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# THE INEQUALITY OF BARGAINING POWER PRINCIPLE

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# The Inequality of Bargaining Power Principle

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Abstract: Which determinants of inequalities of bargaining power between contracting parties' ought to be legally relevant? The answer depends on our theory of contract. Most will agree that inequalities that erect procedural impediments to freely negotiated agreements are problematic. For those who view contract law as an instrument for maximizing social welfare or as a site of pure procedural justice such inequalities will be the main or exclusive focus. But if morally valid contracts are the parties' expression of duties they owe one another as a matter of justice, this is an unsatisfying stopping point. The law should care not only about inequalities that facilitate the exploitation of persons' lack of market opportunities to extract terms better than could be obtained in a competitive market, but also about the exploitation of disadvantages arising from systemic background injustice.

# I INTRODUCTION

If a person's economic power is her general ability to make economic resources serve her ends, then a person's bargaining power is her ability to do that in the context of a bargain—a transaction through which each party seeks to further her own aims together. Unlike a gift or a gift promise, both parties do or promise to do something for the other in exchange for what they get from the other in return. Unlike a forced transfer such as a theft, both parties at least nominally assent to it. At minimum, each had the option of doing otherwise. Under the common law, the operative context is a transaction where the doctrinal requirements of consideration and mutual assent are met. Each receives a promise or performance from the other in return for her own promise or performance through which she manifests her assent to the transaction. A party's bargaining power is her ability to ensure that the terms of such a transaction serve her own objectives. There is inequality of bargaining power whenever one party has a greater ability to do this than the other. The inequality of bargaining power principle attaches legal consequences to such inequalities.

What determines a party's bargaining power? What determinants and consequences of inequality of bargaining power are legally relevant? What determinants and consequences ought to be relevant?

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# II DETERMINANTS OF A PARTY'S BARGAINING POWER

Entering into a bargain involves choosing it over what economists, following John Nash,[1] refer to as the "disagreement point"—the state of affairs that would result should the parties fail to reach an agreement. How much each party is willing to concede to the other, assuming that she is focused exclusively on her own objectives, will therefore depend in part on her perception of how the transaction will further those objectives better than the disagreement point. Call those her perceived *self-regarding gains* where "self-regarding" denotes partiality rather than selfishness.

We might, of course, think that people shouldn't be self-regarding when transacting with others by also considering the extent to which the objectives of their contracting partners will be realized. But when evaluating de facto power dynamics, it doesn't make sense to idealize.

Thus, given self-regarding parties, as a party's perceived self-regarding gains from the transaction decrease, her counterparty's ability to extract more favorable terms for himself decreases. Insofar as her counterparty understands this, he will feel pressure to sweeten the pot to prevent her from walking away. She thus has more bargaining power the greater are her counterparty's perceived self-regarding gains and the more her counterparty believes that she perceives that her self-regarding gains will be low.

It follows that a party's bargaining power is a function of factors both within and outside her control and is as much a matter of the parties' perceptions as it is of reality. When the parties accurately understand their situation and the disagreement point is determined entirely by circumstances outside their control, a party has more power the greater are her counterparty's actual self-regarding gains. But she has more power still if she successfully misrepresents her counterparty's self-regarding gains or manipulates his actual or perceived disagreement point by making it the case that he will do worse or believe that he will do worse (through a threat or other forms of manipulation) should he not agree to a deal with her. She also has more power the lower are her own self-regarding gains or the more that she can falsely convince her counterparty that her self-regarding gains are low, thereby leading him to believe that she will readily walk away from the transaction.

# III FROM DE FACTO POWER TO LEGAL PRINCIPLE

The inequality of bargaining power principle assigns legal consequences to inequalities of bargaining power. It tells us when the law will invalidate or adjust the terms of transactions that were made in the face of such inequalities.

We see the principle at work most prominently in the application of the doctrine of unconscionability where it serves as an explicit element of the analysis.[2] The principle also helps

[1] JF Nash, 'The Bargaining Problem' (1950) 18 Econometrica 155.

[2] Restatement (Second) of Contracts § 208 cmt d (1981) ("gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms").

to ground other defenses including duress, undue influence and fraud and misrepresentation. A defense of duress arises when a person extracts better terms from her contracting partner by procuring his assent through a wrongful threat that takes advantage of his (perceived) lack of reasonable alternatives.[3] A defense of undue influence arises when a stronger party manipulates a person who has put his trust in her or is otherwise dependent on her to extract an advantage for herself.[4] The defenses of fraud and misrepresentation arise when one party misleads the other about aspects of a proposed transaction and gains an advantage as a result.[5] The principle might also inform how courts interpret contracts between unequally situated parties or apply the parol evidence rule.[6]

Some of the doctrines where the principle is at work—most obviously, duress, fraud and undue influence—are predicated on intentionally wrongful conduct of the advantaged party. Those are, in a sense, obvious ways in which inequality of bargaining power ought to invalidate a bargain. Indeed, the law carves them out for separate doctrinal treatment, and so they won't be the primary focus here.

But the principle is also operative in a more elusive set of situations in which unfair pressure arises from unequal circumstances that are not the primary responsibility of the advantaged party. In such situations, the advantaged party may be "moved solely by self-interest, unconscious of the distress he is bringing to the other."[7] This is not to say that wrongdoing is absent in such situations. Persons have duties not to exploit their own superior positions in their dealings with parties about whose operative weaknesses they had reason to know or discover, even when they lack actual knowledge of those weaknesses.[8] Situations targeted by the inequality of bargaining power principle accordingly include those in which the disadvantaged party's manifestation of assent is defective from a normative standpoint because it was procured by the advantaged party's negligent exploitation of the inequality for her own advantage.

# IV DETERMINING THE CONTENT OF THE LEGAL PRINCIPLE

It is unsurprising that the law doesn't regard inequality of bargaining power alone as a sufficient basis for intervention.[9] It isn't inherently wrongful to be the person in the advantaged position

[3] Ibid §§ 175-176.
[4] Ibid § 177.
[5] Ibid §§ 161-164.
[6] See *Madden v. Kaiser Foundation Hospitals*, 552 P2d 1178, 1185 (Cal 1976) ("the concept that a contract of adhesion should be interpreted and enforced differently from an ordinary contract has evolved from cases which have involved contractual provisions drafted and imposed by a party enjoying superior bargaining strength"); *Grande v. General Motors Corp.*, 444 F2d 1022, 1027 (1971) ("there is some question as to whether the [parol evidence] rule has any application at all under Indiana law in situations where there is a disparity in the bargaining position or expertise of the parties")
[7] Lloyds Bank v. Bundy [1975] 1 QB 326, 336-39 (CA) (Lord Denning).
[8] See Mindy Chen-Wishart, 'Unconscionable Bargains: What are the Courts Doing' (LLM thesis, University of Otago 1987) 17-19 (arguing that a showing of unconscionability requires the complainant to show that the enforcer has knowledge of circumstances that would make the disability obvious to a reasonable person or raise a duty to inquire about the possibility).
[9] See Restatement (Second) of Contracts § 208 cmt d (1981) ("[a] bargain is not unconscionable merely because the parties to it are unequal in bargaining position"); UCC § 2-302 cmt 1 (2002) ("The principle is one of the prevention

when the parties' relative positions are determined by factors outside each's control. A more powerful party might not take advantage of her superior position, in which case the content of the resulting bargain isn't affected by the inequality of bargaining power.

There are also situations where it is unproblematic for a party to extract an advantage from a disparity. Suppose one party falsely believes that it is a matter of indifference to him whether he enters into a transaction while the other knows better. It seems unlikely that the better-informed party wrongs the misinformed party simply by honestly explaining the importance of the transaction to him. But if she convinces him of the truth, she will be able to extract more from the transaction for herself thereby increasing her bargaining power.

Not every wrongfully exploited inequality, finally, is sufficiently problematic to justify a legal response. Concerns about security in transactions and administrative costs and considerations of institutional competence, for example, entail that the law shouldn't respond to relatively insignificant disparities.[10]

We might also wonder whether inequality of bargaining power is the right inequality to worry about in the first place. Inequality of bargaining power is a transaction specific imbalance. But the party who has the upper hand in a particular transaction may be less powerful than her counterparty overall. Why should we care about an inequality that arises in the context of a particular transaction when isolated from other power dynamics? Perhaps the answer is that we should care about all such imbalances. But that doesn't justify focusing on inequality of bargaining power to the exclusion of other inequalities. Although a party's bargaining power is likely to be highly correlated with her economic power writ large, it won't always be, and it is unclear the extent to which we should be concerned about inequality of bargaining power when there is general inequality of economic power that runs in the other direction. Consider the famous case of *Alaska Packers Association v. Domenico* where fishermen, upon finding themselves temporarily in a position of bargaining strength, went on strike to extract a promise of a higher wage from their employer.[11] The court invalidated the increase in their wages that their employer acquiesced to under the threat of the strike. We might question the acceptability of that result if the parties' economic positions prior to agreeing to the original bargain were the product of distributive injustice, such that the modified agreement better approximated what the fishermen were owed as a matter of justice.

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of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.").

[10] Mindy Chen-Wishart, *Contract Law* (6th edn OUP 2018) 347 ("the reality of inequality of bargaining power … colours every contractual negotiation to some degree" such that a requirement of true equality would break the back of contract law); Michael Trebilcock, 'An Economic Approach to Unconscionability' in Barry Reiter and John Swan (eds), *Essays in the Law of Contract* (Butterworths 1979) 390-391 (emphasizing the increased transactional uncertainty and insecurity that can result from making under-inclusive categoric rules that respond to bargaining power disparities more inclusive); ibid 391 (raising the concern that courts may be institutionally poorly situated to evaluate transactional unfairness); ibid 404 (concluding that "extreme caution on the part of courts in withholding contract enforcement on the grounds of inequality of bargaining power involving alleged abuses of market-wide monopoly power" is warranted, because "inferences of [market-wide] monopolies are frequently likely to be drawn incorrectly by courts" and "even where correctly drawn, the courts do not have their disposal the remedial instruments required to foreclose all second-order, substitution effects").

[11] 117 F 99 (9th Cir 1902).

# V THEORY

The upshot is that we need to know which inequalities of bargaining power are relevant and why. This means that a satisfactory account of the legal principle needs to be situated within a larger justificatory theory of contract law. In this final section, I survey several contenders, beginning with economic accounts and then moving on to consider rights-based alternatives.

## A Economic Accounts

If, as some economic theorists of the law contend, contract law should be designed exclusively with welfare maximization in mind, inequality of bargaining power is problematic when it causes people to transact (or fail to transact) in ways that don't further their interests. Such theorists also typically operate with a model of persons as rational and self-interested. An economic account of the principle is thus likely to have a procedural flavor, emphasizing inequalities that impede the disadvantaged party's rational pursuit of his ends.

Economic accounts can therefore account reasonably easily for doctrines that reflect epistemic asymmetries between the parties. An economic account will, for example, find problematic inequalities arising from a party's personal inability to determine whether he would have been better off not entering into the transaction as well as circumstances in which the market produces a socially suboptimal amount of information and compensating competitive pressures that would guarantee efficient outcomes regardless are absent.[12] Conversely, informational advantages arising from the advantaged party's investment in the acquisition of socially beneficial information are to be celebrated rather than condemned: voiding a contract because of such an inequality would impair the efficient operation of the market by decreasing participants' incentives to obtain such information.[13]

Certain forms of coercion and pressure will also readily count as problematic on the economic account. Thus, for example, if a party procures another's assent by making an incredible threat that the other falsely believes will be carried out, the result may be a transaction that makes the other worse off.

Yet the economic account doesn't straightforwardly condemn all exploitative conduct in these categories. This is because the unfairness of a transaction alone is irrelevant on an economic account so long as no party is made worse off as a result of the transaction.[14] Thus, high-pressure door-to-door sales tactics that exploit the victim's ignorance of the price he could obtain elsewhere appear to pass muster, as there is no reason why exploiting such ignorance would induce the victim to pay more than his valuation.[15] Similarly, if a ship in distress pays a salvor a price equal to the value of the ship and its cargo and the lives on board, there is no problem with

[12] Trebilcock (n 10) 405-413.
[13] Anthony Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts,' (1978) 7 Journal of Leg Stud 1, 13-14.
[14] In fact, if welfare maximization is the goal, the counterparty could suffer a reduction in welfare so long as the other's welfare gain more than offsets that reduction.
[15] See, e.g., *Jones v Star Credit Corp*, 298 NYS 2d 264, 266-67 (Sup Ct 1969) (invoking unconscionability to reform a contract procured under such conditions).

the transaction from an efficiency standpoint. A failure to agree on terms would result in the loss of the ship and everything and everyone on board, so both parties' end up at least as well off.[16] Indeed, it is not even clear that the economic analyst should favor invalidating contracts that are procured under the duress of a wrongful but credible threat, because the victim does better by acquiescing than suffering the consequences of the threatened action.[17]

If we broaden the frame beyond the transaction itself, considerations of dynamic efficiency may alter these conclusions by giving rise to additional reasons to care about the parties' relative bargaining power. But it is a contingent matter whether aggregate welfare will be increased by equalizing bargaining power. Bilateral monopoly situations where both parties have a similar ability to influence the terms of their transaction give them an incentive to misrepresent their own positions with a view to extracting a greater share of the available surplus for themselves, thus increasing the time and resources each devotes to the bargaining process and the likelihood of impasse and missed opportunities for gains from trade.[18] Such transaction costs may be minimized when a stronger, better-informed party makes an offer on a take-it-or-leave-it basis. While the parties would likely do better overall, all else equal, were a well-informed, neutral third party to impose an equitable solution on them, courts are generally ill-suited to such tasks insofar as they depend on the parties for information about the transaction.[19] Thus, it may be better from a welfare-maximization standpoint to leave things in the hands of the parties.

On the other hand, a laissez-faire approach gives parties worried about having their price ignorance exploited an incentive to spend resources on searching for better prices.[20] And it may give parties an incentive to invest in future bargaining power in ways that are wasteful from an economic standpoint. Thus, for example, a permissive duress doctrine gives parties incentives to make wasteful investments that increase the credibility of their threats or protect them from such threats.[21] Likewise, a refusal to invalidate extortionate salvage agreements may cause ship owners to invest more in safety equipment to lower the chances that they find themselves in need of rescuing in the first place.[22] If salvors can make such investments more cheaply than ships, there is an economic justification for judicial intervention.[23]

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[16] Trebilcock (n 10) 395-96.
[17] Oren Bar-Gill & Omri Ben-Shahar, 'The Law of Duress and the Economics of Credible Threats' (2004) 33 J Legal Stud 391, 391-417.
[18] Richard A Posner, *Economic Analysis of Law* (7th edn 2007) 62.
[19] See *Walgreen Co v Sara Creek Property Co* 966 F2d 273, 275-276 (7th Cir 1992) (Posner, J) ("A battle of the experts is a less reliable method of determining the actual cost [of breach] to [plaintiff] than negotiations between [plaintiff] and [defendant] over the price at which [plaintiff] would feel adequately compensated for [breach]").
[20] Melvin Aron Eisenberg, 'The Bargain Principle and its Limits' (1982) 95 Harv L Rev 741, 781.
[21] See Trebilcock (n 10) 396 ("apart from 'fairness' considerations, one potential advantage of a properly fashioned intervention is that the social waste (inefficiency) that is often generated by strategic behaviour in bilateral monopoly situations [such as "excessive investments in bargaining activities"] might be reduced").
[22] William M Landes & Richard A Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 J L Stud 83, 92-93.
[23] *Post v Jones* 60 US 150, 160 (1857) ("Courts of admiralty … will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain …."); G Gilmore & C Black, *The Law of Admiralty* (2nd edn Foundation Press 1975) 579 ("If the salvor refused assistance unless the master of the distressed ship consented to an extortionate bargain, not only will the agreement be set aside but the judge will reduce the award . . . according to the degree of the salvor's misconduct.").

Does anything change if the social welfare function incorporates a concern about the distribution of welfare alongside the aggregate? According to some, reasons of institutional competence mean that efficiency should remain the primary goal of contract law with other institutions that can more directly regulate the distribution of welfare tasked with the job of promoting fairness.[24] But such arguments have force only if those other institutions are willing and able to do the job. If they aren't willing and able, distributional concerns may justify a more robust equality of bargaining power principle. Even so, a lot of contingency will remain. The party with greater bargaining power in a particular transaction might have a lower level of welfare. Even if she doesn't, redressing a disparity in welfare between the parties by voiding or reforming transactions that have been affected by an imbalance of bargaining power could have unintended distributional effects, if, for example, such regulation makes parties less willing to make contracts with poor parties.

## B Rights-Based Accounts

Rights-based accounts of contract law need not regard agreements as having intrinsic, rights-based significance. They may instead see contract law as instrumentally justified as part of a larger just scheme. But much like the economic account, such accounts seem likely to offer only a contingent justification of the inequality of bargaining power principle.

Thus, in this section I consider whether non-instrumental, rights-based accounts of contract yield prescriptions with less contingent content. On such accounts, morally valid agreements are not mere instruments of social welfare or some other goal external to the agreement itself (such as the furtherance of justice or the protection of rights). Instead, they have intrinsic significance, directly expressing the duties that the parties owe to one another. Any resulting inequality of bargaining power principle will thus need to explain how inequalities of bargaining power undermine the moral validity of an agreement as expressions of what the parties owe one another.

### i Pure Procedural Justice

At one extreme are conceptions of contract that accord priority to formal equality over substantive fairness. Such conceptions may be embedded in larger theories of political morality in which the content of persons' private rights is procedurally determined. On Lockean conceptions, rights are valid when grounded in a chain of voluntary transactions leading back to a moment of valid original acquisition.[25] On Kantian conceptions, they are valid when they instantiate the principle of independence—in Arthur Ripstein's terms, the moral idea that "no person is in charge of another."[26] This principle entails that the boundaries of persons' rights must be determined either omnilaterally by an impartial state that is willing and able to coercively enforce them or by a chain of freely made agreements modifying those omnilaterally determined boundaries. Such theories see the moral bindingness of contracts as flowing from the freely given will of the parties.

[24] E.g., Steven Shavell, *Foundations of Economic Analysis of Law* (HUP 2004) 655.
[25] Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) 174-178.
[26] Arthur Ripstein, *Private Wrongs* (HUP 2015) 56.

Private wrongs on such accounts arise when a person interferes with another's rights without the right-holder's consent thus failing to respect the latter's freedom to do as he wishes with his rightful entitlements. Because the content of those rightful entitlements is procedurally determined, freedom is understood in the same way—without reference to the content of those entitlements. It follows that the operative notion of freedom is purely formal and so must be compatible with disparities in the distribution of persons' entitlements (at least so long the weaker party is not so impoverished that he cannot exercise his agency).

Such conceptions of contract will accordingly deem invalid agreements that are procured by a party's wrongful conduct toward her counterparty such as threats to violate others' rights, fraud, and other forms of manipulation. But situational inequalities in the parties' bargaining positions are generally not morally relevant, even if they are exploited by the advantaged party. The law might still take account of such inequalities, but only insofar as they serve as proxies for situations in which there is a high likelihood of difficult-to-observe coercive or deceptive conduct by the advantaged party.[27]

ii Transaction Specific Justice

In the middle of the spectrum are conceptions of contract that add a substantive requirement of transaction-specific fairness to the criteria of moral or legal validity. Unlike purely procedural accounts in which substantive fairness matters only insofar as it serves as a reliable proxy for procedural problems, substantively oriented conceptions make procedural requirements relevant only as proxies of substantive unfairness[28] or else view procedure and substance as inexorably intertwined.[29]

There are more or less robust conceptions of substantive transactional fairness. A minimal conception might add to the requirement of procedural justice the desideratum that transactions be mutually beneficial or at least not disadvantageous to a party to the transaction ex ante—that they constitute ex ante Pareto improvements.[30] A conception that adds such a substantive requirement to otherwise procedural criteria of validity isn't reducible to the economic account, because the baseline for evaluating whether a transaction constitutes a pareto improvement is moralized: the parties' situation had they not entered into the transaction undistorted by previous

[27] Richard A Epstein, 'Unconscionability: A Critical Reappraisal' (1975) 18 U Chi JL & Econ 293, 302 ("Ideally, the unconscionability doctrine protects against fraud, duress, and incompetence without demanding specific proof of any of them."); Stephen A Smith, *Contract Theory* (OUP 2004) 344 (cases of "cognitive asymmetry . . . are cases . . . in which courts have good reason to be concerned about fraud, undue influence, duress, or a simple failure to agree, but in which they lack direct evidence of the defect").

[28] Cf James Gordley & Jao Jiang, 'Contract as Voluntary Commutative Justice' (2020) Mich St L Rev 725, 758 ("The only good reason for denying relief when a party can protect himself is that there is more room for doubt as to whether the contract is truly unfair. … 'Procedural unconscionability' should matter, but only because it is more likely that the terms of a contract are substantively unfair.").

[29] See Mindy Chen-Wishart, *Unconscionable Bargains* (Butterworths 1989) 108 (arguing that procedural requirements like equality of bargaining power are "substantively inspired and substantively oriented."); Peter Benson, *Justice in Transactions* (HUP 2019) 173; Eisenberg (n 20) 800; James Gordley, 'Equality in Exchange' (1981) 69 Cal L Rev 1587, 1633-1635.

[30] Because contracts can allocate risk one party might end up worse off as a result of the transaction. But so long as the transaction allocated risk in a way that made both parties at least as well off in ex ante terms as they otherwise would have been, it constitutes an (ex ante) pareto improvement.

procedural injustice and perhaps also violations of the pareto criterion itself. The economic account, by contrast, makes the maximization of welfare the ultimate criterion, and so ultimately cares only that the transaction doesn't in fact decrease a party's welfare by more than it increases the welfare of the other, even if the transaction involves wrongful behavior on the part of one of the parties. A rights-based conception built on a pareto criterion can thus more directly vindicate a robust doctrine of duress than can the economic account.

Such a conception provides reasons beyond those offered by the procedural account to invalidate transactions infected by wrongful, manipulative, and deceptive conduct by one of the parties insofar as such conduct is likely to result in transactions that make a party worse off. It may also generate reasons for regulating transactions infected by imbalances of sophistication where the more sophisticated party's conduct doesn't rise to the level of a rights violation on the procedural account. It may, for example, offer a robust justification for regulating consumer contracts that are governed by complex standard forms where consumers' cognitive biases cause them to systematically err when evaluating the value of contracts. In such settings, sellers have incentives to compete on terms that are salient to consumers, recouping their costs by adjusting terms that are less salient. Insofar as the result is likely to be a transaction that makes the less sophisticated consumers worse off, the pareto conception gives the law grounds to intervene, as an economic account also might.[31]

Situational inequalities arising from the circumstances of the parties uninfluenced by the conduct of the stronger party—in particular, one party's need for what his counterparty is offering him and/or his lack of plausible outside opportunities—are not, however, problematic on such an account unless they lead the weaker party to agree to something that makes him worse off. Need and an absence of alternatives make it more likely that his counterparty gets a large share of the surplus. But unless his rational faculties have been clouded by his need or lack of opportunities, it is unclear why the weaker party would assent to a transaction that makes him worse off.

Such situational inequalities are, however, directly relevant on conceptions of contractual validity that tie transactional fairness to a perfectly competitive market ideal. For Peter Benson, the competitive market price embodies transactional fairness because it is "unaffected by the specific purposes, needs, situation or conduct of any given individual" and so represents a standard that is "shared, impersonal, and ordinary" thus expressing the parties' abstract equality.[32] For James Gordley and Hao Jiang, it does so by ensuring that each party is compensated for the risks that the contract imposes on him.[33] This is because competitive pressures render it impossible to say whether the market price will go up or down in the future, so each party to the transaction takes on risk that is reciprocal to the risk the other has assumed.[34]

On these conceptions, when a party's immediate needs, situation, or ignorance prevent her from accessing other market opportunities, the resulting contract is suspect, unless the terms of the transaction imitate those that would be offered in a competitive market. Thus, such conceptions straightforwardly explain why grossly one-sided salvage agreements are problematic even in the

[31] See Oren Bar-Gill, *Seduction by Contrac*t (OUP 2012) 24-25.
[32] Peter Benson, *Justice in Transactions* (HUP 2019) 184-85, 386-88.
[33] Gordley & Jiang (n 28).
[34] Ibid 745-46.

absence of duress, misrepresentation, or fraud, The relevant inequality of bargaining power is the endangered ship's lack of access to reasonable market alternatives,[35] and the transaction is invalid because the salvor exploits the ship's lack of access to procure its assent to a price greatly in excess of the competitive rate.

These conceptions also explain why a person's ignorance of her outside opportunities is relevant. Exploiting such ignorance is one way of procuring assent at a price that exceeds the competitive benchmark resulting in a transaction that is unfair in a transaction-specific sense.[36] On economic accounts, by contrast, such ignorance is not obviously problematic so long as the person isn't thereby induced to pay a price greater than her valuation of the product.

One-sided transactions at prices in excess of the competitive price are not necessarily invalid on these accounts. There is no obvious problem if the one-sidedness is sought by the disadvantaged party for reasons unconnected to the parties' unequal circumstances. Perhaps, for example, a disadvantaged party makes a one-sided deal with a more advantaged party to express his gratitude for something that the advantaged party did for him in the past. Such one-sidedness is unconnected to the inequality of bargaining strength between the parties and thus not unfair in the transaction-specific sense. On the contrary, it serves the disadvantaged party's self-regarding aims when these are broadly construed to encompass reasons to express gratitude to another. Alternatively, a disadvantaged party might make a one-sided deal with another out of his sense of justice owed to the other. For recall that bargaining power disparities don't necessarily track disparities in economic power writ large. Thus, suppose that in *Alaska Packers Association v. Domenico*, the employer acquiesced to the fishermen's demands because it believed that the original wage that the fisherman had been promised was unjust. Even if the employer would have felt compelled by the circumstances to accede to their demands, if its intent in agreeing to the modification was to honor a duty of justice owed to the fishermen, the modification arguably ought to be upheld notwithstanding the pressure it was under.

In most circumstances, of course, one-sidedness that favors an advantaged party likely does not serve the objectives or sense of justice of the disadvantaged party, but instead reflects their unequal positions. Thus, the law should create a strong but rebuttable presumption that such one-sidedness renders the transaction voidable. But this is a presumption that could be overcome with evidence of impeccable procedure.

iii Systemic Justice

Conceptions of contract built exclusively around notions of transaction-specific fairness are untroubled by bargaining power disparities that reproduce and reinforce unjust disparities of resources and opportunities whenever as the disadvantaged party has knowledge of and ready access to market alternatives. Transactional justice, on Benson's account, instantiates a form of respect for others as free and equal responsible agents that is "indifferent to need, interest, and the like" and is therefore "wholly nondistributive in character."[37] On Gordley and Jiang's conception, transactional justice enables "each party to receive something he wants more than

[35] Benson (n 29) 171.
[36] Benson (n 29) 172; Gordley & Jiang (n 28) 750.
[37] Benson (n 29) 27.

what he gives in return without enriching either party at the other's expense," thus preserving the share of resources each has as a result of the background distribution of resources, even if that distribution is unjust.[38] There is thus no invalidating unfairness on such conceptions when a poor person pays a lender a high rate of interest that compensates the lender for undertaking the risks associated with lending money to those with limited resources and uncertain prospects.[39]

These transactional accounts reflect a commonplace assumption that systemic questions of justice are the responsibility of the collective that it is therefore morally permissible for private actors to bracket in their interactions with others. There is some truth behind this assumption. The systemic injustice of parties' starting positions is generally attributable to forces for which the parties themselves are not primarily responsible for. Poor people are riskier prospects for lenders because of their lack of resources and opportunities, which is often the product of a collective failure to ensure that each has their fair share of resources and opportunities. A seller's ability to charge higher prices to women and members of historically disadvantaged racial groups depends in part on the fact that other sellers would do likewise thus worsening the consumer's disagreement point relative to that of his non-discriminated-against peers.[40]

But even if the collective bears the primary responsibility for systemic injustice of these kinds, it doesn't follow that the injustice of contracting parties' starting positions ought not to influence their terms of interaction in the face of a collective failure. If we are assuming, as rights theorists do, that morally valid contracts effectuate transfers of moral rights, it makes good sense to think that contracts must serve overall justice to be morally valid. This is certainly the contention of the proceduralists. It's just that they have a very thin view of what justice entails. Once we have thicker conceptions of justice also in view, we should consider the possibility that a morally valid contract is one that serves the ends of substantive justice by articulating a vision of what justice between the parties requires.

There is, of course, much uncertainty about what justice between contracting parties requires in the face of systemic background injustice. But that is not in tension with the idea that contracts must serve justice to be morally valid, if the parties are the ones who have the moral authority to resolve that normative uncertainty, as seems plausible when the transaction will have a limited impact on third parties. On the contrary, normative uncertainty about the dictates of justice grants the parties latitude to choose among plausible conceptions of just relations between them in accordance with their own reasonable views of what justice requires. It thereby opens up space for a principle of freedom of contract, albeit one that is ultimately subordinated to substantive justice.

While much more needs to be said to make the arguments of the previous paragraphs fully convincing, they point us towards a conception of contract according to which agreements are morally valid when they articulate the parties' plausible vision of justice between them, where this would naturally include a vision of how they ought to respond to any relevant background injustice. The conception has a substantive dimension, because to be morally valid the contract

[38] Gordley & Jiang (n 28) 798.
[39] Benson (n 29) 190.
[40] See Ian Ayres, *Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination* (UCP 2003) (providing evidence of such discrimination).

must articulate a substantively plausible vision of just relations between the parties. It has a procedural dimension because a morally valid contract must represent the parties' good faith joint vision of what justice between them entails.[41]

On this conception, contract law is presumptively tasked with the job of policing these procedural and substantive dimensions of moral validity. The law might, of course, have instrumental reasons to enforce morally invalid contracts if, say, a failure to do so would result in more overall injustice. But insofar as contract law seeks to vindicate the moral rights of the parties it should focus on enforcing only agreements that are morally valid and its operative principle of inequality of bargaining power should cohere with this objective. There would then be invalidating inequality of bargaining power were an advantaged party to impose on the other a transaction that doesn't constitute the parties' plausible joint vision of just relations between them, either because the advantaged party has imposed her vision of justice on the other or because the terms don't reflect a plausible vision of justice at all. We end up with a procedural principle that is infused with substance: its implementation requires the law to determine whether an agreement represents the parties' joint vision of justice between them. Notice that the resulting principle won't express the entire universe of invalidating causes. A contract could be morally invalid on purely substantive grounds, were both parties in good faith to agree on a deal that was transparently substantively unjust because both parties have a plainly unreasonable conception of justice in mind.

It might seem overly demanding to make the moral validity of an agreement turn on whether it implements the parties' joint vision of justice between them. But where neither party is obviously unjustly rich or unjustly poor, and the agreement likely won't interfere with the rights of third parties, the pursuit of justice will usually be compatible with each party seeking outcomes that further her own aims, so long as the price term is constructed to ensure that both are able to do this in roughly equal measure. Thus, in many cases, the conception will yield results that are compatible with the economic vision of two contracting vigorously pursuing mutual self-interested gains. In contrast to the economic model, however, the price term must always be reasonably fair for the agreement to be morally valid.

Notice that the principle doesn't exclude from its ambit unusual cases where an unjustly poor person is able to exploit a fortuitous position of strength with respect to an unjustly rich person. If the poor person imposes on the rich person an agreement that does not reflect a joint vision of what justice between them requires the agreement would be morally invalid, except in unusual cases in which it is plain that justice requires a transaction on such terms.

Defenders of accounts of contract as vindicating transactional justice may point out that the account cannot explain contract law's apparent indifference to questions of systemic justice. But

[41] For a conception of contract and promise that makes considerations of systemic justice potentially relevant to an agreement's validity, see Rebecca Stone, 'Normative Uncertainty, Normative Powers, and Limits on Freedom of Contract' (unpublished); Rebecca Stone, 'Putting Freedom of Contract in its Place' (unpublished). See also Aditi Bagchi, 'Distributive Justice and Contract' in Gregory Klass, George Letsas & Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP, 2014) (arguing for the relevance of considerations of distributive justice to the normative evaluation of contract law); Kevin E Davis & Mariana Pargendler, 'Contract Law and Inequality' (forthcoming) 107 Iowa L Rev (discussing how courts in prominent developing countries use contract law to address distributive inequality).

this apparent indifference can be explained by the practical difficulties that are likely to arise for courts who are attempting to police the bounds of moral validity when those bounds implicate systemic concerns. The implications of those systemic concerns for the just bounds of a particular relationship are difficult to ascertain given the complexity and systematic nature of the underlying normative problem. Courts are institutionally poorly situated to undertake the task of authoritatively teasing them out. Indeed, purely transactional injustice may serve as the most reliable judicially administrable proxy for moral invalidity arising from the parties' failure to implement a joint vision of justice between them in situations in which there are circumstantial imbalances in the parties' initial positions.

But it would be a mistake to confuse indifference at the level of implementation with indifference at the level of principle. Translating the imperatives of systemic justice into workable legal rules is especially challenging for contract law in its traditional incarnation, because it may not be reasonably apparent to private parties and courts whether and to what extent operative disparities in the parties' resources and prospects are the product of injustice. Even when a disparity is apparent, figuring out how the parties ought to respond is often extremely complex and likely to engender significant disagreement by engaging deeply held moral and political commitments. But it doesn't follow that contract law ought to be indifferent to systemic injustice, even if institutional limitations mean that courts cannot be in the drivers' seat. Legislatures in partnership with courts should strive to devise workable rules that ensure that sellers of consumer products deal with all in the same way regardless of gender and race, even if such requirements are hard to implement and enforce in certain contexts as a practical matter. They should also carefully consider whether to enact prophylactic rules that constrain the substance of certain types of contractual relationship relations where evidence suggests that exploitation of systemic injustice is especially likely. Mandatory terms in lease agreements such as the warranty of habitability and minimum wage laws can be understood in this light. In short, difficulties of judicial implementation ought not entail that contract law ought to be blind to inequalities of bargaining power that arise from and perpetuate systemic injustice. Much as institutional limitations of courts may lead to the judicial underenforcement of certain important material constitutional rights, institutional limitations may result in contract doctrine that underenforces principles of justice. It does not follow that those principles do not regulate relationships between contracting parties. Rather, it entails that it is the responsibility of other branches of government to take the lead in ensuring that contractual relationships vindicate those principles.[42]

[42] For discussion of the parallel case of underenforcement of material constitutional rights, see Lawrence Sager, Material Rights, Underenforcement, and the Adjudication Thesis, 90 Boston University Law Review 579, 582-584 (2010).