Rep 390; *The Cenk Kaptanoglu* [2012] EWHC 723, [2012] 2 All ER (Comm) 835; see also Halson, above n 91, at 664–667, arguing that it is meaningless and inadequate at 677.

102. [2001] 2 NZLR 167 at 190.

103. *AG v R* [2003] UKPC 22, *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyds Rep 620 at 638, per Mance J.

104. *Maskell v Horner* [1915] 3 KB 106 (CA).

105. *D & C Builders Ltd v Rees* [1966] 2 QB 217.

106. Spark, above n 9, pp 218–230; see also *NAV Canada v Greater Fredericton Airport Authority* [2008] NBCA 28.

107. C McLeod 'Trust' in *Stanford Encyclopedia of Philosophy* (2011) at http://plato.stanford.edu/entries/trust/ (accessed 3 October 2014) p 11.

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I plan to revise this paper for publication on the basis of a stable view that research is important and worthwhile for example, and I set as an end having a good publishable article.

Here, the first subsection looks at two interconnected ideas in the metaphysics of agency. There are different ways in which my planning process and intentions can be sent off course. Language sometimes – although less so recently – used about duress and undue influence refers to the claimant's will being overborne. This suggests that when I act under duress or even sometimes undue influence, I am not really acting. It is not my action, but just something that happens. This is not right;[108] however, we need to see what it means for me to intend something, as opposed to something just happening to me, to understand how we can model the intuitive idea that duress does not affect the fact that I did intend to hand the money over. The second section of this part examines what we mean by practical reasoning, to which we have alluded before, and models how the defendant can affect our practical reasoning in such a way that we should have a claim.

(a) Agential authority and subjective normative authority

(I) AGENTIAL AUTHORITY

We are used in the philosophy of action to drawing a distinction between two different kinds of action: actions that are governed or directed by the agent – things *she* does – and are therefore truly attributable to her; and those that merely happen to her.[109] It is sometimes said that a policy that has agential authority when it causes an action, speaks for the agent. The policy must 'speak for the agent' when we want to say that the agent directs and governs the action and so must be what Bratman refers to as a self-governing policy. This is jargon: the critical thing is that we have desires about our actions, but also the capacity to step back and reflect on whether to act on them. It is those higher-order self-governing policies that say which desires we treat in our deliberation as justifying reasons for action,[110] and which play a role in our practical reasoning as to what to do next and why. For example, I might desire a cigarette, but critically reflect that for health reasons I ought to give up. That policy to improve my health has agential authority because it directs and governs my decision to give up smoking. Importantly, Bratman has distinguished two ideas, saying that agential direction and governance are different things.[111] In agential direction, there is sufficient unity and organisation of motives that they function as directing the agent (ie he or she acts), but agential governance is direction appropriately involving the agent's treating certain considerations as justifying reasons for action. As we see later in this essay, it is agential governance that is affected by the defendant's action. There is sufficient unity and organisation to my motives (to carry on living) to say that it is *I* who am acting when I hand over money at gunpoint. I make a rational choice on the basis of the circumstances.

Agential authority is important not least because our intentions, as a result of their critical role in our lives as planning agents, look not just to the present but to the future as well. We formulate intentions on the basis of assumptions and conditions, some of which relate to the future and some to the immediate present. At each point, we are

108. See eg Spark, above n 9, pp 218–230 in the context of duress.
109. M Bratman 'Two problems in human agency' (2001) 101 Proc Aristotelian Soc'y 309 at 311.
110. M Bratman 'Valuing and the will' (2000) 14 Phil Perspectives 249 at 258.
111. M Bratman 'Autonomy and hierarchy' in M. Bratman (ed) *Structures of Agency* (Oxford: Oxford University Press, 2007) p 162 at p 177.

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concerned with the activity as a whole, including its future and its past components. If I order a new bathroom, I do so on the basis that the installer will in fact come to do the work in a few weeks. A planning agent's purposive activity is therefore an interwoven structure of partial, referentially interlocking and more or less stable plans.[112] My plan to write this paper is stable over time, for instance, and my plan, say, to go to Bruges is partial in that I have not yet decided how to get there. Perhaps I will take the Eurostar to Brussels, or maybe I will fly to Amsterdam first. For Bratman, our higher-order policies are critical in helping us structure our intentions over time and he argues that this is an important part of an account of agential authority.[113] Such self-governing policies with agential authority are intentions that are general in their content and help to structure our intentions over time by keeping our intentions now consistent with those in the recent or not-so-recent past, and those regarding the future.[114] Bratman takes a broadly Lockean view of personal identity, which identifies a person as a thinking being who can know itself as the same thinking being across time.[115] We are not time-slice agents; we plan partly on the basis of the future, and this provides an important reason for adopting the Lockean view that Bratman does. Our general higher-order policies as to which desires and motivations we treat as important help to constitute that identity over time – my desire to do research is consistent over time and helps constitute my identity as an academic. When I engage in practical reasoning – deciding what to do today, for example – my stable higher-order belief in the value of research helps to make sure that today I intend to redraft the paper and, further, that I will redraft on the basis of comments from a colleague, having last week sent the draft to that colleague with a view to understanding whether I had missed anything. Those attitudes therefore need to be stable over time, but not completely immutable. After all, my values might change and I might decide in time that legal practice suits me better.

(II) SUBJECTIVE NORMATIVE AUTHORITY

Agential authority is related to the separate question of subjective normative authority, which Bratman describes as concerning the relationship between desiring something and treating it as of motivational importance.[116] As Bratman also points out, the two accounts need to be coordinated, as we are agents whose actions are subject to normative deliberation in that we engage in reasoning about what we should do.[117] Therefore, higher-order policies are also vital here. The higher-order policy must concern which desired ends to treat as important in our decision making process.[118] For Bratman, a desire for X leads to an intention in favour of a means to X and because of X as a justifying end. However, by appealing to an idea of the agent's treating something as justifying, do we simply beg the question – why does the agent treat it as such and bring us back to our original question?

Bratman argues not. All we need for subjective normative authority is for the desire for X to function as setting X as an end. A desire for X then functions as a policy in favour

112. M Bratman 'Reflection, planning and temporally extended agency' (2000) 109 Phil Rev 35.
113. Bratman, above n 109, at 319–320.
114. M Bratman 'Introduction' in M Bratman (ed), above n 111, p 1 at p 6.
115. J Locke *An Essay on Human Understanding* (1690) bk II, ch xxvii, para 9.
116. Bratman, above n 109, at 311.
117. Ibid, at 316.
118. Ibid, at 321.

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of X, which acts reflexively so that the policy in favour of X functions to set X as an end by virtue of the operation of the policy. The functioning of the policy in terms of end-setting is not full-blown agency, although its subsequent operation by way of reflexivity is so.[119] In a later paper, Bratman explains it differently. Treating a desire as reason-providing is a strong form of agency, but we can, he says, appeal to a weaker form. That weaker form merely treats the desire as end-setting. For the self-governing policy (say, a self-governing policy in favour of research and scholarship) to favour treating the desire (to finish this paper) as reason-providing, it is not enough for it to favour that desire's functioning as end-setting. It needs to favour that desire's functioning as end-setting by way of the very self-same policy,[120] so that I am satisfied with the policy in the sense of its being relatively stable over time and the fact of the policy itself provides a reason for action. In fact, it is stable. I do think I have good reasons to complete the paper and be research-active. By contrast, I might have a nicotine craving that sets buying a packet of cigarettes as an end (a weak form of agency), but my policy of improving my health provides a reason, with which I am satisfied, not to do so (a strong agency). Consequently, my craving does not provide a reason for a visit to the shop. We do not therefore treat everything we desire equally; we have the capacity to put immediate desires to one side.

(b) Practical reasoning

Practical reasoning is simply reasoning as to what to do, as opposed to theoretical reasoning, which is reasoning as to what we know. As Chen-Wishart has pointed out, I am not responsible for my transactional parties. Indeed, to make me responsible for my transactional parties' practical reasoning would seem to disrespect them as autonomous rational beings pursuing their own norms. This is because we would implicitly be saying that the other party cannot be trusted to make decisions about what to do. Respecting the other party as an autonomous self-legislating agent is at the heart of the relief we provide for mistake,[121] and we need to be consistent with that rationale in explaining or modelling the defendant-sided factors. This is why the defendant must be responsible for causing the problem, or potential problem.

As Bigwood points out, and as we have been discussing throughout, there are (at least) two forms of influence that are recognised as responsibility-relieving in law.[122] Coercive influences are one, and influence by a specially trusted party another. Although, as Bigwood properly points out, they operate differently, the impact we argue here is in both cases that the complainant acts under or 'in the grip of a norm'. This idea of the grip of a norm is an idea that Bratman introduces in the context of subjective normative authority, although he himself got the idea from the work of Allan Gibbard. Bratman explains the way in which 'the grip of a norm' functions in the

119. Ibid, at 322–324; full-blown agency seems a little slippery, as it is not clear whether the phrase, as used by different authors, implies agential direction or governance as well.
120. M Bratman 'Three forms of agential commitment: reply to Cullity and Gerrans' (2004) 104 Proc Aristotelian Soc'y 329 at 330–332; M Bratman 'Hierarchy, circularity and the problem of double reduction' in M Bratman (ed), above n 111, p 68 at p 73 also distinguishes between a desire as motivating and reason-providing.
121. Sheehan, above n 2, at 164–167.
122. Bigwood, above n 23, p 379.

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context of subjective normative authority like this. The desire for X and the thought of X as justifying plays a role in the motivational efficacy of X even though the agent does not fully endorse that functioning.[123] It may seem strange, or even contradictory, to say that the desire is treated as justifying the agent's action and therefore as a reason for action if the agent does not endorse its functioning as a reason. That almost sounds as though the agent treats it as a reason, but not really. In fact, what is going on is that the agent's reasoning is attenuated in that he does not take all the appropriate factors into account. Bratman concludes that a desire for X functions as end-setting for practical reasoning when the desire is treated as justifying in the particular context, but a desire may function in that way despite the absence of a higher-order attitude, which has agential authority, operating in its favour.[124] This may be a little too simple for our purposes, as we will see below, but for now let us accept it.

Both duress and undue influence therefore come about because the defendant has caused a situation in which the agent's desire to act in a particular way is treated as justifying those actions, but where no appropriate higher-order attitude exists to offer any support or explanation. This is what we mean when we say that the end-setting mechanism of the claimant is improperly influenced. The two causes of action differ in precisely how the end-setting mechanism is improperly influenced. In cases of undue influence, we look at the relationship between the parties and the purposes of their interactions, and focus on the social, not the individual. In cases of duress, we look at how the defendant has improperly set up the choice that the claimant must make. Here, the first subsection examines how duress can be modelled in more detail using this concept of 'acting in the grip of a norm'. The second subsection mirrors the first, but examines how a party acts in the grip of the norm when under undue influence.

(I) DURESS AND 'ACTING IN THE GRIP OF A NORM'

We have alluded to rational control theory already when discussing agential authority. A rational control theorist believes that if you are able to make rational choices controlling your actions, you are free. An unsophisticated version of such a theory might simply be that when you put a gun to my head I make a rational choice between life and death, and therefore freedom as rational control is maintained.[125] For Leon, this does not suffice. He argues that a rational control thesis requires rationality not only at the point of choice, but at the point of formation of the agent's beliefs and desires – which, he argues, need to be formed in a truth-, evidence- or reason-sensitive manner.[126] For Leon, in the case of coercion or duress, the agent's desires are formed in the wrong sort of way to count as autonomously formed. They are formed in a way that is caused by the coercer's desires rather than the agent's own standards, reasons and values.[127]

In doctrinal terms, a link has sometimes been made in duress between consent and causation. McKendrick suggests, for example, that lack of consent is relevant to establish the sufficiency of the causal link,[128] but this is not uncontroversial. Causation and

124. Ibid, p 81; the idea that agential authority acts in context can be found in M Bratman 'Nozick, free will and the problem of agential authority' in M. Bratman (ed), above n 111, p 127 at p 129.
125. This is Pettit's objection: P Pettit *A Theory of Freedom* (Oxford: Oxford University Press, 2001) pp 45–47.
126. M Leon 'Reason and coercion: in defence of a rational control account of freedom' (2011) 39 Philosophia 733 at 735–736.
127. Ibid, at 737.
128. McKendrick, above n 82, p 184.

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consent are, according to some, different questions.[129] Bigwood, for example, argues that there are two aspects to this. There is the unproblematic empirical aspect. Did the threat in point of fact cause or induce the claimant to manifest his consent? The second is whether or not the claimant was justified in manifesting consent in response to the pressure. Bigwood argues that it is a common feature of the debate to conflate the two, or at least to highlight the empirical first aspect over the normative second aspect. If we examine the first aspect, we can say that but for the coercion, the agent would have had no desire and formed no intention to enter the transaction. This is what Leon means when he says that the decision to enter the transaction bears the wrong counterfactual relationship to the desire to evade the threatened action.[130] But for the threat, the agent would not have entered into the transaction. The wrong counterfactual is entering the transaction versus the threat's being enacted. The correct counterfactual is entering the transaction versus the consequences and the opportunity cost of not doing so where there was no threat. The correct way to form the intention to enter the transaction is on the basis of reasons that make it a good transaction. The desire to evade the threat is instrumental; it does not explain why – if at all – the transaction's terms are good ones for the claimant. Leon therefore seems to conflate Bigwood's two aspects. However, we still need to assess, as a normative matter, what would count as appropriate reasons for the claimant to make the choice in favour of the transaction. Once the threat is deemed not to be an appropriate reason for the choice, so that in doctrinal terms it counts as illegitimate, it is not made in an appropriately reason-sensitive manner.

There is something to the unsophisticated argument despite this. Agential authority is a combination of agential governance and direction. Pallikkathayil picks up on something similar to argue that a pure impaired action theory of coercion (and by extension probably undue influence) will not work.[131] We should not treat the agent's choice as somehow not a 'proper' action; for Pallikatthayil' it is still 'full-blown' agency. A bad choice is still a choice; the agent assesses the circumstances and chooses to act. There is – as we saw earlier – agential direction.

For Bratman, however, the effect of duress is acting in the grip of a norm. We can explain precisely how the duress claim can be seen in these terms by examining the example that Allan Gibbard gave in first explaining the idea. That example – to which Bratman refers in his account of subjective normative authority – is of the Milgram experiments. These were experiments in which the subjects were told to administer what they thought to be progressively stronger and more dangerous electric shocks to another person (who was in point of fact in no danger at all). As the shocks became more life-threatening, more and more people protested, but largely carried on delivering the shocks when told to do so. For Bratman, the subjects had a desire to conform and their reasoning was 'I guess I should do as I am told', but they did not directly endorse that reasoning or end-setting. Bratman goes on to say that the explicit content of that particular self-governing policy need not therefore appeal to any prior notion of full-blown agency because of the attenuated nature of the reasoning,[132] even if its reflexive operation is an example of such full-blown agency. In the context of his discussion, this might be taken to suggest that there was agential direction even if not

129. *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyds Rep 620 at 636; Bigwood, above n 23, p 345.
130. Leon, above n 126, at 738.
131. J Pallikkathayil 'The possibility of choice: three accounts of the problem of coercion' (2011) 11 Phil Imprint 16.
132. Bratman, above n 109, at 323; as indicated earlier, the notion of full-blown agency and whether it involves agential direction and/or governance is somewhat slippery.

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proper governance. As Gibbard would explain, the subjects did not genuinely believe that the cooperation/obedience norm under which they acted really trumped all other norms, such as the norm not to hurt, injure or kill others, but they were acting in its grip.[133] They internalised the norm, but did not truly accept it. To internalise a norm, Gibbard argues, is simply to have a motivational tendency to act in that way.[134] Were the agent to accept the norm, the agent would be properly involved in his own normative governance.

To explain, for Gibbard, when we work out what to do in a particular case in community with others, we engage in what he calls normative discussion. We engage in this type of normative discussion because shared evaluation and normative governance aids in our setting ends for ourselves – ends consistent with those of others with whom we must interact in our complex social life. Engaging with others influences how we act in given situations; it is normatively governing.[135] Our decisions about what to do in those situations are socially influenced. Essentially, we are unable – in many situations – to achieve our own ends without some cooperation from others. Those other people need to be persuaded to help – or at least not actively obstruct – and this may involve some negotiation and cooperation. This fits with our current context as the defendant-sided factors depend on a social context, a point made by Chen-Wishart in the context of undue influence and accepted in this paper. Governance by the norm, Gibbard says, is our tendency to conform to it, and acceptance of the norm is whatever psychic state leads to its being part of our normative governance.[136]

The distinction with internalising a norm is that the latter works independently of true normative discussion, looking at the real reasons for and against a course of conduct. Hurting another (to adapt the Milgram experiment example) may be acceptable if you find them threatening a child, because protecting the vulnerable from greater harm justifies (the minimum necessary amount of) violence towards the other person. True acceptance of the norm requires such true normative discussion, and consideration of the pros and cons. It seems at least plausible, though, that we have internalised or acted in the grip of a norm that we should act in a given way when that norm was improperly inveigled upon us by the other party. The defendant may, in a duress claim, have illegitimately structured our choices in a particular way.[137] There has been no agential governance, because there has been no *appropriate* recognition of reasons as justifying in the context of the relevant higher-order norms of the agent, and so the claimant does not act in accordance with those rationally chosen higher-order norms. There has, however, been agential direction and subjective normative authority. Since for Bratman autonomous action implies agential governance as well as direction, the agent is not truly acting autonomously, although the actions are his and not merely things that happen.

That illegitimate structuring of our choices is what distinguishes duress cases from cases of normal or natural constraints on our action. There are very few lawful act duress cases, but *AG v R*[138] may provide a vehicle for discussion. In fact, there was,

133. A Gibbard *Wise Choices, Apt Feelings* (Oxford: Oxford University Press, 1990) p 60.
134. Ibid, pp 70–71.
135. Ibid, pp 72–73.
136. Ibid, pp 74–75.
137. G Yaffe 'Indoctrination, coercion and freedom of the will' (2003) 67 Phil & Phenomenological Res 335 at 342, 351 arguing that indoctrinators and coercers tend to give their victims extra reasons for action.
138. [2003] UKPC 22, [2003] 1 EMLR 24; A Phang and H Tijo 'Drawing lines in the sand: duress, undue influence and unconscionability revisited' [2003] 11 Restitution L Rev 110.

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as we have seen, no illegitimate threat here. However, for Bigwood illegitimacy depends on there being a threatened breach of a right or the threatened use of rights for improper purposes.[139] Had the MoD's threat been illegitimate as used for an improper purpose, the soldier's choice would have been at issue; and if there were no practical or reasonable alternatives, the decision would not have been made in a reason-sensitive manner in Leon's terms. Nor would it have been properly accepted in Gibbard's. The desire to sign would function as end-setting for practical reasoning even though the agent did not appropriately endorse it. We saw earlier that Bratman suggested that there would be no higher-order attitude in its favour. Yet in some circumstances we might want to argue that there is such a higher-order attitude. In *Barton v Armstrong*,[140] the higher-order policy in play was to avoid physical injury. In our modified *AG v R*, it is to remain in the SAS. In Bratman's language, this is, however, an instrumental policy. What we need in order to say that there is agential governance as well as agential direction is a non-instrumental policy, so the desire is not seen as a causal means to a further end – avoiding RTU or death or injury at the hands of a Yugoslav hitman – distinct from the desire itself.[141] This – and it is worth stressing the point – ties back to the point we made when discussing Leon. There is the wrong counterfactual. The reason (an instrumental policy to avoid injury) is the, normatively speaking, wrong reason, and so the threat is illegitimate.

What about natural constraints? These are not problematic because the agent's desires are not specifically targeted,[142] and some constraints on freedom are inherent in freedom itself.[143] Natural constraints are simply inevitable; we all make decisions and set ends for ourselves based on the state of the world around us. We do not set aims in an isolated void. In *The Port Caledonia and the Anna*,[144] for example, the owners of the ship were forced to enter into a contract with the tug owners at exorbitant rates or forfeit the ship, which would otherwise be lost at sea. There was a transactional imbalance caused by the circumstances, improperly exploited by the defendants.[145] For present purposes, we should note only that the fact of the ship's sinking on its own is not coercive; it is just part of the world as it is; similarly, a legitimate proposal is just part of the world as the claimant must take it.

(II) UNDUE INFLUENCE AND 'ACTING IN THE GRIP OF A NORM'

Undue influence can be described in similar terms. Chen-Wishart, as we saw, argues that a relational approach to undue influence is required. For her, we are persons with attachments; we commit ourselves to others, projects and relationships. Society itself provides us with the options from which we can choose, and the space in which we

139. Bigwood, above n 23, pp 306–307.
140. [1976] AC 121.
141. M Bratman 'Hierarchy, circularity and double reduction' in M Bratman (ed), above n 111, p 68 at p 77.
142. Leon, above n 126, at 739; see also Yaffe, above n 137, at 336, arguing that a manipulator undermines freedom of will in a way that a different causal mechanism with the same result does not.
143. D Tiplady 'Concepts of duress' (1983) 99 Law Q Rev 188.
[1903] P 184; *The Medina* (1876) 1 PD 272 is another example. The ship had sunk – a natural constraint – but the master of the *Timor* was not permitted to charge an exorbitant sum to take the passengers trapped on a rock to port.
144. Birks, above n 1, p 306.
145. Chen-Wishart, above n 33, at 242.

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can flourish.[146] This sits easily within the normative discourse conception of Gibbard.[147] Bigwood argues that the undue influencer's conduct resides in an exploitative use of a special trust relationship rather than any proposed rights violation by the coercer.[148] Although as human beings our reasons for action often begin externally, unless they are fully and genuinely internalised as our own, there is a risk of our mind being used as a mere channel through which the will of another operates.[149] For Chen-Wishart, therefore, undue influence can be understood as a response to harm to the autonomy-enhancing form of relationships.[150]

In *Allcard v Skinner*, the nun gave up all her worldly wealth at the request of the Mother Superior in circumstances where the Mother Superior was to be treated as the voice of God and where she was forbidden to seek outside advice. In *Allcard*, Cotton LJ professed doubt as to the propriety of the absolute submission required.[151] For Lindley LJ, that, coupled with the rule denying external advice, 'is so oppressive and so easily abused' that the nun required protection.[152] This can be seen in terms of acting 'in the grip of a norm' in precisely the same terms as the Milgram experiments. The Court of Appeal took the view that the nun did not accept the norm of poverty, but acted in its grip; her reasoning was 'Well this is what the Mother Superior wants.' We should note, however, at this point that because she had waited too long and had effectively acquiesced in the continued gift, she did not actually recover the money.[153] There is, though, a trend in England and Australia to see religious influence as potentially problematic.[154] In *Quek v Beggs*,[155] Quek gave virtually all her assets to the church in New South Wales of which Beggs was pastor. Influence was described in Quek as referring to a psychological ascendancy over the donor – terms reminiscent of the 'grip of a norm'. Religious influence is seen as more likely to end in psychological dependency (or acting in the grip of the norm of deference)[156] and therefore more likely to be abused.

One of the most frequent types of case in undue influence is the case where one party – usually the male partner – gets another family member to sign mortgage or guarantee documentation, and the bank subsequently attempts to enforce that. These cases are, in principle, no different. What makes the critical difference and demonstrates that the claimant was in the grip of a norm is whether she (and it usually is the female partner) gave the matter much (if any) thought beyond 'This is what he wants.' For the sake of completeness, we should note that undue influence was also raised unsuccessfully in *AG v R*. The sense that the soldier had received an order might lead to our suggesting

146. Chen-Wishart, above n 33, at 242.
147. Gibbard, above n 133, p 67.
148. Bigwood, above n 23, p 375.
149. Ibid, p 376.
150. Chen-Wishart, above n 33, at 249.
151. (1887) 36 Ch D 145 (CA) 170.
152. Ibid, at 184–185
153. Ibid, at 189.
154. P Ridge 'Negotiating the sacred in law: regulation of gifts motivated by religious faith' in K White and E Coleman (eds) *Negotiating the Sacred: Blasphemy and Sacrilege in a Multi-Cultural Society* (Canberra: ANU Press, 2006) p 133; P Ridge 'Equitable doctrine of undue influence considered in the context of spiritual influence and religious faith' (2003) 26 UNSW L J 66.
155. (1990) 5 BPR 11 at 761; see also *Morley v Loughnan* [1893] 1 Ch 736; *Hartigan v International Society for Krishna Consciousness* [2002] NSWSC 810; *McCulloch* v *Fern* [2001] NSWSC 406; P Ridge '*McCulloch v Fern*' (2002) 18 J Cont L 138.
156. Huguenin v Baseley (1807) 14 Ves Jun 273, 33 ER 526.

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that he acted in the grip of a norm of obedience in signing the agreement, but not all such cases of obedience are problematic. Were he on patrol in Helmand, obedience would be entirely appropriate, and so the MoD can hardly be said to act improperly in 'inveigling a norm of obedience' into the head of the soldier. Indeed, one could quite sensibly suggest that the norm of obedience had been truly accepted by the soldier, who recognised when he joined the army the importance of the chain of command.

We are not quite finished in our modelling of these two causes of action. There is an objection that might be made. Could we say that our account of undue influence is missing an important element of agential authority? Policies with agential authority for Bratman acquire their importance because of their role in structuring the agent's deliberations over time. Yet the idea of the agent's being satisfied with a policy has a synchronic rather than a diachronic nature.[157] It refers to satisfaction *now*, something that may not hold into the future. Bratman acknowledges the mutability of these preferences. We saw earlier that it is possible that my preferences might change, so that a career in legal practice suits me better than academia. Our account of undue influence has not taken this element into account yet; perhaps our preferences just change naturally so that we defer to the other party. Bratman might, however, argue that an agent manipulated in some way through undue influence so that the threads linking him to his past selves are broken has had his responsible agency violated.[158]

This seems to fit reasonably well. Leaving aside that the claimant had waited too long to recover the property, in *Allcard v Skinner* the claimant was, when she made the gifts, fully committed to life as a nun within the Roman Catholic Church. The policy of obedience to the Mother Superior worked so that she made the gift under a policy of obedience which was justified by virtue of the policy itself. The law made a judgment that, despite this, the desire was not a 'legitimate candidate for satisfaction',[159] as the nun did not work through whether to give the money away by virtue of her prior views and attitudes on charitable giving; rather, her giving was in the course of the instrumental policy to please the Mother Superior. Just as in the duress cases, there has been subjective normative authority and agential direction, but not governance, as the reasoning is not appropriately identifying justifying reasons. One can quibble over whether this is plausible on particular facts, and whether the distinction between *Allcard* and my example of the soldier on patrol is a valid one, but the underlying and implicit philosophical thrust of the doctrine seems clear. Quite possibly, the distinction between the military and religious contexts is nothing more than a social policy decision.

The problem in undue influence, therefore, is a self-regarding use of a personal capacity to influence a relationship where self-denial is expected,[160] and where the action by the claimant is connected to a higher-order policy in an instrumental way rather than the non-instrumental way that we in fact require. The abnormality of the transaction therefore helps us decide what is problematic. Abnormal transactions include cases of such extreme improvidence as to threaten the claimant's future autonomy.[161] We might also examine the context of the relationship; if parents guarantee a

157. J Morton 'Deliberating for our far future selves' (2013) 16 Ethical Theory & Moral Prac 809 at 815–816.

158. A reading of Bratman suggested by M McKenna 'Compatibilism: state of the art' in *Stanford Encyclopedia of Philosophy* (2009) http://plato.stanford.edu/entries/compatibilism/supplement.html (accessed 13 September 2014).

159. A phrase used by Bratman, above n 123, at 70.

160. Bigwood, above n 23, p 375.

161. Chen-Wishart, above n 33, at 254.

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large debt, which they might not readily be able to afford, of their children, that is explicable.[162] Where a nun hands over all her wealth, it might not be, except on the instrumental explanation of 'pleasing the Mother Superior'. By like reasoning, in *Credit Lyonnaise v Burch*, where a young and junior employee put her house 'on the line' to guarantee her employer's borrowings, it might not be explicable,[163] except in the instrumental way that she wishes to please her employer, and similarly in cases where a female partner signs a guarantee or mortgage over the family home without independent advice or thought. This is evidence that the defendant is doing harm to the autonomy-enhancing properties of social bonds or, in different terms, whether the claimant is acting in the grip of a norm. In *Credit Lyonnaise v Burch*, the norm might be that 'my boss' should be given anything he wants, however financially crazy. If the claimant acts in the grip of such a norm, the relationship is autonomy dis-enhancing, or is being used as such. What we need instead is a non-instrumental connection between the act of guaranteeing the debts and the immediate higher-order policy in play.

CONCLUSION

The two defendant-sided unjust factors we have looked at seem very different from each other. This paper first outlined the law on duress and undue influence, and adopted a rationalisation of the causes of action such that undue influence is based on abuse of what we called deferential trust, and duress on an illegitimate threat or proposal leading to the claimant's lack of consent. The paper also distinguished undue influence from the unconscionable bargains doctrine, where a different justification applies that does not rely on the abuse of such trust reposed in the defendant. On the basis of that, it demonstrated that there is a common structural core to both duress and undue influence and the effects of the claimant's agency, although it has assumed rather than proven a theoretical rationale for saying that defects in the claimant's agency justify relief. In each case, the defendant has forced himself in different ways into the complainant's end-setting.

In duress, this takes place by improperly setting up choice conditions so that the claimant's intentions are formed in a non-autonomous way rather than being responsive to the normal natural constraints. For Pallikkathayil, this is at the heart of her account. The defendant takes control of an option that the complainant is entitled to have.[164] She makes it impossible for agential governance over the complainant's actions to be possible, although there is both agential direction and subjective normative authority. Undue influence can also be modelled in the way that Pallikkathayil suggests. The defendant, by using the parties' relationship to force her way into the claimant's decision making capacity, makes it impossible for there to be proper agential governance, although again there is agential direction and subjective normative authority. Rather, the claimant defers to the defendant.

The importance of this is that Bratman's theory allows us to appreciate that the law of unjust enrichment contains two different types of claim. In both cases, the claimant is not following 'his rationally determined norms'; while in claimant-sided cases, such as mistake claims, that is because of an unfulfilled condition to his individual

162. *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.
163. [1997] 4 All ER 144.
164. Pallikkathayil, above n 131, at 18.

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intention,[165] in defendant-sided cases it is because of problems in setting those norms. On a view that maintains[166] that there be only one type of claim in a category, this is impossible; but on a more realistic pluralistic account, this does not matter.[167] There are also real doctrinal consequences to more fully understanding the structure of the defendant-sided claim. One is the availability of change of position. That defence allows the defendant to say that he relied on his right to keep the money by – usually – spending it and therefore dis-enriching himself. By appreciating the need for the defendant to have done something, we can see why the defendant is disabled in many cases from relying on his receipt of the assets because of the way in which he consciously inveigled himself into the claimant's decision making, but without needing to resort to wrongdoing as an explanation.[168]

165. See Sheehan, above n 2, at 164–167. In failure of consideration cases it is because of the failure of a condition to the parties' joint or collective intention: ibid, at 175–178.
166. See eg P Jaffey *Private Law and Property Claims* (Oxford: Hart Publishing, 2007).
167. See generally D Sheehan and TT Arvind 'Private law theory and taxonomy: reframing the debate' (2015) 35 Legal Stud 480; on Jaffey in particular, see D Sheehan 'The property principle and the structure of unjust enrichment' [2011] 19 Restitution L Rev 138.
168. E Bant *The Change of Position Defence* (Oxford: Hart Publishing, 2009) pp 172–177, 195–196.

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