How Should Religious Fraud and Religious Undue Influence be Regulated by English Courts?

Craig Thomas Allen

Thesis submitted for the degree of Doctor of Philosophy awarded by Oxford Brookes University

The thesis is submitted in partial fulfilment of the requirements of the award of Doctor of Philosophy

May 2021

99, 448 words

Abstract

How should the law regulate religious influence motivating gifts? Should criminal fraud laws apply to religious representations? When do religious officials take advantage of adherents in making a financial gain? These are challenging questions that this thesis sets out to assess. The focus is upon the regulation of religious fraud and religious undue influence in English law. Commentators on religious fraud have left significant questions unanswered concerning how such conduct can be regulated by s2 of the Fraud Act 2006, fraud by false representation. One of the objectives of this thesis is to justify why it is possible to litigate religious representations alleged to be false, even if juries are prohibited from testing the falsity of religious beliefs by the jurisprudence on *Article 9* of the *European Convention of Human Rights*.

The second objective of this thesis is to illustrate the problems with how courts determine when religious influence, an inevitable part of any religious experience, becomes undue in equitable settings. Fundamental differences exist between religious and nonreligious contexts that are not explicitly recognised by courts in finding that religious defendants have taken advantage of an adherent's trust in presumed cases of undue influence.

Based on this analysis, the thesis engages with a third objective and develops a rationale explaining when defendants should be convicted for religious fraud under *s2 FA06* and found liable for religious undue influence in presumed undue influence cases. Normative discussions on autonomy and exploitation are examined. This thesis provides reasons why courts should take account of the features of religious relationships and religious motivations for gifts in cases. The rationale reduces the concern identified that decisions in both areas of law are unprincipled and give rise to religious bias. In turn, the thesis describes how religious influence should be regulated by English courts in a way that ensures more consistent regulation of gifts motivated by religious faith across the two different areas of law.

Acknowledgements

I cannot thank my supervisor Professor Peter Edge enough for his supervision, general guidance and patience over the years. This thesis was inspired by our chats in my second and third years on the LLB at Oxford Brookes University. His willingness to read and comment on draft after draft has been extraordinary. I have developed considerably as a legal researcher and person from his knowledge, enthusiasm and kind nature.

My gratitude extends to Professor Lucy Vickers and Dr Yue Ang for their detailed comments and discussions on earlier drafts of this thesis.

I would also like to thank the Faculty of Law for the funding opportunity to undertake my studies at Oxford Brookes University. Without this support, this thesis would not have been possible.

My appreciation also goes out to my parents, Martin and Karen, and my sister, Becca, for their continued interest, support and sacrifices over the years that has allowed me to get to this stage in my studies. I dedicate this thesis to my partner, Holly, whose encouragement and zest for life is has been a constant source of inspiration.

TABLE OF CONTENTS

Table of cases

Courts of United Kingdom, England and Wales

Evans v Lloyd [2013] EWHC 1725 (Ch); [2013] 6 WLUK 637

Eweida v British Airways plc [2010] EWCA Civ 80; [2010] 2 WLUK 376

Farmer v Hill [1948] J.C. 4.

Ghai v Newcastle City Council [2009] EWHC 978 (Admin); [2009] 5 WLUK 175

Goldsworthy v Brickell [1987] 1 Ch 378

Group Seven Ltd and another v Ali Nasir and others [2017] EWHC 2466

Hackett v Crown Prosecution Service [2011] EWHC 1170 (Admin); [2011] 5 WLUK 172

Hall v Hall (1868) 1 L. R. P. & D. 481, 482 (P. & D.)

Hammond v Osborn [2002] EWCA Civ 885; [2002] 6 WLUK

Hart v Burbridge [2014] EWCA Civ 992; [2014] 7 WLUK 786

Hollis v Rolfe, [2008] EWHC 1747; [2008] 7 WLUK 681

Huguenin v Basely (1807) 14 Ves. 273; 33 E.R. 526

Inche Noriah v Sheik Allie Bin Omar [1929] AC 127

Ivey v Genting Casinos Ltd [2017] UKSC 67 (SC); [2018] A.C. 391

Ilot v Mitson [2017] UKSC 17; [2018] A.C. 545

Kliers v Schmerler [2018] EWHC 1350 (Ch); [2018] 4 WLUK 571

Kunicki v Hayward [2016] EWHC 3199

Langton v Langton [1995] 2 FLR 890

Laurence v Poorah [2008] UKPC 21

Libyan Investment Authority v Goldman Sachs International [2016] EWHC 2530 (Ch); [2016] 10 WLUK 301

Lyon v Home (1868) LR 6 Eq 655

Mba v Merton LBC [2013] EWCA Civ 1562; [2014] W.L.R.

Mahoney v Purnell [1996] 3 All E.R. 61

Monck v Hilton (1887) 2 Ex. D. 268

Morley v Loughnan (1893) 1 Ch 738

NatWest Bank v Morgan [1985] AC 686

Nel v Keane [2003] EHW 190 (unreported)

Niersmans v Pesticcio [2004] EWCA Civ 372; [2004] 4 WLUK 62

Norton v Relly (1764) Eden 368; 28 ER 908

Nottidge v Prince (1860) 2 Giff. 245

O'Sullivan v Management and Music Agency Ltd [1985] QB 428

Parfitt v Lawrence [1872] LR 2 P and D 462

Penny v Hanson [1887] 18 Q.B.D. 478

Powell v Powell [1900] 1 Ch 243

Philips v De la Warr Times, July 19, 1960

R. (on the application of Watkins-Singh) v Aberdare Girls' High School Governors [2008] EWHC 1865 (Admin); [2008] A.C.D. 88

R v Augunas [2013] EWCA Crim 2046

R v Downes (1875) 13 Cox CC 111

R v Feely [1973] Q.B. 530; [1973] 2 W.L.R. 201

R v G [2003] UKHL 50 (HL)

R v Ghosh Q.B. 1053; [1982] 3 W.L.R. 110

R v Hayes [2015] EWCA Crim 1944; [2018] C.R. 1 App. R. 10

R v Headteacher and Governors of Denbigh High School, ex p Begum [2006] UKHL 15; [2007] 1 A.C. 100

R v McDevitt [2012] NICC 16

R v Price (1989) 90 Cr. App. R. 409

R v Secretary of State for Education and Employment and others ex parte Williamson [2005] UKHL 15; [2005] 2 W.L.R. 590

R v Stokes [2019] EWCA Crim 1433

R v Stringer and Banks (1992) 94 Cr. App. R. 13

R v Valujevs [2015] 3 WLR 109 (CA)

R v Wright [2013] EWCA Crim 820; [2013] 4 WLUK 72

Re A [2001] Fam. 417; [2001] 2 WLR 480

Re Brocklehurst's Estate (1978) 1 Ch 14

Re Craig, Dec'd [1971] Ch 95. C

Roche v Sherrington [1982] 1 WLR 599

Royal Bank of Scotland plc *v* Etridge (No 2) [2001] UKHL 44; [2001] 3 W.L.R. 1021

Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378

Schomberg v Taylor [2013] EWHC 2269 (Ch); [2013] 1 WLUK 200

St Clair v King [2018] EHWC 682

Simpson v Simpson [1992] 1FLR 601

Stonehouse v Masson [1921] 2 K.B. 818

Thomas Phillips v Thomas Monsoon [2014] Unreported March 20, 2014 (MC)

Tufton v Sperni [1952] 2 TLR 516

Westminster Bank plc v Morgan [1985] 1 AC 686

Wingate v SRA [2018] EWCA Civ 366; [2018] W.L.R. 3969

Zamet v Hyman [1961] 1 WLR 1442

<u>European Court of Human Rights</u>

Alida Maria Fränklin-Beentjes and Ceflu-Luz Da Floresta v Netherlands (2014), (Application no. 28167/07)

Eweida v United Kingdom (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (2013) 57 E.H.R.R. 8

Kokkinakis v Greece [1994] (App No. 14307/88)

Serif v. Greece, no. 38178/97, §53 ECHR 199-IX

Svyato-Mykhaylivska Parafiya V. Ukraine (App no. 77703/01 2007)

Courts of the United States of America

Braunfeld v. Brown, 366 U.S. 599, 610 (1961)

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)

Christofferson v. Church of Scientology, 57 Or. App. 203, 229, 644 P.2d 577, 594 (Ct. App. 1982)

Corigani v. Pironi 23 A. 355 (N.J. 1891) (New Jersey)

Dolan v. Hurley, 283 F. 695 (D. Mass. 1922)

Doveydenas v. The Bible Speaks (1989) 869 F.2d 628 (1st Cir.), cert. denied, 493 U.S. 816

Employment Division v Smith (1990) 494 U.S. 872

Estate of Lakatosh 656 A.2d 1378, 1381 (Pa. Super. Ct. 1995)

Estate of Mann (1986) 184 Cal.App.3d 593

Estate of Sarabia (1990) 221 Cal.App.3d 599

Fletcher v. Peck, 19 U.S. 87, 3 L.Ed 162 (1810)

Founding Church of Scientology of Washington v. United States (1969), 409 F. 2d 1146

Friedman v. Rogers, 440 U.S. 1, 17-18 (1979)

Good v. Zook, 88 N.W. 376, 378 (Iowa 1901)

Gilmore v. Lee, 86 N.E. 568 (Ill. 1908)

Grunwald v. Bornfreund, 696 F. Supp. 838, 840-41 (E.D.N.Y. 1988)

Guill v. Wolpert, 218 N.W.2d 224 (Neb. 1974)

Held v. Florida Conference Association of Seventh Day Adventists 193 So. 828 (Fla. 1940)

In re Estate of Hamm, 227 N.W.2d 34, 38 (Wis. 1975)

In re Hartlerode's Will, 148 N.W. 774, 777 (Mich. 1914)

In Re Estate of Reid (2002) 973 P.2d 345.

In Re Will of Kauffman 247 N.Y.S.2d 664 (N.Y. App. Div. 1964)

Jeffers v. United States, 392 F.2d 749 (9th Cir. 1968)

Katz v. Superior Court, 73 Cal. App. 3d 952, 988, 141 Cal. Rptr. 234, 256 (1977)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Lindley v. Lindley, 356 P.2d 455 (N.M. 1960)

Longenecker v. Zion Evangelical Lutheran Church, 50 A. 244 (Pa. 1901)

McMasters v. State, 21 Okla. Crim. 318, 207 P. 566 (1922)

Marbury v. Madison 5 U.S. (1Cranch) 137 (1803)

Murphy v O'Neill 454 A.2d 248, 249 (R.I. 1983)

Odorizzi v Bloomfield 246 Cal.Appl2d 123 (1966)

Paul v. Watchtower Bible & Trust Soc'y, 819 F.2d 875, 878-83 (9th Cir.)

Paul v. Watchtower Bible & Trust Soc'y, cert. denied, 484 U.S. 926 (1987)

People v. Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964)

Philadelphia Baptist Ass'n v. Hart's Executors, 17 U.S. (4 Wheat.) 1 (1819)

Post v. United States, 135 F. I (5th Cir. 1905)

Sherbert v. Verner 374 U.S. 398 (1963)

Sherr v. Northport-East Northport Union Free School Dist., 672 F. Supp. 81, 94 (E.D.N.Y. 1987)

Succession of Reeves, 704 So.2d 252, 259 (La. App. 3d Cir. 1997)

State v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951) cert. denied, 343 U.S. 927 (1952)

Roberts-Douglas v. Meares, 624 A.2d 405, 421 (D.C. 1992)

Roberts-Douglas v. Meares, reaffd, 624 A.2d 431 (D.C. 1993)

Roe v. Wade, 410 U.S. 113, 155 (1973)

Ryan v. St. Michaels Roman Catholic Church of Whitlemore, 216 N.W. 713 (Iowa 1927)

The Founding Church of Scientology of Washington D.C. v. United States 133 U.S. App. D.C. 229; 409 F.2d 1146; (1969)

The Prize Cases, 67 U.S. 635, 17 L.Ed 459 (1862)

Torcaso v. Watkins, 367 U. S.488 (1961)

United States v. Article or Device, Etc., 333 F. Supp. 357, 361 (D.D.C. 1971)

United States v. Ballard 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944)

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991)

United States v. Carruthers 152 F.2d 512 (7th Cir. 1946)

United States v. DeJesus (2003) 378 FED.Appx. 112

United States v. Gering 716 F.2d 615 (9th Cir. 1983)

United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968)

United States v. Marks (1996), 947 F.Supp. 858 (E.D. Pa. 1996)

United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981)

United States v. Snowden 770 F.2d 393 (4th Cir. 1985)

United States v. White, 150 F. 378 (C.C.S.D.N.Y. 1906)

Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125 (D. Mass. 1982)

Wallerstein v. Church of Scientology, 212 Cal. App 3rd; 260 Cal. Rptr. 331 (1989)

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)

White Crane v. United States 259 Fed. 480 (9th Cir. 1919)

Whitmire v. Kroelinger 42 F.2d 699 (W.D.S.C. 1930)

Courts of Australia

Antov v Bokan [2018] NSWC 1474

Bester v Perpetual Trustee Co Ltd (1970) 3 NSWR 30

Commercial Bank of Australia Ltd v Amadio [1983] HCA 14

Hartigan v International Society for Krishna Inc [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002)

Illuzzi v Christian Outreach Centre (1997) Q ConvR 54-490

In Church of New Faith v. Commissioner of Pay-Roll Tax (1983), 154 C.L.R. 120 (H. C. of Australia)

Johnson v Buttress [1936] HCA 41

Khan v Khan [2004] NSWSC 1189

McCulloch v Fern NSWSC 406 (Unreported, Palmer J, 28 May 2001)

Thorne v Kennedy [2017] HCA 49

Quek v Beggs (1990) 5 BPR 11, 761

Stivactas v Michaletos (No 2) Court of Appeal of NSW, 31 August 1993, BC930187

Courts of Canada

Church of Scientology and The Queen (No. 6), Re, 1987 CanLII 122 (ON CA).

Seguin v Pears 2016 CarswellOnt 17438, 272 A.C.W.S. (3d) 673

Seguin v Pears 2018 CarswellOnt 5617, 2018 ONCA 355

Syndicat Northcrest v. Amselem (2004) 241 DLR (4th) 1, 27

Courts of New Zealand

Brusewitz v Brown [1923] NZLR 1106 (SC)

Table of United Kingdom Statutes and Legislation

England and Wales

Fraud Act 2006, s1, 2, 3, 4, 11, 12

Fraudulent Mediums Act 1951

Human Rights Act 1998, s 1, 2, 3, 4

Inheritance (Provision for Family and Dependants) Act 1975, s 1, 2

Interpretation Act 1978, s5, sch1

Motor-Cycle Crash Helmets (Religious Exemption) Act 1976

Senior Courts Act 1981, s50

Slaughterhouses Act 1974, s36(3)

Vagrancy Act 1851, s4

Table of Overseas Legislation and International Conventions

European Court of Human Rights

Articles 9(1)-(2), 14

United States of America

State

California Probate Code §6104 (2010)

Maine Revised Statutes Annotated §1022

Federal

U.S. Const. amend. I.

Australia

Victoria Charter of Human Rights and Responsibilities Act 2006

Chapter 1: Introduction

Between 2005-2020 Tony, a young god-fearing father and married churchgoer of Faith Allegiance, a fictitious evangelical religious group that views the Bible as the ultimate form of authority, gave 20% of his wages each month and 100% of his bonuses to the church. Tony believes that the payments made to the church will guarantee he reaches heaven when he eventually dies. He was assured of this by Elizabeth, the minister of the Faith Allegiance church he has attended since 2005. Elizabeth told Tony that the gifts are used for the upkeep of the church and to help with the Faith Allegiance's activities. In 2020, Tony sadly caught COVID and began self-isolating away from his wife and daughter. He became extremely worried about his deteriorating condition and the possibility of his family also contracting COVID. He reached out to Elizabeth for advice and comfort. Elizabeth, concerned for Tony's health, requested that they discuss his situation through Zoom. During their chat, Elizabeth suggested that Tony should make a gift to the church to show his devotion to God, who would subsequently rid Tony of COVID. Tony believed Elizabeth and immediately gifted £5,000 to the church. One-week later Tony's symptoms grew more severe and he was rushed to a hospital for treatment. Tony was hospitalised for three weeks. After this time, he made a full recovery and was able to move back into his family home.

Two months later, Tony becomes extremely distrustful of Elizabeth after his experience with COVID and began to question his faith and relationship with Elizabeth over the years. After deciding that Elizabeth has lied to him to financially benefit the church through a difficult period where attendance was prohibited by the government, Tony abandons his faith. Tony wants his financial contributions between 2005-2020 back from the church, as he has now been made redundant by the recruitment agency he works for. Tony has since been unable

to meet his mortgage payments. Gemma, Tony's wife, is a full-time caregiver for her ill father and is only able to make nominal contributions to the family's bills. Tony has not been able to find another job because of record levels of unemployment and is consequently fearful that he will fall into further financial difficulties in the short-term, which will impact greatly his and his family's life.

Religious gifts made in similar contexts are common in many faiths and will often be used for a variety of purposes. For example, to help fund religious organisations and places of worship, to support evangelical practices and to contribute to the charitable practices of religions. Funding religions through gifts made by adherents is likely to be seen by most as an uncontroversial practice and one that is not explicitly prohibited by English law.

The fictitious scenario involving Tony raises questions about whether he can challenge the legality of the gifts motivated by religious faith since 2005.[1] I have outlined an example of an adherent who had donated large sums of their property to a religious institution because of a long-term relationship of influence and trust with a religious leader, who later changes their mind on the reasons for their gifts. The change of mind is caused by a growing distrust of religious officials, like Elizabeth, and because of a change of financial circumstances that were not and could not have realistically been anticipated at the time any of the gifts were made. In such circumstances, donors, like Tony, may feel that they have been induced to make some or all of the gifts because of lies, or consider that they have been taken advantage of by religious

[1] Evidence exists that other religious groups have been making similar religious claims. For example, "By faith you can be saved from the Coronavirus pandemic by covering yourself with the Divine Plague Protection Oil and wearing the Scarlet Yarn on your body" see National Secular Society, 'Charity regulator to look into sale of coronavirus 'protection kits' 02/04/20 <https://www.secularism.org.uk/news/2020/04/charity-regulator-to-look-into-sale-of-coronavirus-protection-kits> Accessed August 2020. For similar religious promises of curing COVID using snake-oil in the US see Canopy Forum on the Interactions of Law and Religion, Shlomo C. Pill, 'Selling Religious Cures and Other First Amendment Pitfalls in the Age of Coronavirus,' March 2020 <https://canopyforum.org/2020/03/16/selling-religious-cures-and-other-first-amendment-pitfalls-in-the-age-of-coronavirus-by-shlomo-pill/> Accessed August 2020.

officials seeking to gain financial capital, either to benefit themselves or their religious practices. However, changes to Tony's position and feelings on the motives for the gifts may or may not be justified. This depends on the nature of the religious official's influence and whether laws determine that the conduct is an inevitable part of the religious experience of the relevant faith or reaches a level that it is characterised as unlawful. This requires courts to consider whether Tony's gifts to Faith Allegiance are of his own free-will? Is Elizabeth's conduct sincerely based on her religious beliefs? Are the answers to each of the questions different at any time during Tony's and Elizabeth's fifteen-year relationship?

This thesis engages with religious beliefs and other influential religious factors motivating adherents to enter into financial transactions[2] to better understand how religious influence should be regulated by English laws.[3] I address how religious fraud and religious undue influence should be regulated by courts in England by exploring criminal fraud laws and the civil law doctrine of undue influence in equitable settings. To achieve this, I explore the most pressing challenge of regulating religious influence by considering primary and secondary sources relating to religious fraud and religious undue influence. After identifying the doctrinal, theoretical, and rights-based challenges, I develop a rationale to better establish when courts should consider that adherents have voluntarily entered into financial transactions in religious contexts. This rationale will be proven to give greater legitimacy to decisions on defendant liability and the remedies awarded to claimants.

[2] My analysis of financial transactions is limited to *inter vivos* gifts and donations made to religious officials and institutions motivated by religious faith.
[3] I discuss legally recognised religions, spiritual groups and their beliefs, which feature in the case law examined. I presume that similar beliefs considered and applied to similar decisions would also be categorised legally as religious by English courts.

My thesis is split into two parts: in part I, before engaging with the English understandings of both legal wrongs, I review how US courts have litigated religious fraud cases and also, how Australian and US courts have regulated religious undue influence in chapter 2. The courts in both jurisdictions have experienced both types of cases more frequently in contemporary settings than English courts.[4] The judicial reasoning of the judgments examined offers detailed discussions of the difficulties of determining when religious influence becomes unlawful. I use comparative law to identify common challenges experienced in the US and Australia that have, or at some point, will likely be similarly experienced by English courts. Additionally, I explore potential comparative lessons from the US and Australia that could benefit how English law could regulate both legal wrongs.

My selection of the two jurisdictions as comparators for English understandings of criminal laws and equitable doctrines is not unusual. Commentators assessing the impact of criminal laws on religion and religious beliefs have often considered the US as an appropriate comparative jurisdiction.[5] The US criminal fraud laws discussed here are different from the English *FA06* offences, but the laws share enough similarities for it to count as a suitable jurisdiction to consider the common challenges of regulating religious fraud, and the possible means of addressing those challenges. Similarly, comparisons between English and Australian understandings of equitable principles and the laws on trusts are common. In much of the common law commentary on undue influence there is a great focus on leading English cases.[6] Further, English civil law commentators have examined US understandings of undue influence

[4] I do not consider the Australian experience of regulating religious fraud. Such cases are rare in Australian legal territories.

[5] See Matthew Gibson, 'Rastafari and Cannabis: Framing a Criminal Law Exemption,' (2010) Ecclesiastical Law Journal, 12(3), 324-344 & Peter Edge, 'Religious drug use in England, South Africa and the United States of America,' (2006), Religion & Human Rights, 1(2), 165–177.

[6] In particular, *Allcard v Skinner* (1887) 36 Ch D 145, see Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: Allcard v Skinner Revisited in Australia,' (2003) University of New South Wales Law Journal, 26(1), 66-89 & Simone Degelling, 'Undue Influence and the Spiritual Economy,' in Kit Barker et al, *Private Law and Power*, (Hart Publishing 2017).

to determine whether lessons should be adopted from this comparative jurisdiction.[7] Appropriate comparisons are possible because the jurisdictions share similar understandings on undue influence and similar social norms on general gift-giving, religious gift-giving and family provisions law.[8]

More specifically, there are clear reasons why the US is a suitable comparative jurisdiction for understanding religious fraud regulation, beyond the instrumental reason that it is an English-speaking country. The US Supreme Court has decided the leading religious fraud case globally, *United States v Ballard* [1944][9] (hereinafter *Ballard*), which concerned religious representations communicated through the mail. The reasoning of the US Supreme Court has been followed in federal and state cases involving allegations of religious fraud in criminal and civil contexts. I discuss how courts have subsequently interpreted the judgment and the issues that have been recognised by other US courts, as a result of doing so. I also provide an overview of the suggestions from US commentators on how courts could seek to address these challenges and introduce some of the concerns about adopting such approaches in practice. This analysis offers important insights into the complexity of regulating religious fraud using criminal laws.

I subsequently explore the reasoning of the leading judgments on religious undue influence found in Australia and the US. Extending my civil analysis to Australian law is significant. Between 2000-2005, five cases of religious undue influence reached the Supreme Courts of Australian legal states.[10] The reasoning contained in these judgments is detailed and considers the complexities of determining religious influence from undue influence. Moreover, the

[7] See William Swadling, 'Undue Influence: Lessons from America,' in Charles Mitchell & William Swadling, *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays*, (OUP 2013).
[8] See, pages 63-67.
[9] 322 U.S. (1944).
[10] See n 151.

Australian cases have been examined by a number of scholars who have generated a detailed body of commentary on the challenges of regulating gifts motivated by religious faith. In particular, I expand upon Pauline Ridge's leading work in the common law world on how Australian courts have decided cases and what questions remain from those important judgments.[11] The US also contributes to understandings of how religious undue influence is regulated. Recently, US commentators have also generated detailed commentary on contemporary religious undue influence cases, which I engage with. Based on this comparative analysis, I demonstrate how both jurisdictions have and continue to share a similarly challenging experience of regulating religious undue influence through the test for presumed undue influence, as it stands in each jurisdiction. I list the prevalent complexities of regulating religious undue influence before explaining the potential limit of insightful comparative lessons from both jurisdictions that could be used to otherwise enrich the English understanding of presumed undue influence in my later analysis.

Departing from the comparative analysis, I move on to illustrate how similar legal challenges are experienced in England under the current understandings of the most relevant laws for regulating religious fraud and religious undue. In chapter 3, I firstly consider *s2* of the *Fraud Act 2006* (hereinafter *FA06*), fraud by false representation. This is the broadest offence contained in the *FA06*[12] and the offence most likely to regulate religious representations resulting in financial gains. Elizabeth's claim that God will rid Tony of COVID in exchange for a gift is an example of a representation that could foreseeably be litigated under *s2 FA06*.

[11] Pauline Ridge (n 6); 'Moral Duty, Religious Faith and the Regulation of Testation,' (2005) University of South Wales Law Journal, 28(3), 720-739; 'Negotiating the sacred in law: Regulation of Gifts Motivated by Religious Faith,' in Elizabeth Burns Coleman et al, *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society*, (ANU Press 2006); 'Legal and Ethical Matters Relevant to the Receipt of Financial Benefits by Ministers of Religion and Churches,' (2003) Griffith Law Review, 12; 'McCulloch v Fern,' (2002) Journal of Contract Law, 18, 13.

[12] David Ormerod, 'The Fraud Act 2006-Criminalising Lying?' (2007) Criminal Law Review, 196.

Religious cases of this nature are rare in contemporary settings. In the most significant case, *Thomas Phillips v Thomas Monsoon* [2014][13] (hereinafter *Phillips*), a Magistrates court dismissed a claim that the tenants of the Church of the Latter Days Saints were fraudulent on the grounds that it was nonjusticiable and amounted to vexatious litigation.

Religious fraud regulation is not new to the laws of England.[14] Regulation preventing the use of unworldly contexts to unlawfully acquire financial capital has existed for centuries.[15] Yet despite the considerable value of global religious fraud,[16] and growth in global scholarship,[17] religious fraud is yet to be viewed again as an area of real legal concern in contemporary settings in England. Domestic fraud agencies do not discuss religious fraud at all.[18] This omission is, however, surprising given that media coverage on alleged instances of religious fraud is now common.[19]

---

[13] Unreported March 20, 2014 (MC).

[14] St John A. Robilliard, *Religion and Law: Religious Liberty in Modern English Law*, (Manchester University Press 1984), 119; also see Ronald C. Finucane, *Miracles, Pilgrims: Popular Beliefs in Medieval England*, (Palgrave 1977).

[15] Vagrancy Act 1851 and the Fraudulent Mediums Act 1951; for greater detail on these Acts see Robilliard (1984), 118-119 & Peter Edge, 'Determining Religion in English Courts,' (2012) Oxford Journal of Law and Religion, 1(2), 402-423.

[16] In 2014 the ACFE estimated that of the £3.7 trillion global estimated costs of fraud, 2.9% was caused through religious and charitable fraud, ACFE, 'Report to the Nations on Occupation Fraud and Abuse 2014,' <http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf>, page 27. Accessed May 2020.

[17] In the US see Marjorie Heins, 'Other People's Faiths: The Scientology Litigation and the Justiciability of Religious Fraud,' (1981) Hastings Constitutional Law Quarterly, 9(1), 15; Jonathan Turley, 'Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation,' (1988) William and Mary Law Review, 29(3), 441-500; Caleb Mason, 'What is Truth? Setting the Bounds of Justiciability in Religiously-Inflected Fact Disputes,' (2010) Journal of Law and Religion, 1, 91–139; Nicholas Barborak, 'Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud,' (2000) Akron Law Review, 33(4), 577-610; Sean Senn, 'The Prosecution of Religious Fraud,' (1990) Florida State University Law Review, 17(2), 325-352. Religious fraud research has been conducted in Taiwan and Hong Kong by Jianlin Chen, see 'Regulating Religious Fraud in Taiwan and Hong Kong: A Comparative Study on the Convergences and Deviations in the Understanding of Religious Freedom,' (2019), Chinese Journal of Comparative Law, 7(1), 150-189; 'Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan,' (2018) National Taiwan University Law Review, 13(2), 183-237; 'Hong Kong's Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud,' (2018) Journal Of Law And Religion, 33, 421-446.

[18] Only clairvoyance scams have been examined, see Amanda van Eck Duymaer van Twist, *Minority Religions and Fraud: In Good Faith*, (Routledge, 2nd Edition, 2016), 4.

[19] For example, BBC World Service, Your Question of Faith, 'How do Religious Frauds and Imposters?' 17 Apr 2000 < https://www.bbc.co.uk/sounds/play/p0344sp1> Accessed June 2020; Damien Gayle, 'Met police examine fraud allegations at Space Nation church,' Wed 13 Nov 2019 <https://www.theguardian.com/uk-news/2019/nov/13/met-police-examine-fraud-allegations-spac-nation-church> Accessed June 2020; BBC News,

Religious fraud litigation based on *s2 FA06* raises complex theological and legal questions for English courts; most notably, when should religious beliefs and representations surrounding gifts be classified as fraudulent by the law? Should the law enter into a debate so heavily grounded in theology? I discuss why it is unlikely and undesirable that defendants should invariably be exempt from the offence where the representations alleged to be fraudulent are motivated by religious faith.

After outlining the reasons why religious fraud should be viewed as a real concern for English courts, I analyse the most troubling aspects of religious fraud regulation in light of the US experience. This analysis involves intertwined considerations of criminal law doctrine, procedure and human rights protections. These challenges are produced by the *actus reus* and *mens rea* requirements for *s2 FA06*. Some of the regulatory challenges and questions discussed apply uniquely to religious contexts. Other challenges examined are general criminal doctrinal ones that are compounded when considered in religious contexts. There are two primary challenges for the effective regulation of religious fraud. Firstly, whether religious beliefs featured in cases can be tested for falsity, and if courts are allowed to do so, how can conventional methods test different types of religious beliefs? I term this the "falsity testing challenge." Secondly, I question what role should the sincerity of the defendant's religious beliefs have in cases? I call this the "sincerity testing challenge." I also review several other areas of concern generated by the wording of *s2 FA06*. This extends to the difficulties of determining a defendant's knowledge of unworldly and religious matters, how dishonesty assessments might be overly critical of defendants from less established faiths, and whether group sincerity is relevant to cases involving multiple defendants within religious structures.

'Coronavirus: London church investigated over 'protection' oil,' 2 April 2020, <https://www.bbc.co.uk/news/uk-england-london-52136588> Accessed June 2020.

My analysis of *s2 FA06* in religious contexts reveals the significance and worrying nature of the challenges facing English courts in regulating religious fraud. I submit that the suggestions of how these challenges can be addressed using the alternative approaches proposed by the US commentators mentioned should not be transplanted into English criminal fraud laws because of the religious freedom concerns identified. I demonstrate that without further developments to the understandings of the *actus reus* and *mens rea* of *s2 FA06* by the courts or Parliament, defendants are presented with multiple opportunities to escape liability by explaining their conduct through religious pretexts. Judicial determinations that representations are religious and cannot be tested for falsity could result in abuses of religious categorisation by both dishonest adherents and racketeers using religion as a cloak to mask their true intentions of making a profit. I conclude that significant developments in case law or through legislative reform are needed to ensure *s2 FA06* does not overregulate or underregulate religious representations that result in gains of property. This applies most forcefully to the falsity testing challenge; particularly where religious beliefs are incapable of testing for truthfulness by conventional legal methods. However, I argue that the sincerity challenge would also benefit from further legal analysis by courts.

In chapter 4, I consider the equitable doctrine of undue influence in religious contexts. I discuss how courts have determined when religious influence becomes undue in presumed undue influence cases. Other than being a civil law doctrine, religious undue influence has a different foundational understanding in contemporary English law compared to the criminal regulation of religious fraud.[20] Religious and spiritual undue influence cases were common in the

[20] Suspicions that religious influence is highly influential on motivations for both *inter vivos* gifts and testamentary dispositions has a long historical pedigree in England and Wales. This suspicion goes as far back as transfers of land regulated by Mortmain Statutes, for general commentary see Jeffrey G. Sherman, 'Can Religious Influence ever be "Undue" Influence?' (2008) Brooklyn Law Review, 73(2), 581-598.

nineteenth century. The leading case from this period, *Allcard v Skinner* (1887)[21] (hereinafter *Allcard*), remains relevant to doctrinal discussions in English courts and is still cited in leading contemporary nonreligious undue influence cases.[22] Similarly, civil law scholars have discussed *Allcard* principally to consider and assess the doctrine's correct rationale.[23]

Since that period religious undue influence cases have been less common in England until recently when English courts witnessed a small resurgence in claims.[24] Despite the religious pedigree of the doctrine, there are several worrying areas commented on in historical and contemporary cases that risk courts continuing to produce unprincipled decisions on defendant liability in hard cases. This view is evidenced in my examination of both religious, spiritual and general presumed undue influence cases. My analysis builds on the extensive work of Ridge, who makes important comparisons between English and Australian cases. Some of the challenges investigated apply uniquely to religious undue influence cases because of the nature of religious relationships. I also demonstrate how the doctrine suffers from general doctrinal challenges relating to the operation of presumptions and the rebuttal stage that are compounded in religious cases. I claim that the challenges are the result of an overarching challenge that I call the "grounding principle problem." I discuss how the doctrine's rationale is not sharply defined or consistently applied by courts and explain why this treatment of the rationale is significant in religious undue influence cases.

---

[21] See n 6.

[22] Most notably, *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180 (HL) *and Royal Bank of Scotland plc v* Etridge *(No 2)* [2001] UKHL 44; [2001] 3 W.L.R. 1021.

[23] See Peter Birks & Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson & Daniel Friedmane, *Good Faith and Fault in Contract Law*, (Clarendon Press 1997); Rick Bigwood, 'Contracts by Exploitation: From Unfair Advantage to Transactional Neglect' (2005) Oxford Journal of Legal Studies, 25(1), 65-96 and Mindy Chen-Wishart, 'Undue Influence: Vindicating the Relationships of Influence' (2006) Current Legal Problems, 59(1), 231-266.

[24] *Catt v Church of Scientology Religious Education College Inc* (2001) C.P. Rep 41, *Azaz v Denton* [2009] EWHC 1759 (QB); [2009] 7 WLUK 568, *Curtis v Curtis* [2011] EWCA 1602; [2011] 11 WLUK 381 & *Kliers v Schmerler* [2018] EWHC 1350 (Ch); [2018] 4 WLUK 571.

As a result of this analysis, I assert that English courts possess too much discretion when making distinctions between religious influence and undue influence, which should be of concern to any religious organisations receiving gifts motivated by religious faith. I contend that the religious nature of the party's relationship and the donor's religious beliefs motivating gifts may not be taken seriously by courts because of objective conceptions of what constitutes valid reasons for gift-giving. I demonstrate that there is a real potential that suspicious or unusual religious beliefs motivating gifts are wrongly treated as evidence of undue influence by courts. I also discuss how the doctrinal test causes large gifts to religious institutions, or individuals of any background, to be categorised as suspect and subject to a presumption of influence. I argue that this sort of reasoning creates significant disadvantages for religious defendants when rebutting presumptions of influence.

I close my doctrinal analysis of the English understanding of equitable undue influence in religious contexts by addressing why the understandings of undue influence found in the US and Australia should not be directly transplanted into English law. I consider that the understandings of the doctrine held in both jurisdictions are unable to offer a sufficiently principled and justified means of addressing the challenges examined in an appropriate way. The three jurisdictions share too many common challenges for this to be a suitable approach. Instead, based on my domestic doctrinal and comparative analysis, I argue that a new rationale must be developed to address the grounding principle problem, which explicitly takes account of religious factors in cases. This is developed in part II of the thesis.

Before that stage of my thesis, I identify several overlaps between the two legal wrongs, despite the obvious differences in legal contexts. In chapter 5, I demonstrate how my combined analysis of both legal wrongs reveals that regulating religious influence poses multiple hybrid

challenges. These challenges relate to the understandings of the rationales for *s2 FA06* and presumed undue influence, the use of undefined principles in judicial reasoning and the limitations of subjective concepts. I reaffirm that the overarching problem of regulating religious influence using criminal fraud laws and civil undue influence is the degree of discretion held by judges and juries in deciding claims, and the lack of clear understanding of the fundamental principles relevant to both legal wrongs. This discussion concludes part I and sets out the fundamental considerations of regulating religious influence through both legal wrongs.

In part II, I take a jurisprudential turn and develop a principled response to the challenges identified in part I. This response is designed to avoid the risks of underregulating and overregulating religious conduct that shapes an adherent's reasons for gifts in the ways examined. In chapter 6, I begin my development of such a response by focusing exclusively on the rationales seeking to theorise presumed undue influence and set aside my criminal fraud analysis. I discuss the three most frequently discussed, and arguably leading rationales:[25] Birk's and Chin's impaired will account;[26] Bigwood's wrongdoing as exploitation account;[27] and Chen Wishart's hybrid account of relational autonomy, which is grounded in a Perfectionist framework.[28] I argue that neither of the accounts adequately addresses the claimant sided, defendant sided, and both claimant sided and defendant sided challenges of regulating religious undue influence identified in the civil sections of part I. The layered approach of my critique demonstrates that the general weakness of the restitution scholarship is a failure to give

[25] Public policy could also be considered as in see generally Graham Ferris, 'Why is the Law of Undue Influence so Hard to Understand and Apply?' in Elizabeth Cooke, *Modern Studies in Property Law- Volume 4*, (Hart Publishing 2007). It has however not been considered, as the account offers the least likely means of addressing challenges pervading the doctrine and has gained less traction in discussions on the correct rationale.
[26] See Birks & Chin (n 23).
[27] Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) Oxford Journal of Legal Studies, 16(3), 503-515 & Bigwood (n 23), 65-96.
[28] Adapted from Joseph Raz, *The Morality of Freedom* (OUP 1986) in Chen-Wishart (n 23), 231-266.

sufficient attention to hard cases of religious undue influence that would, in turn, benefit the justifications for deciding easier cases of undue influence. I consequently demonstrate that the failure of each rationale exists at both a normative and practical level.

Despite my strong critique of the three rationales, I consider that in part each helps to explain an inherent part of what constitutes undue influence in religious contexts. I subsequently use the critique of the rationales to develop my own rationale termed the "integrative rationale of autonomy and exploitation" in chapter 7. I first explain how this applies to presumed undue influence and then to *s2 FA06*. Through my rationale I advance more detailed conceptions of impaired will, exploitation, and relational autonomy. I contend that this combination of principles changes how the offences would be regulated by English courts, which would lead to more principled decisions on liability, if it were accepted.

I adopt Gerald Dworkin's conceptions of personal autonomy for the first limb of my rationale, which is claimant-sided. I include two conceptions of autonomy advanced by Dworkin, even though Dworkin later rejected his first account. I explain why the critique of that account is not as applicable to this context. This explanation of autonomy is a new addition to the rationale debates. Using the understandings of autonomy, I explain that a donor's autonomy can be infringed in two ways. Firstly, their autonomy is infringed where the donor's first-order and second-order preferences are not aligned at the time the gift is made. I define this as "incongruence between reasons." Alternatively, a donor's autonomy is infringed where their reflections are hindered. I term this "reflection thwarting."

I embed this understanding of personal autonomy within a Perfectionist framework described by Joseph Raz. My usage of this framework elaborates on my analysis of Chen-Wishart's

rationale. Incorporating this additional understanding of autonomy helps to sets limits to what conduct should be characterised as valuable and autonomous by court in gift-giving settings. It is particularly important to the religious focus of my analysis, which touches on rules obedience and poverty, as it helps to guard against determinations made by courts that those rules accepted by adherents are characterised as restrictions on their autonomy.

The second limb of my rationale, which is defendant-sided, is inspired by Joel Feinberg's leading account of interpersonal exploitation in criminal law theory. I consider Feinberg's rich analysis of criminal exploitation[29] and focus on exploitation resulting in financial harm or conduct that was intended to cause financial harm.[30] This understanding of exploitation has not been considered in the rationale debates discussed or in detail by commentators concerning *s2 FA06* litigation. Nevertheless, I demonstrate why this conception of exploitation is a justifiable aspect of my rationale that provides an appropriate definition for the term in cases of presumed undue influence and *s2 FA06*.

Exploitation establishes when infringements of autonomy become violations of autonomy that justify criminal or civil liability. Where this alignment occurs in civil contexts, a gift has been unduly influenced, and where it is proven in criminal contexts, a *s2 FA06* offence is committed if the other statutory requirements are also fulfilled. My usage of exploitation sets another limit to what conduct should be characterised as undue influence and fraud by false representation in religious contexts.

[29] Set out in Joel Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to* Self, (OUP 1989).
[30] *Ibid*, 176.

More broadly, my rationale has a wider focus on temporality, as the constituent elements of religious influence and relationships can vary greatly between parties over time. In the criminal context, temporality features in assessments of whether the defendant satisfies all elements of the *actus reus* and *mens rea* of *s2 FA06*. In the civil context, temporality and causation are less commonly found in discussions concerning undue influence. No real commentary exists on how temporality can or should be understood in the doctrinal test for presumed undue influence. Instead, temporality is treated more as an implicit factor in equitable understandings of the doctrine in England and Australia that I argue has not been given sufficient recognition. Temporality analysis does, however, feature in some US religious cases. It is treated as a relevant factor by judges concerning when presumptions of influence arise and whether one can be rebutted by defendants. I consider this reasoning and explain how my rationale engages with changes in religious influence and relationships, and why it is sometimes necessary to consider severing gifts from presumptions of influence when such changes have occurred.

Overall, I claim that the combination of normative principles in my rationale, set within a temporally nuanced Perfectionist framework, provides greater doctrinal clarity for what constitutes unlawful religious influence. It does so by explaining what conduct should be captured by both legal wrongs, and also, what factors are relevant to the decisions of courts. Consequently, my rationale is better placed to establish when courts should determine that individuals have voluntarily entered into financial transactions in religious and general contexts. Accordingly, my rationale gives greater legitimacy to judicial reasoning and decisions on liability by reducing the discretion afforded to judges and juries through advancing principled ways of addressing many of the challenges of regulating religiously motivated conduct in both areas of law. Therefore, I demonstrate how my rationale guards

against the sorts of concerns mentioned in part I, even if judges and juries deciding cases lack any degree of religious literacy on the party's religious beliefs.

My thesis makes several contributions to legal knowledge on how religious influence should be regulated and more generally, to the existing doctrinal understandings of both legal wrongs evaluated. I outline the main challenges of regulating religious fraud and advance understandings of how religious representations alleged to be fraudulent should be litigated using *s2 FA06*. I describe some potential means of how courts of Parliament could confirm how the falsity testing challenge should be addressed in religious cases based on the US regulatory experience. In doing so, I highlight areas of law that are fertile ground for future analysis in this context and general human rights jurisprudence.

My focus on the equitable understanding of undue influence also creates similar contributions to equity and restitution scholarship. By deciding how hard cases of religious undue influence should be decided, I contribute to understandings of the doctrine more generally and explain how courts should interpret the concepts of impaired will and exploitation in presumed undue influence cases of any nature. Consequently, I further understandings on how specific doctrinal issues should be addressed by courts. My rationale also contributes to the rationale debates by reaffirming why monist rationales offer inadequate explanations of when influence becomes undue.

I now begin my substantive analysis of the comparative and domestic regulatory approaches for determining liability for religious fraud and religious undue influence, and the challenges of doing so in part I. I continue to describe the main and secondary contributions to legal knowledge of my thesis in more detail in part II.

PART I

Chapter 2: A Comparative Analysis of Religious Fraud and Undue Influence

1. Introduction

In this chapter, I first examine the US experience of religious fraud regulation. I focus predominantly on the US Supreme Court decision in *Ballard*. This decision is the starting point of any discussion of religious fraud;[31] it has said more about the issues that concern religious freedom and sincerity of beliefs in the US than any other case.[32] I discuss the reasoning of the majority and dissenting US Supreme Court Justices and consider how this reasoning has been applied in subsequent decisions. I also outline the main concerns about the decision and the alternative approaches argued by commentators to create more effective regulation of religious representations. Such discussions will be relevant to my examination of how courts would prosecute religiously motivated representations using *s2 FA06* in chapter 3.

I subsequently review the Australian and US experience of religious undue influence regulation by discussing the leading cases within each jurisdiction. This analysis reveals a number of challenges in determining when religious influence becomes undue that are either common or unique to each jurisdiction. The challenges are split into three categories: the characteristics of the parties, the "gift," and the review process conducted by courts in both jurisdictions. My analysis also offers some insights into the means of addressing the challenges that are

[31] Heins (n 17), 158.
[32] Kent Greenawalt, *Religion and The Constitution: Volume 1: Free Exercise and Fairness*, (Princeton University Press 2006), 110

subsequently relevant to my discussion in chapter 4 of the English experience of regulating religious influence through the civil doctrine of undue influence.

1.1. Religious fraud regulation in the US

Religious fraud has been a problematic area of legal regulation in the US for over a century.[33] Since the early twentieth century, there has been a steady stream of cases under federal law, mainly relating to the offence of mail fraud.[34] Cases have consistently posed challenging questions for courts about how claims should be prosecuted and how far courts should take account of religious liberty protections. Religious liberty protections under the First Amendment of the US Constitution have been significant in cases relating to untestable religious representations and the potential for religious exemptions to generally applicable criminal laws. Religious fraud prosecutions are, however, rare[35] and claims have been less frequent since the turn of the twenty-first century. This development does not mean that religious fraud is not regularly committed throughout US states. Depending on how religious fraud is defined,[36] there is a vast amount of quantitative data and reports suggesting that such

[33] *Post v. United States*, 135 F. I (5th Cir. 1905). and *United States v. White*, 150 F. 378 (C.C.S.D.N.Y. 1906).
[34] For example, see *McMasters v. State*, 21 Okla. Crim. 318, 207 P. 566 (1922) (spiritualism); *State v. Handzik*, 410 Ill. 295, 102 N.E.2d 340 (1951) cert. denied, 343 U.S. 927 (1952) (faith healing); *United States v. Ballard* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); *United States v. Carruthers* 152 F.2d 512 (7th Cir. 1946) (religious fraud); *Jeffers v. United States*, 392 F.2d 749 (9th Cir. 1968) (religious fraud); *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981) (Scientology); *Van Schaick v. Church of Scientology of Cal., Inc*., 535 F. Supp. 1125 (D. Mass. 1982) (Scientology); *Christofferson v. Church of Scientology*, 57 Or. App. 203, 229, 644 P.2d 577, 594 (Ct. App. 1982) (Scientology); *United States v. Gering* 716 F.2d 615 (9th Cir. 1983) (religious fraud); & *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991) (religious fraud).
[35] Senn (n 17), 327, ft 10.
[36] Religious fraud can just mean secular fraud offences committed in religious contexts. For instance, misuse of solicited funds for different means than promised, tax fraud, skimming religious accounts, and fraudulent expense claims.

conduct is extremely prevalent in US states.[37] The US is also factored into the global trend of fraud, which is increasingly committed in religious contexts.[38]

1.1.1. The US Legal Context

Religious fraud regulation in the US generally touches on two categories of laws. Firstly, federal laws, which are "Supreme law[s] of the land."[39] State laws are not discussed in the following analysis in any real detail due to the volume of laws and legal differences between states.[40] However, this choice does not weaken the analysis that follows. The analysis conducted on US regulation of religious fraud provides a solid foundation for comparisons that have also been adopted by senior courts in other common law jurisdictions prosecuting instances of alleged religious fraud.[41] Moreover, the cases examined below have received the

[37] Carol S. Peters, 'More Than Just Good Deeds: Fraud Within Religious Organizations,' (2015) A Capstone Project Submitted to the Faculty of Utica College in Partial Fulfillment of the Requirements for the Degree of Master of Economic Crime Management, 2 <https://pqdtopen.proquest.com/doc/1728329488.html?FMT=AI?> Accessed October 2018. Other sources support this conclusion, although the validity of these resources used is open to question see Walter Pavlo, "Fraud Thriving in U.S. Churches, But You Wouldn't Know It," 18 November 2013, Forbes <https://forbes.com/sites/walterpavlo/2013/11/18/fraud-thriving-in-u-s-churches-but-you-wouldnt-knowit/#7d688ec277bf> Accessed October 2018.

[38] Peters (n 37), 3-4 cites the International Bulletin of Missionary Research (2015) which stated that fraud against religious institutions will amount to $50,000,000,000 by mid-2015. It also estimated that by 2025 this number will jump to $100,000,000,000 a year. However, Peters rightly notes that other researchers have concluded that these estimates are not accurate due to underreporting by religious institutions (see Pavlo, (n 37)). Additionally, it is mentioned that the estimates do not take into account fraud committed at non-Christian religious organizations, 3-4. This estimate seems to ignore the ACFE estimate of the global cost of religious fraud of $3.5 trillion in 2011, Association of Certified Fraud Examiners, 'Report to The Nations on Occupational Fraud and Abuse: Global Fraud Study 2012, 4 <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-tonations.
pdf> Accessed October 2018. The amount of money that is acquired through fraudulent religious practices each year seems more likely to be larger.

[39] John M. Scheb, *An Introduction to the American Legal System*, (Cengage Learning 2002), 74.

[40] I do not consider civil areas of law that have been considered to offer suitable means of regulating religious representations that result in financial gains. For example, contractual claims for breach of promise and tortious claims of intentional infliction emotional distress. For commentary on the potential of these sorts claims involving allegations of religious fraud see Barborak (n 17).

[41] See the Canadian case of *Church of Scientology and The Queen (No. 6), Re*, 1987 CanLII 122 (ON CA), where the court discusses the appellant counsel's case in favour of not E-meters used by Scientologists capable of committing fraud. This included: *Ballard* (n 9), 6; *Founding Church of Scientology of Washington v. United States* (1969), 409 F. 2d 1146, (Scientology and fraud); *Christofferson* (n 33), 18. (Scientology and fraud); and *Van Schaick* (n 33), 22 (Scientology and religious fraud). Australian courts have adopted a similar comparative

most commentary from scholars focusing on the legal challenges of regulating religious fraud in the common law and civil law world.

Secondly, the First Amendment to the US Constitution is commonly examined in religious fraud cases. This provision is key to the main themes of this chapter as it proscribes rights on religious freedom[42] applicable to all US states through the Fourteenth Amendment.[43] The First Amendment can be used to strike down federal laws,[44] executive action,[45] and State laws,[46] if a law is an impermissible burden on religious liberty rights. The religious rights provided by the First Amendment are twofold: Congress or wider governmental institutions shall make no law respecting an establishment of religion. This is known as the "Establishment Clause."[47] Secondly, the First Amendment protects the free exercise of religious liberty,[48] which is termed the "Free Exercise Clause."[49] This clause allows individuals to believe in any religious ideologies they choose to and mandates that individuals cannot be forced to believe in one particular religion by the state.[50] Additionally, the Free Exercise Clause protects the right of individuals to manifest their religious beliefs, which can result in exceptions being granted to laws where beliefs are incompatible with generally applicable laws.

approach; *In Church of New Faith v. Commissioner of Pay-Roll Tax* (1983), 154 C.L.R. 120 (H. C. of Australia), Mason A.C.J. referred to *Ballard* twice about whether religious beliefs could be tested for falsity, [13] & [23].
[42] U.S. Const. amend. I.
[43] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).
[44] *Marbury v. Madison 5 U.S.* (1Cranch) 137 (1803).
[45] *The Prize Cases*, 67 U.S. 635, 17 L.Ed 459 (1862).
[46] *Fletcher v. Peck*, 19 U.S. 87, 3 L.Ed 162 (1810).
[47] Scheb (n 39), 88; it is not assessed in this chapter, but the test applied by courts to determine if federal law or executive action has violated this right, they follow a three-part stage developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[48] U.S. Const. amend. I.
[49] Scheb (n 39), 88.
[50] *Cantwell* (n 43) & *Torcaso v. Watkins*, 367 U. S.488 (1961).

The Free Exercise Clause may be limited by legal states under certain conditions.[51] The test for what conditions must be proven by national and state institutions has developed considerably over the decades of jurisprudence.[52] Federal and state courts must assess three steps before lawfully restricting the religious liberty of individuals:

a) Proof that *Free Exercise of Religion has been infringed*.[53] This requires that the alleged religious conduct restricted must be legally classified as religious.[54] Appellants must also show that their religious beliefs are sincerely held.[55] Once an infringement is found courts must assess whether the infringement is constitutionally permissible;[56]

B) States must show a *compelling interest*[57] by offering a reasoned justification for restricting conduct, for example, providing public education to all children.[58] The free exercise of religion is a fundamental right.[59] Accordingly, states must show that the exercise of the right creates a grave and immediate danger to the interest specified.[60] The burden is on the individual to demonstrate that there is no rational connection between the state's action and the interest advanced.[61] This involves balancing the state's interest against the individual's interest;[62]

---

[51] *Ibid*.
[52] For example, B) was included after *Sherbert v. Verner* 374 U.S. 398 (1963). Yet it was not applied consistently in subsequent cases, see William P. Marshall, 'Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law,' (2011) Texas Tech Law Review, 44, 243-244, in particular ft 37.
[53] For further detail see, W. John Thomas, 'Preventing Non-Profit Profiteering: Regulating Religious Cult Employment Practices,' (1981) Arizona Law Review, 23(3), 1013-1016.
[54] *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).
[55] *United States v. Kuch*, 288 F. Supp. 439, 444-45 (D.D.C. 1968).
[56] *Ibid*, 1015-1016.
[57] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), also see Thomas (n 53), 1016-1020, ft 20.
[58] The State has adopted this as a compelling interest against an Amish claim that compulsory schooling until the age of sixteen years old violated the free exercise of their religious rights, *Yoder* (n 54).
[59] *Ibid*
[60] *Roe v. Wade*, 410 U.S. 113, 155 (1973).
[61] *Friedman v. Rogers*, 440 U.S. 1, 17-18 (1979).
[62] *Yoder* (n 54).

C) States must subsequently show that there are *no other less restrictive means by which they could pursue the compelling interest*.[63] If states fail to do this, the legislation or action challenged is held unconstitutional by courts. In *Cantwell v. Connecticut* (1940),[64] a statute requiring religious groups to obtain a certificate before soliciting religious contributions was found unconstitutional because it was not the least restrictive alternative means available to effectuate the state's interest. Courts should only examine alternatives that are equally or substantially as effective.[65]

The free exercise of religious rights is important to the understanding of *Ballard* now examined, subsequent cases discussed, as well as the comments made on those cases by scholars considered below.

1.1.2. Challenges and comparative lessons on religious fraud regulation

This section discusses the eminent US Supreme Court decision in *Ballard*. The detailed judicial reasoning of the Supreme Courts establishes how US courts have regulated instances of religious fraud and outlines the alternative ways US laws could regulate this conduct. I also discuss cases decided subsequently, which reveals how the Supreme Court in *Ballard* did not address all of the challenges relevant to the effective regulation of religious fraud. Accordingly, I identify some areas in the US regulatory approach that are considered problematic.

[63] *Ibid*, also see Thomas (n 53), 1020-1022, ft 20.
[64] 310 U.S. 296,306-07.
[65] *Ibid*, 1021.

1.1.3. *United States v. Ballard* (1944)[66]

Guy and Edna Ballard founded a religion called the "I Am" movement in 1930. The group publicly claimed to further individual self-fulfillment and personal success. Guy saw himself as a divine messenger of St. Germaine who could heal ailments and diseases (a power that was also allegedly shared by his wife and son). His powers were demonstrated to adherents in exchange for payment. Guy informed his followers that he had been in direct contact with Jesus and would pass on Jesus's teachings in his practices. Guy's beliefs were communicated using mail-order literature and personal meetings. These representations formed the basis of an allegation against the family for mail fraud.[67]

Eventually, the case was heard by the US Supreme Court after an appeal was made against the decision of the Court of Appeal for the Ninth Circuit, which held that Guy's beliefs could be tested for falsity by juries and that Guy was guilty of mail fraud. Justice Douglas gave the majority opinion of the Supreme Court, which is well-known for two main reasons. Firstly, the judgment strictly enforced the First Amendment jurisprudence principle that courts and juries should not determine or suggest that a defendant's religious beliefs are false. Justice Douglas stated, "[f]reedom of thought, which includes freedom of religious belief. . . embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[68] For the majority of the Justices, it did not matter that Guy's beliefs were unusual or even impossible, the First Amendment afforded "…the widest possible

[66] See n 9.
[67] This is regulated as a federal crime and requires a) intention, b) a "scheme or artifice to defraud" or the obtaining of property by fraud and, c) a mail or wire communication, see U.S. Code, Title 18, Part I, Chapter 63 § 1343
[68] *Ballard* (n 9), [86] (Justice Douglas).

toleration of conflicting views."[69] It was held that if jury members were to decide the falsity of Guy's religious beliefs they would "…enter a forbidden domain."[70]

Secondly, Justice Douglas discussed how liability in religious fraud claims should be determined to prevent undue violations of the defendant's religious liberty rights protected by the Free Exercise Clause. The majority of the Supreme Court decided that the liability of religious defendants for mail fraud should be determined by juries. Consequently, the religious context in which the representations occur was held to provide an insufficiently strong justification for the creation of a religious exception to the offence. The majority of the Supreme Court discussed how juries could assess the sincerity of Guy's religious beliefs to determine whether he should be convicted for mail fraud. Each juror would subsequently be allowed to subjectively determine whether they considered that Guy genuinely believed that his representations were true.

The Supreme Court sent the case back to the Court of Appeal for the Ninth Circuit to be tried after reversing that court's decision on the falsity analysis. There, Guy was found to have acted insincerely, and consequently convicted for mail fraud by a jury. In contrast, if the jurors had found him sincere, he would not have been found guilty and would have been allowed to carry on the religious practices of the I AM movement.

The Supreme Court decision firmly established that judges and juries are prohibited from testing the falsity of religious beliefs at trial. In cases considering state and federal fraud laws, including federal mail fraud, the reasoning of the majority Justices, which was based on the

[69] *Ibid*.
[70] *Ibid*.

First Amendment, prohibits prosecutions and juries from determining whether the alleged fraudulent religious representations featured in cases are false. Accordingly, state or private litigants do not need to prove this element of fraud offences. The majority of the Supreme Court agreed with the trial court's reasoning that this decision makes it harder for victims to prove that they were defrauded.[71]

In the Supreme Court's judgment, the majority and dissenting Justices had different perspectives on how religious fraud should be adjudicated. In the leading opinion, Justice Douglas was primarily concerned with the First Amendment protections. Justice Douglas submitted that the falsity of the defendant's beliefs should not be examined by juries;[72] judges should be sensitive to the religious contexts of religious fraud claims and not assess whether the defendant's beliefs are religiously grounded or not.[73] This reasoning is labelled the "religious reservation" approach,[74] which is based on the view that:

"Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."[75]

Justice Douglas subsequently added,

[71] *Ibid*, 87.
[72] *Ibid*, 88.
[73] *Ibid*.
[74] Jonathan Weiss, 'Privilege, Posture and Protection Religion in the Law,' (1964) Yale Law Journal, 73, 597.
[75] *Ballard* (n 9), at 87.

"The religious views espoused by the respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain."[76]

Chief Justice Stone offered an alternative approach in a separate opinion, despite concluding that the verdict reached was correct. Justice Roberts and Justice Frankfurter also agreed with this reasoning, defined as the "clearly culpable theory."[77] This reasoning combines two approaches found in the earlier decisions before the case reached the Supreme Court. Firstly, the "deceitful defendant approach" of the trial court was considered[78] on the basis that jurors should be permitted to decide whether the defendant "honestly and in good faith" believed his representations.[79] The jury could only find Guy guilty if he did not believe in those beliefs.[80] The trial court made it clear to the jury that religion could not come into this case[81] and their focus must be on whether the representations were used to deceive others to gain financially.[82]

Secondly, the three Justices adopted the "factual fraud approach" from the judgment of the Court of Appeal for the Ninth Circuit.[83] Judge Denman, writing for the majority of the Court of Appeal, submitted that showing the truth of religious representations was a strong form of evidence that should not have been taken away from the defendants by the trial court.[84] That decision was deemed "an obvious denial of the freedom of religion of the First Amendment."[85]

---

[76] *Ibid*.
[77] Weiss (n 74), 597-598.
[78] Court of Appeal ruling, *Ballard v. United States* 138 F.2d 540, 545 (9th Cir. 1943), 38.
[79] Weiss (n 74), 597-598.
[80] *Ballard* (n 78), 38.
[81] *Ibid*.
[82] Weiss (n 74), 596.
[83] *Ibid*, 597-598.
[84] *Ballard* (n 78).
[85] *Ibid*, at 546.

The factual fraud approach looks at the mischief a statute was created to prevent. It does not look at the motives of defendants, but the falsity of the religious representations made.[86] The Court of Appeal for the Ninth Circuit subsequently treated the claim as analogous to any non-religious fraud claim,[87] and applied the statutory wording of the federal mail fraud offence in a literal way. The "clearly culpable theory," implies that representations can be separated from their religious context and objectively judged by juries.[88] The main question in this approach is whether the defendant has fraudulent intent, not whether there is a religious context.[89] Accordingly, religious contexts do not provide an alternative lens to assess representations.

Justice Jackson held a more diverging view about the challenges of testing the falsity and sincerity of religious beliefs, which is termed the "hands off approach."[90] Justice Jackson declared, "I would dismiss the indictment and have done with this business of judicially examining other people's faith."[91] The dissent is particularly detailed and touches on more of the challenges of how courts may seek to regulate religious fraud. Interestingly, Justice Jackson began his dissenting opinion by asserting that the teachings of the Ballard's were "…nothing but humbug, untainted by any trace of truth."[92] Justice Jackson subsequently qualified this statement by submitting, "But that does not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions."[93] Justice Jackson considered that religious fraud is the price to pay for religious freedom provided by the Free Exercise Clause on the grounds that,

[86] Weiss (n 74), 596.
[87] *Ibid*.
[88] *Ibid*, 598.
[89] *Ballard* (n 9), 90.
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid*, 92.
[93] *Ibid*.

"There appear to be persons- let us hope not many who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for."[94]

The dissenting opinion went further than the religious reservation approach and submitted that neither the falsity nor sincerity of a defendant's religious beliefs should be assessed by courts[95] because:

"I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which cannot be proven false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."[96]

Justice Jackson argued against the separation of representations from religious contexts and against the decision of the Court of Appeal for the Ninth Circuit, and the other Supreme Court Justices that religion did not impact on the legal issues.[97]

Justice Jackson also discussed whether juror and judicial assessments of sincerity were ever relevant:

"I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud… Some who profess belief in the Bible read literally what others

[94] *Ibid*, 94.
[95] *Ibid*, 92-94.
[96] *Ibid*, 92-93.
[97] Weiss (n 74), 599.

read as allegory or metaphor, as they read Aesop's fables… It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money."[98]… "When does less than full belief in a professed credo become actionable fraud if one is soliciting-gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt."[99]

Overall, the Supreme Court decision established that US courts are prohibited from assessing the truth of religious beliefs in the context of fraud prosecutions. This decision was followed in several subsequent federal and state cases, some of which are discussed in the following section.[100] More generally, the decision gives considerable respect to religious liberty protections proscribed by the First Amendment. However, the Supreme Court sidestepped other important questions raised by the prosecution and the previous *Ballard* decisions.[101] Significantly, the Justices failed to decide the crucial issue of the place of sincerity in religious fraud adjudication.[102] *Ballard* did not invent the "good faith" or sincerity-based approach for prosecuting instances of religiously motivated mail fraud.[103] However, such cases were uncommon and many of those cases failed to engage with issues concerning the constitutional protection of religious beliefs in fraudulent practices, or whether those beliefs should be tested for falsity.[104] Years later, these issues were placed squarely into Free Exercise jurisprudence in *Ballard* and were not adequately addressed by the Supreme Court.

---

[98] *Ballard* (n 9), 93-94.
[99] *Ibid*, 95.
[100] *Caruthers* (n 33), 518; *The Founding Church of* Scientology (n 40), 1161-1162; *Rasheed* (n 33), 4; *Van Schaick* (n 33), 1140.
[101] *Ballard* (n 9), 88.
[102] Heins (n 17), 163.
[103] A fact which many commentators overlook. See for example, *White Crane v. United States* 259 Fed. 480 (9th Cir. 1919).
[104] See the cases before 1944 listed in n 33.

1.1.4. Judicial reception of *Ballard*

Religious fraud cases have been uncommon since *Ballard*.[105] Consequently, US courts have had little occasion to consider the application of a Free Exercise Clause defence.[106] Cases that have followed *Ballard* considered that the Supreme Court expressly allowed the defendant's sincerity to be tested.[107] Courts that allowed this assumed that when the Supreme Court declared that the trial court decided correctly on the falsity question, it also endorsed the trial court's "good faith" approach to adjudicating religious fraud. Shortly after the decision, some courts recognised that *Ballard* avoided the issue.[108] The distinction between testing falsity (which was prohibited) and sincerity was restated in *United States v. Rasheed* (1981).[109]

Ballard left two other categories of concerns unaddressed. The first relates to how do courts determine whether defendants are making representations that are part of religious doctrines to trigger the *Ballard* immunity?[110] Subsequent cases later addressed this oversight. In *The Founding Church of Scientology of Washington D.C. v. United States* (1969),[111] the United States Court of Appeals for The District of Columbia Circuit had to determine whether religious literature promoting the benefits of E-meters was religious or secular.[112] A distinction was necessary to determine whether the representations could be tested for falsity. Judge Wright, writing for the majority, found that the representations were religious.[113] This

[105] For example, *Caruthers* (n 33).
[106] Stated by Judge Gillette in *Christofferson* (n 33), 599.
[107] *Braunfeld v. Brown*, 366 U.S. 599, 610 (1961), 609 (Justice Brennan) & *People v. Woody*, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964). Similarly, a number of scholars also fell into this trap. For instance, Richard Morgan, *The Supreme Court and Religion,* (Macmillan Publishing 1972), 150 & Lawrence Tribe, *American Constitutional Law*, (Foundation Press 1978), 859, cited by Heins (n 17), 163, ft 44.
[108] *Katz v. Superior Court*, 73 Cal. App. 3d 952, 988, 141 Cal. Rptr. 234, 256 (1977) & *Christofferson* (n 33).
[109] 663 F.2d 843 (9th Cir. 1981). The correct approach has since been recognised by most commentators, see Heins (n 17), 158 & Weiss (n 74), 595.
[110] Heins (n 17), 158 & Weiss (n 74), 595.
[111] See n 40.
[112] *Ibid*, 1158-1159.
[113] *Ibid*, 1161.

judgment goes one step further than the Supreme Court decision in *Ballard* and decided that before engaging with the controversial debate over falsity or sincerity testing, courts must first determine whether the alleged fraudulent beliefs stem from religious doctrines or are secular claims.[114] Despite this development, the court failed to develop a principled means of determining the religiosity of representations that could later be applied by courts.

The omission of both *Ballard* and *The Founding Church* links to the second question left unanswered by *Ballard*; how can courts establish whether the context in which the relevant religious representation is made is secular or religious?[115] In *Christofferson v. Church of Scientology* (1982), the Oregon Court of Appeals considered a number of representations made by Scientologists regarding the health benefits of using E-meters alleged to have been used to fraudulently solicit funds. The Court of Appeals ruled that only purely religious items and representations are excluded from falsity examinations. This conclusion was justified on the remanded Court of Appeal decision in *The Founding Church*.[116] The impact of the decision had very little impact on the federal regulation of religious fraud because it examined state law and not federal laws. In *The Founding Church*, the court held that when courts determine whether the First Amendment offers protection to defendants in religious fraud cases they must establish: 1) that defendants represent a legally recognised religion; 2) the beliefs alleged to be fraudulent form part of religious doctrine; and, 3) even if the former two are satisfied, the religious representations cannot have been made for an entirely secular purpose.[117]

In *Christofferson*, the Court of Appeals concluded,

[114] The reasoning reflects step a) of the Free Exercise Clause test listed on page 14.
[115] Heins (n 17), 158.
[116] *United States v. Article or Device,* Etc., 333 F. Supp. 357, 361 (D.D.C. 1971). *Ibid*, 599-600.
[117] *Ibid*, 602.

"There are certainly ideas which may only be classified as religious. Statements regarding the nature of a supreme being, the value of prayer and worship are such statements. There are also, however, statements which are religious only because those espousing them make them for a religious purpose. The statements which are alleged by plaintiff to be misrepresentations in this case are not of the type which must always and in every context be considered religious as a matter of law."[118]

However, this reasoning cannot persuasively address this challenge in the way the court intended to, given the state context of the decision and the operation of precedent. Consequently, the second challenge remains open to debate in fraud contexts.

1.1.5. Academic reception of *Ballard*

The interpretation of *Ballard* in cases like *Founding Church* and *Christofferson* that religious fraud should be prosecuted using neutral criminal laws has received support.[119] If falsity cannot be tested, sincerity testing is seen to present the only viable way religious fraud can be appropriately adjudicated according to one commentator.[120] Sincerity testing carried out correctly by courts does not violate religious conduct or beliefs,[121] so long as it is not allowed to merge with falsity testing.[122] Courts have noted how this task is a very sensitive undertaking[123] that warrants extreme caution.[124]

[118] *Christofferson* (n 33), 244.
[119] Senn (n 17), 325.
[120] *Ibid*, 335.
[121] *Ibid*.
[122] *Ibid*, 337.
[123] *Sherr v. Northport-East Northport Union Free School Dist*., 672 F. Supp. 81, 94 (E.D.N.Y. 1987), cited by *ibid*, 337, ft 64.
[124] Jeffers (n 33), cited *ibid*, ft 65.

Multiple factors are put forward to establish how courts can appropriately assess the defendant's sincerity. These are: 1) defendants act inconsistently with beliefs; 2) the adverse consequences of beliefs are accepted by defendants; 3) representations have ulterior purposes; 4) the size and history of the religious organisation defendants are part of; 5) the extent of any parallel between the challenged beliefs and traditional beliefs; 6) the defendant's devotion to the faith; 7) statements and testimony; 8) whether the challenged tenet is part of an organised faith to which the defendant belongs to; 9) coexistence of secular fraud; 10) reference to case law and; 11) evidence of concealment. These factors should be considered collectively where appropriate.[125] As discussed above, the sincerity-based approach has been followed in all religious fraud cases since *Ballard* but in a less structured manner on a case-by-case basis.

For some scholars, however, cases decided after *Ballard* did not effectively deal with the main challenges of regulating religious fraud. *Ballard* has been criticised for failing to grant religious exemptions to defendants facing charges relating to alleged fraudulent religious conduct.[126] Religious exemptions are viewed as a more suitable way of protecting the defendant's religious liberty rights by circumventing falsity testing.[127] Exemptions would be granted where a defendant represents religious doctrine and their conduct, alleged to be fraudulent, occurs in religious contexts.[128] Even though the difficulty of determining whether the context of the conduct is religious or secular is recognised,[129] exemptions are still recognised as the most suitable way of adjudicating religious fraud. It is submitted that this approach offers a more effective means of balancing the state's interests with the religious interests of individuals under the Free Exercise Clause. On this reasoning, it is claimed that Justice Jackson's opinion

[125] Senn (n 17), 342.
[126] Heins (n 17), 189-197.
[127] *Ibid*.
[128] *Ibid*, 189-197.
[129] *Ibid*, 194-195.

should have persuaded the majority of the Supreme Court in *Ballard* to reach the opposite verdict.[130] It is accepted that by rejecting the sincerity-based approach, religious fraudsters may illegitimately rely on an exemption to evade liability. [131] However, it is argued that this is a small price to pay for establishing that religious falsity is non-justiciable.[132]

Other commentators consider that the falsity and sincerity of the defendant's beliefs motivating their representations should be tested by courts. The modern statement of the boundaries of justiciability of religious disputes under the Free Exercise Clause is set by *Ballard*[133] and this is described as the "crudest [of] formulations."[134] Justice Douglas' ruling has been interpreted to include a blanket ban on religious beliefs similar to those practiced by the Ballards.[135] Consequently, it is argued that the *Ballard* ruling applies to other cases regardless of how straightforwardly falsifiable the beliefs of the defendant are because Justice Douglas failed to legally define what count as religious beliefs in alleged fraud contexts.[136] Ignoring the justifications offered by the Supreme Court decision, namely Justice Jackson, and other commentators, it is submitted that courts can effectively and justifiably test religious beliefs for falsity.[137] Those who object to this conclusion are considered wrong and at odds with both the practical requirements of ordinary adjudication and contemporary theological accounts of the epistemic status of religious beliefs.[138] Courts should distinguish between religious beliefs held by religious institutions and individuals with religiously-infected beliefs. An example of

[130] *Ibid*, 165.
[131] *Ibid*, 189.
[132] *Ibid*, 189.
[133] This is not entirely correct. There are more two other areas of justiciability within Free Exercise jurisprudence. Firstly, the government is forbidden from independent interpretation of religious texts or tenets in a way that provides an authoritative statement on how they should apply. Secondly, the government may not inquire into or review any internal decisionmaking or governance of religious institutions, see Scott C. Idleman, 'Tort Liability, Religious Entities, and the Decline of Constitutional Protection,' (2000) Indiana Law Journal, 75(1)(14), 221-223.
[134] Mason (n 17), 93.
[135] *Ibid*, 95.
[136] *Ibid*, 95.
[137] *Ibid*, 92.
[138] *Ibid*, 92-93.

the former category is a minister requesting donations from adherents to pray for them to reduce their time in purgatory. The latter category is a belief with a religious dimension that may not form part of religious doctrine. For example, a defendant who alleges to have killed someone because they thought they were the devil, and their faith prescribed the action. This distinction seeks to avoid detailed jurisprudential and theological debates about the former category of beliefs[139] and whether the context surrounding beliefs is secular or religious.[140]

On this reasoning, it is argued that courts should adopt the "non-overlapping magisterial model,"[141] which is premised on the idea that distinctions can be made between fact and value. Facts that can be tested by scientific methods *should* be tested for falsity by courts regardless of whether it is linked to religious doctrine.[142] On the other hand, judges should not declare something as false that cannot be proven to be false.[143] At times fact and value overlap and when this occurs, the Free Exercise epistemological problem applies and prohibits courts from ruling on falsity.[144] Additionally, where evidence is indifferent to whether beliefs are justiciable or non-justiciable, the defendant's beliefs should be tested.[145]

1.2. Conclusions

The US experience of regulating religious fraud has been far from straight forward. US courts have faced significant problems in regulating religious representations that result in financial

[139] *Ibid*, 99.
[140] *Ibid*, 99-100.
[141] *Ibid*, 93.
[142] *Ibid*, 118.
[143] *Ibid*.
[144] *Ibid*, 118-119.
[145] *Ibid*, 119.

gains. Courts have been required to address complex questions relating to theology, constitutional law, criminal law and procedure. *Ballard* left some of these questions unanswered, which were examined more effectively in later jurisprudence. Accordingly, for a case that has allegedly said more about religious liberty than any other case in US history,[146] *Ballard* is underdeveloped and is arguably a more limited decision in practice. *Ballard* offered one clear rule for courts seeking to regulate religious fraud through the federal offence of mail fraud, but very little in terms of the *stare decisis* for lower courts to follow. Moreover, controversy still exists over what is the most appropriate way of regulating religious fraud using criminal laws.

The US experience is indicative of the considerable legal challenges facing other courts regulating religious fraudulent conduct using criminal laws. This experience also offers some lessons that can potentially inspire how English criminal fraud laws should prosecute instances of religious fraud. In chapter 3, I discuss how this analysis informs how *s2 FA06* should regulate fraudulent religious representation.

2. Religious undue influence regulation in Australia and the US

In this section, I consider how Australian and US courts have decided religious undue influence cases. I explain the tests for undue influence in both jurisdictions and engage with the reasoning of Australian and US jurisprudence. I consider several common and unique challenges in both jurisdictions that are experienced in contemporary settings. I also identify comparative lessons

[146] Greenawalt (n 32), 110.

that are relevant to my discussion of the English understanding of undue influence in chapter 4.

2.1. Jurisdictional contexts and doctrinal tests

Australia

Australia is a common law jurisdiction that developed out of the English Common law tradition.[147] It operates at federal and state levels across five legal territories.[148] Federal laws are contained in the Constitution of Australia and are invoked to strike down incompatible state laws. The Constitution does not contain a Bill of Rights, but some states, like Victoria, have human rights charters.[149] A provision on religious liberty does, however, feature in the Constitution under s116. This provision essentially mirrors the wording of the Establishment Clause contained in the US First Amendment.[150] It is, however, of less significance to the understandings of religious undue influence examined below.

Historically, Australian legal states have faced very few cases of religious undue influence. In contrast, there has been a rise in cases in the twenty-first century, which have said a great deal about the uniquely complicated treatment of religious cases. Other than the US, no other jurisdiction has generated as much commentary on religious undue influence in the common law world. In the last twenty-five years, five cases have been decided by the Supreme Courts

[147] Dana Zartner, *Courts, Codes and Customs*, (OUP 2014), 71.
[148] These are New South Wales, Queensland, West Australia, South Australia, and Victoria.
[149] Victoria Charter of Human Rights and Responsibilities Act 2006.
[150] For commentary on this provision and the subtle ways it is different from the First Amendment see, Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future,* (Routledge 2018), chapter 7.

of different legal states.[151] Decisions demonstrate how courts have applied the doctrine in a general manner to regulate the legitimacy of gifts given to religious figures or institutions. The challenges experienced by courts in hard cases of religious undue influence remain largely unaddressed by courts and commentators, which has inspired commentary from scholars.[152] Religious undue influence is, therefore, an area of increasing importance practically and doctrinally in Australia.

Comparing the different treatment of presumed undue influence cases is more straightforward than the analysis of US fraud laws, even though Australia is also a federal legal system. The doctrine forms part of the common law for each state and was transplanted into Australian law based on the English understanding.[153] English jurisprudence is still cited by Australian courts to develop understandings and support the reasons given by judges for decisions.[154] Accordingly, each state has applied the doctrine in a similar way since its incorporation into Australian law in combination with a range of High Court of Australia precedents.[155]

The doctrine of undue influence is applied in both equity and probate. *Johnson v Buttress* [1936][156] is the leading Australian authority on the doctrine. There Latham CJ set out the equitable test for presumed undue influence,

---

[151] New South Wales and Queensland, see *Quek v Beggs* (1990) 5 BPR 11, 761; *Illuzzi v Christian Outreach Centre* (1997) Q ConvR 54-490; *McCulloch v Fern* NSWSC 406 (Unreported, Palmer J, 28 May 2001); *Hartigan v International Society for Krishna Inc* [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002); *Khan v Khan* [2004] NSWSC 1189.
[152] Degeling (n 6).
[153] Robyn Honey, 'Divergence in the English and Australia Law of Undue influence: Vacillation or Variance?' in Andrew Robertson & Michael Tilbury, *Divergences in Private Law* (Routledge 2016), 271.
[154] For example, *Thorne v Kenny* [2017 HCA 49, [30]-[37] (Kiefel CJ) citing *Etridge (No 2)* (n 22) amongst other cases. Additionally, *Allcard* (n 6) is considered a leading authority on undue influence by state and federal courts, see Ridge (n 6), 72.
[155] Notably, *Johnson v Buttress* [1936] HCA 41; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14 & more recently, *Thorne* (n 154).
[156] See n 155.

"Where certain special relations exist, undue influence is presumed in the case of such gifts. These relations include those of parent and child, guardian and ward, trustee and *cestui que trust*, solicitor and client, physician and patient and cases of religious influence... Wherever the relation between the parties is such that the donee is in position to exercise dominion over the donee by reason of trust and confidence reposed in the donee."[157]

Claimants must also show that a gift cannot be explained by "ordinary motives"[158] or "is not readily explicable by the relationship of the parties"[159] for a presumption of influence to arise. The presumption can be rebutted by defendants showing that gifts are "voluntary and a well-understood act of the mind" of donors.[160] The test is considered to be based on the free will of donors.[161] In my analysis conducted below, I focus solely on presumed undue influence cases.

The test for actual undue influence considered in probate was also laid down in *Buttress*,[162] and consists of four elements. The defendant must have the capacity to influence the claimant; influence must have been exercised by the defendant; the influence must have been undue and; it must result in the claimant entering into the transaction.[163] All elements must be proven for a claim to succeed, which in recent jurisprudence has proven extremely difficult for claimants.[164]

[157] *Ibid*, 119.
[158] *Thorne* (n 154), [34] (Kiefel CJ) citing *Allcard* (n 6), 185 (Lindley LJ).
[159] *Ibid*, citing *Etridge (No 2)* (n 22) [21] (Lord Nicholls).
[160] *Johnson* (n 155), 123 (Latham CJ) quoting Eldon L.C. in Huguenin v Basely (1807) 14 Ves. 273; 33 E.R. 526.
[161] *Ibid*.
[162] *Ibid*, 134.
[163] Michael Bryan et al, *Equity and Trusts in Australia*, (CUP, 2nd Edition, 2017), 101.
[164] *Ibid*.

The US

The US has a rich body of primary and secondary legal sources on the doctrine of undue influence developed over decades of adjudication.[165] The doctrine has recently been a significant focus for courts and scholars due to a rise in elder abuse.[166] Decisions and commentary on religious undue influence are generally infrequent,[167] but have proven an area of legal concern for the last decade.[168] Accordingly, religious and nonreligious case law has been examined and criticised recently. Both judges and commentators are generally dissatisfied with how the doctrine is applied in practice; it is claimed it often leads to unprincipled outcomes.[169] Some US commentators have gone so far as to say that undue influence "is one of the most bothersome concepts" in all law.[170]

Originally, for a claimant to show undue influence they needed to prove that they experienced some form of "fraud" or "coercion."[171] Gradually, this strict approach softened during the

[165] Ronald J. Scalise, 'Undue Influence and The Law of Wills: A Comparative Analysis,' (2008) Duke Journal of Comparative & International Law, 48, 41-106.
[166] *Ibid*, 41; Karl Spivack, 'Why the Testamentary Doctrine of Undue Influence Should Be Abolished,' (2010) Kansas Law Review, 58, 246; David Horton, 'The Uneasy Case for California's "Care Custodian" Statute,' (2008) Chapman Law Review, 12(1)(3), 47-69; Mary Quinn et al, Undue Influence: Definitions and Applications, A Project Supported By The Borchard Foundation Center On Law And Aging, Final Report, March 2010, 1-145 <http://www.courts.ca.gov/documents/UndueInfluence.pdf> Accessed November 2019.
[167] See Law Magazine and Review, 'Undue Influence,' (1873) a Monthly Journal of Jurisprudence for Both Branches of the Legal Profession at Home and Abroad, 2(8), 742-749; Charles Z. Lincoln, *Civil Law and the Church*, (The Abingdon Press 1916), 657-689; Briscoe Baldwin Clark, *New York Law of Contracts: Volume 1*, (Edward Thompson Company 1922) chapter VII, A. J. White Hutton, 'Undue Influence and Fraud in Pennsylvania Wills,' (1948) Dickson Law Review, 53, 12-28 & C.S. Patrinelis, Undue Influence in Nontestamentary Gift to Clergymen, Spiritual Adviser, or Church,' (1950) American Law Reports, 14, 2d 649, 657.
[168] See Jeffrey J. Sherman, 'Can Religious Influence Ever Be Undue Influence,' (2008) Brooklyn Law Review, 73(2), 579-644; John B. Jarboe, 'Undue Influence & Gifts to Religious Organization,' (2017) Catholic Lawyer, 35(3), 271-282. For older commentary see A.P. Wrosch, 'Undue influence, Involuntary Servitude and Brainwashing: A More Consistent Interests-Based Approach,' (1992) Loyola of Los Angeles Law Review, 25(2), 499-55.
[169] In 2009, the Superior Court of California motivated by the lack of a definition of undue influence in the California Probate Code funded a study to develop an appropriate definition. Recommendations were not accepted. For the full report see Quinn et al (n 166). This also applies to most leading casebooks, Spivack (n 166), 264.
[170] Robert H. Sitkoff & Jesse Dukeminier, *Wills, Trusts, And Estates*, (Wolters Kluwer Law & Business, 10th Edition, 2005), 281.
[171] Scalise (n 165), 51-52.

twentieth century and was replaced by an approach based on the "free will" of donors, and whether it had been overpowered and subjected to the will of another.[172] The donor's will must be overpowered by another in a way that is incapable of being resisted, which causes donors to make a transfer they would have not done if they were free to act according to their own wishes.[173] Circumstantial evidence also became a way of demonstrating undue influence.[174]

States developed individual approaches to the doctrine out of these developments. The common elements of undue influence now examined in state courts are: "(1) the influencer had disposition or motive to exercise it; (2) the influencer had the opportunity to exercise the influence; (3) the influencer did in fact exercise the influence, and (4) the testamentary disposition at issue was a result of the undue influence."[175] This approach is controversial;[176] many critics consider that it is unhelpful, "almost totally meaningless," and contain elements that "beg the question."[177]

The doctrine was later contained in several state statutes, mainly relating to testamentary dispositions.[178] Statutes typically describe the test for undue influence and establish what factors should be considered by judges, which varies across states. Additional legislation and precedents guide courts on what aspects indicate undue influence. In the context of gift-giving, undue influence is more frequently invoked in probate and is the main way wills are

[172] *Ibid*, 53; also see Spivak (n 166), 262.
[173] R.L. Anand, *Law of Undue Influence, Fraud and Duress* (1957), 341, cited in Spivack (n 166), 262.
[174] Scalise (n 165), 53.
[175] The American Law Institute, Restatement (Third) Of Prop (2003)., § 8.3 cmt. e. These elements are considered the main doctrinal aspects by scholars interpreting State decisions, Scalise (n 165), 55.
[176] Many critics, including courts, consider that it is unhelpful, "almost totally meaningless," and contain elements that "beg the question" see *Succession of Reeves*, 704 So.2d 252, 259 (La. App. 3d Cir. 1997) cited by Scalise (n 165), 55, ft 100.
[177] *Succession of Reeves* (N 176) cited by *ibid*, 55, ft 100.
[178] For example, the California Probate Code §6104 (2010).

challenged.[179] Consequently, many decisions and commentary consider challenges in probate contexts[180] and much of the following commentary on the US experience is based on undue influence as it is understood in probate contexts.[181]

The lack of clear doctrinal definitions in state Probate Codes[182] led to a significant nationwide development in 2003. The American Law Institute[183] published The Restatement (Third) Of Property, Wills & Other Donative Transfers. This was a twenty-year project designed to update the law of succession. The Restatement provides an overview of how the doctrine operates in probate settings. It is not binding on state courts but is typically considered alongside state laws, and often has a persuasive role on probate tests and legislative reform in states.[184]

Most US states apply a presumption of undue influence in probate.[185] Some states follow a one-stage approach that determines if the parties were in a "confidential relationship."[186] The relationship must be proven by claimants challenging the will. If it is proven, the burden shifts to defendants who can try to rebut the claim. The relationships covered in states vary, but typically consist of some form of fiduciary duty. The Restatement covers three types of

[179] Eunice L. Ross & Thomas J. Reed, *Will Contests,* (2d ed. 1999), § 7.21 at 7-109 cited by Scalise (N 165), 99, ft 11.
[180] This is one factor of the doctrine that is at odds with Australian and English understandings of undue influence.
[181] Regulation in states, like Ontario, indicates that courts seek to keep the test for undue influence for *inter vivos* gifts strictly separate from the test in probate. Contrast the trial judgment in *Seguin v Pears* 2016 CarswellOnt 17438, 272 A.C.W.S. (3d) 673 (merging both tests in a probate claim) with Court of Appeal decision keeping the tests separate, 2018 CarswellOnt 5617, 2018 ONCA 355. The US approach to equitable undue influence is therefore very similar to other jurisdictions conceptions. However, this does not prevent appropriate subsequent analysis on the issues of adjudicating equitable claims of presumed undue influence in chapter 4.
[182] Quinn et al (n 166), 9, although some codes have partial definitions.
[183] It is "the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law…" ALI, 'About ALI,' < https://www.ali.org/about-ali/> Accessed June 2019.
[184] For discussion see Clifton B. Kruse, Jr, 'Reformation of Wills: The Implication of Restatement (Third) of Property (Donative Transfers) on Flawed but Unambiguous Testaments, (2000) ACTEC Notes, 25(4), 323-324; Lawrence W. Waggoner, 'Class Gifts under the Restatement (Third) of Property,'(2007) Ohio Northern University Law Review, 33(3), 993-1012 & Lawrence W. Waggoner, 'How the ALI's Restatement Third of Property Is Influencing the Law of Trusts and Estates,' (2015) Brooklyn Law Review, 80(3), 1019-1028.
[185] This is another key distinction between Australian and English understandings.
[186] Sitkogg & Dukeminier (n 170), 282-284; for a range of states adopting this model see Spivack (n 166), 263.

confidential relationships: (a) fiduciary, (b) reliant, and (c) dominant-subservient.[187] An example of (b) is a relationship between spiritual advisors and parishioners.[188] The presumption does not arise because the donee is a religious minister but because the minister also holds a fiduciary duty towards parishioners, "which, if used for the benefit of the donee, will result in the exercise of an influence not possessed by the ordinary person, and sufficient, according to the ordinary experience of mankind, to overcome the will of the donor."[189]

Other states adopt a two-stage approach[190] following the approach of the Restatement. This approach requires "suspicious circumstances" to surround the creation and execution of testamentary dispositions and evidence of a confidential relationship.[191] The Restatement describes what suspicious circumstances cover, for example, the physical and mental state of the donor; whether independent advice was received before the testamentary disposition was created, and whether a reasonable person would regard the transaction as unfair.[192]

A second ground also exists where a will is made by a testator of a weakened mental state in some US states.[193] Naturally, this basis of claims overlaps with incapacity claims and so both claims are regularly brought jointly. Courts use factors such as age and frailty in determining whether the donor was "susceptible" to undue influence, and for some courts, this can act as a primary factor to suggest that a testamentary disposition was unduly influenced.[194]

[187] Restatement (Third) Of Prop (2003)., § 8.3. cmt. g.
[188] See *Gilmore v. Lee*, 86 N.E. 568 (Ill. 1908) & *In re Hartlerode's Will*, 148 N.W. 774, 777 (Mich. 1914).
[189] Patrinelis (n 167), 657, cited in Worsch (2017), 507, ft 65.
[190] Sitkogg & Dukeminier (n 170), 288-289; for states following this model see Spivack (n 166), 263.
[191] Restatement (Third) Of Prop (2003)., § 8.3. cmt. g.
[192] *Ibid*, § 8.3. cmt. h.
[193] Scalise (n 165), 57.
[194] Citing *In re Estate of Hamm*, 227 N.W.2d 34, 38 (Wis. 1975)., *ibid*, 57, ft 112.

2.2. Why is religious undue influence regulation so problematic?

This section identifies the common challenges and potential lessons on regulating religious undue influence in both Australia and the US. I consider both jurisdictions together to demonstrate the widespread nature of the challenges assessed. Three categories of issues are examined, the characteristics of parties, the donor's motivations for making gifts, and the review processes of courts. This analysis demonstrates the extent of problems in hard cases of religious undue influence and with the test for presumed undue influence, more generally. Only the most compelling of these uniquely religious and religiously compounded doctrinal challenges are assessed.

2.2.1. Characteristics of donors and donees

The donor's religious fervour

Australian courts have generally failed to consider the significance of religious fervour motivating gifts, and how it could alter the assessment of whether a gift has been unduly influenced in presumed undue influence claims. This is most explicitly demonstrated in *Hartigan*,[195] where the claimant, a follower of Hare Krishna, gifted her family home worth $87,0000 to the founders of a Hare Krishna community. The transaction was overseen by the defendant's agents, who were not members of the community. The defendants were found to have unduly influenced the claimant's gift because it was not a fully voluntary decision even

[195] See n 151.

though the court found no signs of pressure exerted on the claimant or impropriety from the defendants.

The claimant's impulsive nature and reasons for the gifts were not deemed significant by the court. The court did not pay much attention to the fact that before gifting her property, the claimant was originally told by the defendants that she was not spiritually ready to give large monetary gifts and that the value of the property gift was not in line with the spiritual understanding of "giving" set out in the community's religious literature. Instead, the court focussed on two facts in finding undue influence, firstly the highly improvident nature of the transaction, which would negatively impact on her family,[196] and secondly, that the legal advisors to the transactions, the agents, had been selected by the defendants and so were not sufficiently independent to the defendants.[197] The court did not establish that the defendant deceived the claimant or demonstrate how the claimant's will was impaired.

Interestingly, the court also held that the gift could not be explained by ordinary motives,[198] which is a surprising conclusion. Ordinary people regularly have intense feelings for certain ideologies and institutions. This is an uncontroversial statement and is one that applies equally to religious beliefs and organisations, as well as non-religious beliefs and organisations. Accordingly, the correctness of the judgment is questionable because it failed to account for the donor's religious fervour in any real sense.

Distinguishing between religious fervour and enthusiasm that has been taken advantage of is a difficult task in practice. However, it is an important exercise to carry out in religious undue

[196] *Ibid*, [36] (Bryson J).
[197] *Ibid*, [88]-[89].
[198] *Ibid*, [36].

influence cases. A similar case to *Hartigan* may occur where a minister regularly states that a parishioner does need not make a gift to the religious institution. A donor may ignore these statements and gift property on the basis that their interpretation of their faith requires it. Based on the reasoning in *Hartigan*, Australian courts seem unlikely to give much weight to religious fervour and other facts suggesting the gift would have been made regardless of the defendant's conduct because of the donor's state of mind at the time. *Hartigan* demonstrates that there are few safeguards in place to prevent Australian courts from straining facts in this manner, which may confuse religious fervour motivating gifts for undue influence. Consequently, where the undue nature of the influence is less clear in religious cases, decisions may wrongly focus on the less relevant factors, rather than the donor's enthusiasm to make gifts in order to reach what the court sees as a just result.

US courts have on occasion made efforts to distinguish between religious fervour and unduly influencing conduct in cases.[199] In *Held v Florida Conference Association of Seventh Day Adventists* (1940),[200] a testator left all of his wealth to two defendants who were religious leaders in the Florida Conference Association of Seventh Day Adventists by will. During a period of ill-health, he amended his will leaving most of his property to the defendants while living in a hospital run by Seventh Day Adventists. The testamentary dispositions received by the defendants were challenged on the grounds of presumed undue influence. The court considered that the testator was peculiar and likely to be viewed by many as a "religious fanatic."[201] Nevertheless, the court held that despite the donor's religious fanaticism and susceptibility to influence in a time of bad health, the donor had not been unduly influenced and had acted on their own free will when amending his will. This approach of the court, which

[199] *Good v. Zook*, 88 N.W. 376, 378 (Iowa 1901), 665-66, see Jarboe (n 168), 278, ft 64.
[200] 193 So. 828 (Fla. 1940). Example from Jarboe (n 168), 281.
[201] *Ibid*, 648 (Mr Justice Burford).

evaluated the donor's religious enthusiasm, helps to establish that undue influence can be interpreted in a more nuanced that considers whether gifts are simply motivated by religious enthusiasm or if this enthusiasm is subsequently taken advantage of by defendants.

2.2.2. The "gift"

Religious gifts made against social norms

In the Australian experience of regulating religious undue influence, the "ordinary motives" part of the presumed undue influence test has been criticised on the grounds that,[202]

"…measuring the improvidence of the transaction according to society's norms ('the ordinary motives on which ordinary men act') has serious consequences for transactions motivated by religious faith because such transactions are often intended to contradict such norms. *Gross improvidence in secular terms may be the primary attraction and motivation for a gift to a religious institution or individual. Many religions espouse poverty as a means to spiritual growth*. Some Christians, for example, hone their faith by 'trusting in the Lord' rather than in financial security..."[203]

The court's reasoning in *Hartigan* is an example of where this conflict has occurred.[204] Bryson J considered that giving a family home to the defendants was highly improvident and failed the ordinary motives because the gift left the young donor's family homeless. The claimant believed when making the gift that she was furthering her own spiritual growth. As mentioned

[202] Ridge (n 6), 83-85.
[203] *Ibid*, 83-84.
[204] *Ibid*, 85.

above, improvidence assisted the court in finding that the gift had been unduly influenced. It has been observed that this part of the decision in *Hartigan* is consistent with the understanding of improvidence discussed in other decisions.[205] The court viewed the claimant's religious beliefs as highly unusual without giving much weight to the claimant's independent religious reasons for making the gift.

It has subsequently been argued that the ordinary motives test can discriminate between religious groups of different sizes and social acceptability because what counts as ordinary motives may include mainstream religious practices but not those of minority religions.[206] Accordingly, presumptions of influence could apply more readily to gifts to the latter sorts of groups because of the unusual practices of the group or the donor's reasons for the gifts. This critique suggests that judicial assessments of objective or alleged normal conceptions of gift-giving should be re-examined to prevent potential differences in treatment on what constitutes ordinary motives between religious groups. For example, courts could give greater focus to the particular contexts of gifts and the donor's religious motivations.

In the US, two diverging viewpoints exist on how gifts going against social norms should be assessed by courts. Neither view specifically looks at gifts motivated by religious faith, but each view signals a larger problem created by the doctrine that is more likely to be experienced in religious claims. The first perspective considers that the doctrine is never applied in a vacuum and the social norms of the time inevitably reflect what gifts are considered acceptable.[207] The policies and norms that have influenced interpretations of the doctrine have changed in the US during the previous decades. At one time, charitable bequests were given a

[205] *Ibid*.
[206] *Ibid*, 84.
[207] Spivack (n 166), 276-283.

great deal of importance and could easily trump the claims of the donor's family members in undue influence claims.[208] Applying this to religious gifts, courts may satisfy tests for undue influence tests more easily where detailed legislation exists on family provisions legislation within states, or courts generally give weight to norms of inheritance.[209] The influence of the social norm to provide for one's own family has been considered to be so strong in undue influence claims that it cannot protect testamentary freedom, which prevents the doctrine from operating legitimately.[210] Similarly, US jurisprudence generally indicates that provision for family members is viewed as natural and normal, whereas testamentary dispositions made to associates or new acquittances are unnatural.[211] Accordingly, US norms on inheritance may unjustly override religiously motivated gifts. I consider how this often trumps a donor's autonomous wishes to deal with their property as they see fit below.[212]

There is a second view on how social norms can impact on a court's assessment of when influence becomes undue. The US interpretation of the doctrine offers a great deal of discretion to judges depending on the test applied in states. It is claimed that the doctrine is "dysfunctional" because judges view facts and conceptions of gift-giving through their own ideologies[213] and decisions are regularly decided on the grounds of "sheer narrow-mindedness, rigid notions of social propriety and outright bigotry."[214] *In Re Will of Kauffman* (1964)[215] provides evidence of such reasoning. The sexuality of the defendant, the recipient of testamentary dispositions of considerable value, was viewed negatively by the court. This

[208] This reasoning is found in 1819 inspired by the 1736 English Mortmain Law, see *Philadelphia Baptist Ass'n v. Hart's Executors*, 17 U.S. (4 Wheat.) 1 (1819)., cited in Sherman (n 168), 598, ft 118.
[209] Melanie Leslie, 'Enforcing Family Promises: Reliance, Reciprocity and Relational Contract,' (1999), North Carolina Law Review, 77(2)(5), 585.
[210] Ray D. Madoff, 'Unmasking Undue Influence,' (1997) Minnesota Law Review, 81, 576–777.
[211] Scalise (n 165), 58.
[212] See pages 81-82.
[213] Spivack (n 166), 276-277. There is further evidence of this analysis of decisions in Jeffrey G. Sherman, 'Undue Influence and the Homosexual Testator,' (1981) University Pittsburgh Law Review, 42(2), 225-268.
[214] Spivack (n 166), 264-265.
[215] 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), an example from, *ibid*, at 265.

altered the court's assessment of the claimant's allegations (the testator's brother) that defendant made false accusations about how the testator's family viewed the testator's relationship with the defendant when he amended his will. The court found the defendant had unduly influenced the testamentary dispositions he had received because he was held to have dominated the will of the testator, and the allegations made against the family when the will was amended were found to be false. However, in practice, the accusations made by the defendant seem accurate of how the testator and the defendant were made to feel about their relationship by the testator's family on numerous occasions. It has been argued that the court's judgment is unjust and motivated by "…its distaste for Robert's [the testator's] homosexuality, and its sympathy for the family's double injury in being disinherited by a bequest to his male lover and the resulting "exposure" of his "unnatural acts" to the public eye."[216]

Additionally, in *Estate of Lakatosh* (1995),[217] the court viewed a relationship between a young man and elderly woman, that was possibly romantic, as inappropriate, and this altered how the court assessed their relationship before finding that the gifts made to the donee had been unduly influenced. It is argued that the gifts should have been viewed as "a reasonable statement from an elderly woman who had been abandoned by her family and had found someone to help her with chores and errands that she could no longer do herself."[218]

Both the US and Australian interpretations of the doctrine are unable to guard against the conflict of the sorts of social norms mentioned in cases. This conflict is created by the subjective understandings of what constitutes ordinary motives, which is left to judges to determine on a case-by-case basis. The effect of this degree of subjectivity could be felt more

[216] *Ibid*, 277.
[217] 656 A.2d 1378, 1381 (Pa. Super. Ct. 1995), an example from *ibid*, 278.
[218] *Ibid*.

forcefully in religious cases, like *Hartigan*, where the defendant's religious beliefs do not match what the court considers are ordinary or appropriate religious practices.

Active and passive exploitation

Commentary on US religious cases, unlike commentary in Australia, has specifically examined what role active solicitation has in determining whether gifts and testamentary dispositions motivated by religious faith have been unduly influenced. *Doveydenas v. The Bible Speaks* (1989)[219] and *Whitmire v. Kroelinger* (1930)[220] are examples of where this assessment has been adopted by courts. In *Doveydenas*, the donor gifted $19,000,000 to a religious group to set up a TV channel, help cure the migraines of the donor's assistant, assist the donor's general wellbeing, and on one occasion, the money was used to help a minister escape from Romania where he was allegedly detained. Some gifts were found to have been unduly influenced, and others were deemed to have been made by the donor freely. In *Whitmire*, the executor of the donor's estate sought to recover three monetary gifts totaling $115,000 used to build a church and three gifts of property on the grounds of undue influence. The court held that only four of the gifts were unduly influenced by the defendant. In both decisions, the courts determined at what stage the defendant realised they could take advantage of the donor's trust and subsequently when they did, compared to when the gifts were in line with the beliefs and practices of the relevant religion. Distinguishing between gifts actively solicited and those that have not provides an insight into how courts could distinguish religious influence from undue influence.

[219] 869 F.2d 628 (1st Cir.), cert. denied, 493 U.S. 816 cited by Jarboe (n 168), 277.
[220] 42 F.2d 699 (W.D.S.C. 1930), cited by *ibid.*

2.2.3. The review processes of courts

Judicial discretion

A common feature of the challenges of regulating undue influence mentioned above in the Australian experience is the extent of the discretion afforded to judges by the presumed undue influence test. The discretion is used to determine whether aspects of the test have been satisfied in cases. I have shown how these assessments typically involve a significant degree of subjective analysis. In *Thorne v Kennedy* [2017],[221] a case decided by the High Court of Appeal, there is evidence to bolster the view that there are conflicting views on how undue influence cases should be decided, which is only overcome by a judge's interpretation of the doctrine's grounding principle, and how it applies in practice. The decision was an opportunity for the highest court in Australia to consider the operation of the doctrine and the issues that have developed in cases. Therefore, in many senses, *Thorne* is a hard case of undue influence.

The claimant was in a relationship with a wealthy businessman and was asked by the defendant to marry him. Before the wedding, the defendant asked a solicitor to draw up a prenuptial agreement. The defendant asked the claimant to attend a meeting with the solicitor and to sign the agreement. The defendant claimed that the wedding would not go ahead if the claimant did not sign it. The solicitor advised the claimant that the agreement provided very little for her compared to the defendant's significant wealth. The claimant later challenged the prenuptial agreement on the grounds of undue influence, duress, and unconscionable conduct.

[221] See n 154.

Writing for the majority of the High Court,[222] Kiefel CJ found undue influence and submitted that undue influence is proven when the will of the donor is impaired, or where a gift is not freely and voluntarily made.[223] It was held that the defendant's efforts to pressure the claimant need not have been illegitimate or improper at any time.[224] Kiefel CJ stated that the assessment of the improper nature of pressure should be reserved for duress.[225] In deciding whether the claimant's will had been impaired to an appropriate degree, trial judges are not required to ascribe weight to factors relevant to cases or consider which are fundamental or subordinate.[226] Assessing the will-power of a person was argued incapable of mathematical precision.[227]

Gordon J agreed with the majority decision but declared that it was reached in an unprincipled way. Gordon J submitted that the defendant's behaviour amounted to unconscionable conduct, not undue influence.[228] Gordon J found that the claimant's will was not impaired.[229] Instead, the claimant's will was taken advantage of by the defendant.[230] Accordingly, the claimant was aware of her conduct but could not "…make a rational judgment to protect her own interests" and "In those circumstances, which were evident to and substantially created by Mr Kennedy [the defendant], it was unconscionable for Mr Kennedy to procure or accept her assent to the agreements."[231]

Considering the two opinions of the High Court reveals that judges interpret the doctrine differently in practice, even when each judge agreed on the doctrine's rationale. Consequently,

[222] *Ibid,* Bell J Gageler J Keane J Edelman J concurred with Kiefel J's reasoning and verdict.
[223] *Ibid,* [31]-[33].
[224] *Ibid*, [30].
[225] *Ibid*, [26].
[226] *Ibid*, [62].
[227] *Ibid*.
[228] *Ibid*, [79].
[229] *Ibid*, [80].
[230] *Ibid*.
[231] *Ibid*, [81].

undue influence may capture certain kinds of behaviour on one occasion, but not on others. This does not mean that judges and courts are fundamentally talking past one another when they disagree about whether transactions are unduly influenced, rather, it suggests that courts may apply the doctrine differently even with an agreed understanding of the rationale. Therefore, judges may struggle to find consistent interpretations in majority decisions in hard cases of presumed undue influence.

My conclusion has direct applicability to religious cases and may explain why dubious Australian decisions like *Hartigan* have the same outcome as decisions where undue influence appears more probable in easier cases. Moreover, if there is agreement on the operation of the doctrine in practice, as in *Thorne*, the resolution of particular issues may vary greatly because of subjective interpretations of what impaired will means, or regarding other elements of the test, for example, ordinary motives, as discussed above. Issues like those mentioned arise more readily in hard cases of religious claims. Consequently, the risk of unprincipled and subjective decisions is increased, especially when courts apply non-religious precedents to religious claims and fail to consider the differences in relationships and motivations for gifts that may indicate some reduction of free will. However, this does not mean that the donor's will is impaired in any real sense on all occasions.

The extent of judicial discretion afforded to judges by understandings of the doctrine is also a common issue in the US experience. This discussion has shaped the doctrine's application since the early twentieth century.[232] It is now generally accepted that the doctrine is based on the donor's or testator's impaired will.[233] State courts continue to employ this rationale in

[232] See generally Scalise (n 165).
[233] See pages 57-59.

decisions.[234] Alongside impaired will, public policies have also played some role in deciding cases.[235]

No US state provides an exact definition of undue influence, so cases are decided on certain factors on a case-by-case basis. Consequently, judges determine how the doctrine applies with little substantive constraints. The predominant criticism relating to the extent of the discretion held by judges when applying undue influence tests in the US is an obvious one; it does not confirm how forms of influence become undue with any degree of precision.[236] Quinn et al note that US courts have on occasion gone against traditional understandings of the doctrine.[237] Additionally, Quinn et al identify that legal experts observe disagreements between probate judges as to whether undue influence must be intentional.[238] Moreover, there is also disagreement between judges about what factors render people vulnerable to undue influence, or what makes parties weak.[239]

Based on this insight, there are real practical concerns about the discretion held by judges and understandings of the doctrine's rationale. The US and Australian experiences establish that even where the grounding principle problem is decided, judicial discretion on what indicates unduly influence and what factors are relevant to claims can still negatively affect decisions and risk unprincipled decisions. Consequently, the experiences of both jurisdictions give rise to forceful questions over the suitability of a rationale premised on the claimant's will and when it can be proven that it has been sufficiently impaired by a defendant's conduct.

---

[234] For example, *Estate of Mann* (1986) 184 Cal.App.3d 593 & *Estate of Sarabia* (1990) 221 Cal.App.3d 599.
[235] Spivack (n 166), 299-301.
[236] Quinn et al (n 166), 114.
[237] *Ibid*.
[238] James E. Spar et al, 'Assessing Mental Capacity and Susceptibility to Undue Influence Behavioral Sciences and the Law,' (1995) Behavioural Sciences and the Law, 13, 391-403, cited in *ibid*, 114.
[239] *Ibid*, 115.

Presumptions of religious influence

The level of discretion afforded to judges in claims is also problematic in religious claims regarding when courts decide if a presumption of influence applies automatically or if it must be proven by claimants. This features in the approaches of both Australian and US courts. For instance, *Hartigan* is described as a unique case where the donor did not have any prior religious relationship with the donee but gifted her family home to the defendants.[240] The donor believed that depriving herself of material wealth would ensure spiritual growth, a belief which was based on her readings of Hare Krishna literature. Ridge has argued that *Hartigan* should not have been tried as an undue influence case. From the facts, it is correct to argue that an automatic presumption of influence should not have arisen between the parties, at least before the gift had been made, as there was no relationship of heightened trust and confidence between the parties. Accordingly, an automatic presumption of influence was inappropriate based on the facts. Bryson J's explanation of why a sufficient relationship existed between the parties for an automatic presumption to arise stretches the facts too far. The claim should have been one of unconscionable conduct since the defendant's beliefs were a special disability akin to an emotional infatuation, and this was knowingly taken advantage of by the defendant's agents.[241] Although the choice of claim does not automatically affect the outcome for claimants, it prevents awkward interpretations of facts, like in *Hartigan*.[242] By considering the relationship of the parties in a more principled way, courts would not need to strain the facts like Bryson J did to find that a presumption of influence applied to the party's relationship.[243]

[240] Ridge (n 6), 81.
[241] *Ibid*, 82.
[242] *Ibid*.
[243] *Ibid*.

The US interpretation of the doctrine does not generally include a special category of relationships that presumes influence. As mentioned above, some states consider three types of confidential relationships, which do not automatically include the spiritual leader relationship.[244] A presumption of undue influence can nevertheless arise in relationships between religious leaders and adherents where the leader of the religion also holds a fiduciary role. The critical question for courts is whether the relationship between the spiritual advisor and adherent alone is sufficient or may be treated as such by courts.[245] This question deserves greater attention. In practice, presumptions of influence are very difficult to rebut,[246] especially in one-stage test understandings of presumed undue influence. In early religious cases of presumed influence, a confidential relationship arose *per se* in this context.[247] In later cases, however, courts began to require more than this type of relationship for a presumption to arise.[248] For example, whether the donor received independent legal advice.[249] The *per se* relationship has not been consistently followed by all states.

In scenarios involving automatic presumptions of influence, courts should question how they arise in relationships, as well as how they apply over time. In religious relationships where an automatic presumption of influence arises where there is also evidence of a fiduciary role, US courts have considered the appropriateness of presumptions in long-term relationships involving gift-giving. In *Whitmire*,[250] the defendant, the Pastor of a Baptist church, was in regular contact with the donor for eight years. Money was given to the defendant during each

[244] See page 59.
[245] Jarboe (n 168), 275-277.
[246] Rachel Welden-Smith, 'A statutory definition of undue influence,' (2009) Unpublished report prepared for the San Francisco Superior Court cited in Quinn et al (n 166), 44.
[247] See *Corigani v. Pironi* 23 A. 355 (N.J. 1891) (New Jersey) & *Ryan v. St. Michaels Roman Catholic Church of Whitlemore*, 216 N.W. 713 (Iowa 1927), examples taken from Jarboe (n 168), 276.
[248] See *Else v. Fremont Methodist Church*, 73 N.W.2d 50 (Iowa 1955); *Guill v. Wolpert*, 218 N.W.2d 224 (Neb. 1974) (expressly rejecting holding in *Corigani*); *Lindley v. Lindley*, 356 P.2d 455 (N.M. 1960); *Longenecker v. Zion Evangelical Lutheran Church*, 50 A. 244 (Pa. 1901)., cited *ibid*, 277, ft 21.
[249] *Ibid*, 277.
[250] See n 220.

of the years for the reasons mentioned above.[251] During this time, the parties mainly communicated through letters but also occasionally lived in the same city as one another for short periods.

The district judge's analysis of presumptions of influence that must be proven by claimants makes it clear how this sort of presumption, compared to one that applies automatically, can take into account changes in relationship and influence. An automatic presumption of influence did not apply in *Whitmire* because the defendant did not hold a fiduciary position in the party's relationship.[252] The court consequently considered whether each gift was subject to a presumption of influence. A presumption did not apply to the two gifts made at the start of the party's relationship. However, a presumption did apply to the subsequent gifts. The party's relationship had changed at this point, which the court viewed with suspicion. It was found that after the donor had spent time living in the same location as the defendant, the defendant had taken the opportunity to unduly influence the donor. The gifts of property were also made when the health of the donor was in decline. As a result, it was held that the transactions made during these dates called for an explanation. The defendant did not convincingly explain the lawfulness of the gifts, which were subsequently found to have had been unduly influenced.

The analysis of the district court in *Whitmire* demonstrates that presumptions of influence that must be proven to arise by claimants can operate in a temporally nuanced way. This approach helps to establish the appropriateness of presumptions of influence on each occasion a gift has been made and whether it is appropriate to sever a gift from a presumption.[253] Severance greatly reduces the burdens faced by defendants when rebutting such presumptions.

[251] See page 68.
[252] The district judge discusses the law relating to presumption of influence in spiritual contexts after finding that the gifts were unduly influenced, *Whitmire* (n 220), 710-712.
[253] This approach is not adopted in Australian jurisprudence on religious undue influence.

Presumptions that must be proven by claimants are, therefore, based on a more realistic understanding of relationships of influence. In circumstances where presumptions arise automatically because of the type of relationship between the parties, courts may not account for the inappropriateness of presumptions in long-term relationships. As a result, courts subsequently impose an extreme burden on defendants to rebut presumptions, as little evidence may exist to show that gifts were an expression of the donor's true will. Additionally, gifts may have been large and out of character for donors. These factors, amongst others that could be considered by courts, make it extremely difficult for automatic presumptions to be rebutted.

Furthermore, these concerns could feature more readily in the US states that consider that confidential relationships can arise between spiritual leaders and parishioners, even if the donor is influenced by third parties acting in the interests of religion.[254] US courts have heard claims alleging that a minister's comments in sermons pricked parishioner's conscience and pressured them donating.[255] Such cases have generally been unsuccessful.[256] Courts have nevertheless stated that comments made by religious leaders to congregations may make parishioners more susceptible to undue influence.[257] However, a presumption of influence may unjustly arise automatically in these circumstances despite there not being a sufficient relationship of trust and confidence between each of the congregation members and religious leaders.

[254] See Sherman (n 168), 629.
[255] For example, *Roberts-Douglas v. Meares*, 624 A.2d 405, 421 (D.C. 1992).
[256] Sherman (n 168), 633-636.
[257] Roberts-Douglas (n 255), modified on other grounds and reaffd, 624 A.2d 431 (D.C. 1993), at 424. Cited by *ibid*, 631, ft 304.

Significance of improvident transactions

In the Australian context, the role of improvidence in religious cases has been questioned.[258] The reason for this concern is that interpretations of improvident transactions could have detrimental impact the interests of donees, especially where there is no clear evidence that the donor's will has been impaired. In *Hartigan*, Bryson J considered that the gift of land did not satisfy the "ordinary motive test," which was the main reason for a finding of undue influence as discussed above.[259] Ridge questions "… is the logical conclusion from *Hartigan* that the court will never allow a mother with a young family and no other means of support to give away her only asset?"[260] Although *Hartigan* is a religious case, understanding the role of improvidence is a challenge equally applicable to all types of presumed undue influence claims.

Australian courts have on occasion ignored equitable maxims and undone unwise bargains in religious claims. *Hartigan* is an example where this has happened for the reasoned listed above.[261] Additionally, the threshold test in presumed undue influence claims can be considered an extension of the problem identified by Bradney in how the law treats 'obdurate believers'[262] and how family law imposes objective moral standards that do not match up to the standards of obdurate believers.[263] Subsequently, the believer's standards are found to be unacceptable by courts. Bradney argues that incompatibility is created between the law and the believer.[264] Such a similarity could also arise in religious undue influence cases in the same way. On this basis, religious defendants are more likely to be found liable for undue influence

[258] Ridge (n 6), 82-83.
[259] See page 64.
[260] Ridge (n 6), 83.
[261] See page 61.
[262] Ridge (n 6), 84-85.
[263] Anthony Bradney, 'Faced by Faith,' in Peter Oliver et al, *Faith in Law: Essays in Legal Theory*, (Bloomsbury 2000), 90, cited in *ibid*. For example, Roman Catholic adoptions agencies rejecting applications from homosexual couples wishing to adopt a child.
[264] Ridge (n 6), 84-85.

where gifts cannot be explained by ordinary motives but can be explained by religious motives. Therefore, the ordinary motive test seems to be out of date or at least less relevant to claims. It has subsequently been argued that the standard set by Australian courts ignores how believers frequently gift large sums of money to religious institutions and that the law of undue in religious claims has created incompatibility between conceptions of legitimate gift-giving and religious gift-giving that may encompass improvidence.[265]

Similarly, in the US, the doctrine has been criticised in probate contexts for allowing judicial disapproval of testamentary plans, especially in relation to conceptions of abnormal or uncommon dispositions.[266] Consequently, improvidence can include transactions that do not accord with the intestate schemes of states. For example, in *Murphy v O'Neill* (1983),[267] the court stated, "[t]here is a body of case law which may be cited for the proposition that an unexplained, unnatural disposition in a will, when considered with other factors, can give rise to the drawing of an inference of undue influence."[268] Accordingly, the US experience also contains questionable interpretations of improvidence in non-religious contexts that are equally, if not more likely in religious claims.

The role of independent advice

In the Australian context, independent advice is typically seen as the leading way presumptions of influence can be rebutted.[269] *Hartigan* confirmed that the legal advice received by the

[265] *Ibid*. 84.
[266] Scalise (n 165), 58 quoting Lawrence A. Frolik, 'The Biological Roots of the Undue Influence Doctrine: What's Love Got to do with It?' (1996) University of Pittsburgh Law Review, 57(4), 868.
[267] 454 A.2d 248, 249 (R.I. 1983)., see Scalise (n 165), 59.
[268] *Ibid*, 249, Scalise (n 165), 59.
[269] Ridge (n 6), 67.

claimant must be independent of any of the parties to the gift or transaction.[270] The suitability of independent advice is narrowed further by decisions confirming that legitimate advice need not be legal, but need be pragmatic.[271]

However, it is unclear whether the advice received by claimants must be followed for a defendant to show that a presumption of influence is rebutted. Ridge has questioned whether some gifts cannot be categorised as lawful where independent advice had been received by a donor, but the advice cannot remove a donee's advantage.[272] There are two opposing perspectives in Australian jurisprudence on this question. View (I) considers that if the advice was given to claimants, but not followed, a presumption of influence can still be rebutted by defendants. In *Hartigan*, Bryson J claimed it is an overstatement that advice is necessary for a gift to be valid[273] and conceptually there is no need for advice to be received for gifts to be legally valid.[274]

View (II) contends that unless independent advice is followed by claimants, it is almost impossible for the presumption of influence to be rebutted by defendants. Meagher et al (the leading textbook on equity in Australia) holds the view, "…reliance is to be placed upon the presence of advice only if it appears to have had effect upon the donor in forming his independent intention; it will be hard to show this if the advice were not followed'."[275] This approach seems more favoured by the High Court's judgment in *Thorne*. The High Court ruled that although independent advice was received by the claimant, who was aware of the terms of

[270] [83] & [89] (Bryson J).
[271] See *Brusewitz v Brown* [1923] NZLR 1106 (SC) & *Bester v Perpetual Trustee* Co Ltd (1970) 3 NSWR 30 cited by Ridge (n 6), 76.
[272] Ridge (n 6), 76.
[273] Citing *Watkins v. Coombs* [1922] HCA 3, 194, (Isaacs J) as evidence of this belief at [31].
[274] [31].
[275] Roderick Meagher et al, *Equity: Doctrines and Remedies*, (LexisNexis Australia, 4th edition, 2002), [15]-[135] citing *Powell v Powell* [1900] 1 Ch 243, 246.

the prenuptial agreement and strong reasons not to sign it,[276] other factors indicated that the presumption could not be rebutted by the defendant.

However, it should be questioned why this is a legitimate view on the role of independent advice in religious contexts since the advice is less likely to be followed. Improvident transactions motivated by religious faith may be the leading reason a donor may ignore legal advice.[277] Additionally, donors may ignore advice because they believe the advisor does not adequately respect their religious motivations. Accordingly, the interpretation of the role of independent advice in view (II) may not serve the intended purpose of this factor in claims involving altruistic motivations.

A different sort of question concerning the source of the advice is raised in cases where religious advisors are called by one party to assist with transactions. In *Khan v Khan* [2004],[278] an Imam acted as a mediator between the parties seeking to finalise a contract of sale for a property. The Imam concluded that the sale had been completed in a previous meeting between the parties. One member of the selling party disagreed and declared that the property was worth more than what had been offered. The Iman stated that the selling party should accept the contract and "…will be reward[ed] in the after-life."[279] Deeds of the sale were not drawn up at the time and the buying party subsequently sought specific performance for the alleged contract. In response, the selling party alleged that if the contract was binding, it had been unduly influenced by the Imam. The New South Wales Supreme Court found that third parties could unduly influence a transaction if the two stages of the equitable test were proven. The Supreme Court held that the Imam had not unduly influenced the agreement and was only

[276] *Thorne* (n 154), [14] (Kiefel CJ).
[277] Ridge (n 6), 84.
[278] NSWSC 1189.
[279] *Ibid*, [12] (Barrett J).

advising on religious, not legal matters. Instead, the buying party was found to have unduly influenced the transaction by asking the Imam to attend the second meeting. The Supreme Court submitted that the defendant knew what impact the presence of the Imam would have on the selling parties' sense of religious duty.[280]

The reasoning of the court in *Khan* raises a separate question on the role of religious advisors in claims and how strict the independent aspect of advice must be. *Hartigan* and *Antov v Bokan* [2018][281] confirm that legal advisors acting for the defendant in transactions will not always be sufficiently independent to rebut the presumption because they may act in the interests of defendants. However, in religious contexts, the justification for strict independence is not as strong. Advisors may hold single roles as religious advisors or legal advisors but could also hold both roles. A US case is instructive to this discussion. *In Re Estate Maheras* (1995)[282] the defendant was the advisor to a will leaving the bulk of the testatrix's estate to the church. Both the defendant and testatrix were members of this church. The Oklahoma Supreme Court found this fact suspicious and ultimately, that the advisor unduly influenced the testatrix. In a scenario where the advisor does not impair the advisee's free will but is part of the same church, there is a question about the independence of the advisor. In these sorts of scenarios, the advisor is aware of the religious and legal facts relevant to gifts. It is unclear whether courts in both jurisdictions would find this advisor sufficiently independent of the context. Practically, this sort of advisor is better placed to advise donors on the nature of transactions; they have a greater understanding of the religious motivations for transactions. There is a distinct possibility that donors motivated by religious faith are more likely to follow the advice of advisors who hold both roles, especially when advisors do not benefit from the planned gifts. Therefore, if a

[280] *Ibid*, [37].
[281] NSWC 1474, [551].
[282] 1999 OK CIV APP 4, 973 P.2d 345.

restrictive approach to the role of independent advice applies in religious claims, the role of advice is considered in a way that is at odds with the aim of the factor, that reasoned advice should be followed by donors. Accordingly, determining the correct role of independent advice is significant to religious claims and requires further discussion to help produce better-reasoned decisions.

Judicial assessments of policies and the impact on donor autonomy

Policies have been used by Australian courts to determine whether gifts have been unduly influenced in presumed undue influence claims.[283] The role of these policies has been questioned in the religious cases.[284] In particular, the public policy of providing for one's own family has been subject to criticism in this context.[285] *Hartigan* is an example where the court has given more weight to the improvidence of the gift, rather than the donor's intentions at the time of the gift in finding undue influence. Bryson J focused on how the gift of the claimant's property would subsequently impact her children's lives[286] and concluded that gifting the family home was "…an entire departure from ordinary behaviour…"[287] The usage of the public policy is criticised for representing an additional aspect of the ordinary motives test that discriminates against certain religious practices, as demonstrated above.[288] Moreover, the policy could also embody a social perspective of what motherhood should entail that was subjectively determined by the court. The use of the public policy was arguably relied on by

[283] For example, providing for one's family and preventing exploitation by religious ministers, Ridge (n 6), 86-87.
[284] *Ibid*.
[285] *Ibid*. The policy is referred to by Bryson J in *Hartigan* (n 151), [33].
[286] *Hartigan* (n 151), [36].
[287] *Ibid*.
[288] See pages 63-64.

the court in *Hartigan* to rescind an unwise decision; the court did not determine that the donor's will was sufficiently impaired when the property was gifted.

Similarly, *Quek v Beggs* (1990)[289] provides evidence that policies based on family provisions laws relied on by courts to reason decisions can unjustly restrict donor autonomy. The defendant, a Baptist minister, received substantial gifts from a congregation member. The donor believed that the defendant was a messenger from God, a view which allegedly was also sincerely shared by the defendant. The donor did not change her mind about the gifts when she was alive. Her will subsequently contained few assets for her family. The daughters of the donor brought a claim of undue influence against the defendant, believing that they had been unlawfully disinherited. During the time the donor relied on the defendant for support and comfort, the claimants were estranged from their mother and did not rely on her to support their lifestyles while she was alive. The Court found that the gifts could not be explained by ordinary motives and ruled that the gifts received by the defendant had been unduly influenced.

It has been argued that the decision was motivated by the underlying policy of family provisions legislation even though the provisions did not apply directly to the claimants;[290] it is unclear how the donor's will had been impaired by the defendant and the decision acknowledged that the defendant had not exploited the donor.[291] *Quek* consequently demonstrates how an autonomy conflict can occur in religious claims between a donor's wishes and family provisions legislation norms. The decision of the court provides evidence that courts may prioritise this policy over the wishes of religious donors in an unprincipled way.

[289] See n 151.
[290] Family Provision Act 1982 (NSW), (Ridge n 6), 87-88.
[291] *Ibid*, 86.

2.3. Conclusions

In both Australia and the US, religious undue influence cases have given rise to a number of legal challenges and questions concerning just and principled regulation. The analysis conducted in this chapter bolsters my view that religious undue influence cases are hard cases to decide. Both jurisdictions demonstrate unique religious challenges of regulating religious influence, as well as how general doctrinal challenges are compounded in religious settings. I later demonstrate how these challenges also feature in religious undue influence cases decided by English courts in chapter 4. There, I also argue that the insights generated by my analysis in this chapter offer insufficient means to address many of the common challenges of determining when religious influence becomes undue. I propose a more wide-reaching and principled response in chapter 7.

The challenges of regulating both legal wrongs in religious contexts examined have worryingly received much less attention in English cases and commentary than in Australia and the US. My focus now shifts to consider the challenges of regulating religious fraud through English criminal laws, before moving on to address the challenges of determining religious undue influence through the equitable understanding of presumed undue influence found in English law.

Chapter 3: The Challenges of Religious Fraud for English Criminal Law

3. Introduction

In 2014 a Magistrates Court heard allegations relating to religious fraud under the *Fraud Act 2006*.[292] A former adherent of the LDS Church claimed that the President of the Church made false representations motivated by religious beliefs and practices in order to receive money through annual tithes. Judge Riddle held that a court was an inappropriate forum for claims of this nature.[293] The case was subsequently dismissed on the basis that the allegations made against the Church's President were non-justiciable. Judge Riddle found that the private prosecution merely amounted to an expression of the alleged victim's distaste for the defendant's faith and beliefs.[294]

Phillips is still the most significant contemporary case within England and Wales concerning criminally litigated religious fraud, even though it was unreported. The decision immediately suggests an overarching problem with this area of law, which is worryingly gaining little academic attention in domestic settings;[295] should defendants alleged to have committed criminal fraud evade liability because of the religious context of representations? A religious exemption to a generally applicable criminal law is unlikely to be a justified response for the various ways in which religious fraud may occur, as discussed in my introduction.[296] To answer this question English courts must determine how to assess the liability of alleged religious

[292] See n 13. For brief commentary see Frank Cranmer, 'Thomas Phillips v Thomas Monson: Westminster Magistrates' Ct: DJ Riddle, Chief Magistrate, 20 March 2014 Private prosecution – doctrine – Fraud Act 2006,' (2014) Ecclesiastical Law Journal, 16(3), 393.
[293] *Phillips* (n 13), 3.
[294] *Ibid*.
[295] See van Twist (n 18); Steven Greenfield et al, 'From Beyond the Grave: The Legal Regulation of Mediumship,' (2012) International Journal of Law in Context, 8(1), 97-114; Mason (n 17) & Cranmer (n 293).
[296] See Edge (n 5), 170-172.

fraudsters, and in turn, consider how to overcome the challenges that arise during that assessment. This analysis is greatly under-discussed domestically and involves complex areas of criminal law and human rights concerns.

Without a thorough investigation into the issues of regulating religious fraud identified below, victims and defendants of *s2 FA06*, fraud by false representation, are likely to experience several adverse consequences. By allowing defendants to evade liability, defendants can continue their fraudulent religious practices under the guise of a religious cloak. Regulation could also over-criminalise religious conduct, undermining the aims of criminal fraud laws, and unjustly infringe the religious freedom protections laid out in the *European Convention of Human Rights* set out in *Article 9*, which has been incorporated into English law through the *Human Rights Act 1998* (hereafter *HRA*).

This chapter highlights the most forceful challenges that English courts will face in regulating religious representations using *s2 FA06*. This analysis has a wide remit, as each challenge identified is likely to apply equally to any religious beliefs and practices. The issues identified, therefore, have direct and widespread relevance to many of the ways religious institutions raise financial capital in England.

I assess the challenges produced by the *actus reus* and *mens rea* requirement of s2 *FA06*. This offence is the broadest offence of the *FA06*, and the one most commonly charged.[297] Accordingly, the offence is likely to be the most relevant to religious fraud cases. Both the *actus reus* and *mens rea* of the offence raise unique challenges for courts deciding the liability of defendants in religious fraud cases. There are also general doctrinal challenges with the

[297] Ormerod (n 12), 196.

offence that are compounded in the religious contexts considered. The challenges are identified by considering doctrinal and procedural factors, and human rights obligations under *Article 9 ECHR*, which English courts are required to follow. Many of the challenges discussed were also identified in the US experience of religious fraud regulation mentioned in chapter 2. I explain why the US official and alternative approaches to the regulation of religious fraud should not be transplanted into English law without further elaboration by judges or Parliament on how the most significant challenges examined should be addressed.

I subsequently explore how these challenges could be approached by either of these legal institutions in chapter 7. I do not completely address the falsity testing challenge mentioned below. In less obvious instances of abuse of religious capital, the problem is an insurmountable challenge relating to theology and the truth of religions, an area of knowledge that the law is generally uncomfortable in engaging with. The problem also has potentially significant ramifications for the influence of religion on law, in particular to religious accommodation claims. Accordingly, in chapter 7, I provide a rationale for the offence, which could later take account of how the falsity challenge is eventually addressed by English courts or Parliament.

3.1. *s2 FA06* and religious fraud: *actus reus* challenges

s2 FA06 prohibits false representations;[298] a representation is characterised as false if it is untrue, misleading,[299] or might be either.[300] The representation must also be made dishonestly[301] and intentionally by defendants to make a gain for themselves or another, or

[298] s2(1)(a).
[299] s2(2)(a).
[300] s2(2)(b).
[301] s2(1)(a).

cause loss to another or expose another to a risk of loss.[302] For example, a person who sells a painting stating that it is a real Picasso painting when they know it is not would be guilty of the offence. In this section, I discuss the *actus reus* requirements of the offence and illustrate what challenges are caused by the requirements of falsity relating to religious representations.

3.1.1. Proving the falsity of religious representations

The most complex challenge that English courts will inevitably face in religiously based *s2 FA06* cases, stems from the *actus reus* conduct elements that defendants must communicate a false representation.[303] As already outlined, a representation is false if it is untrue, misleading,[304] and the defendant knows this, or that the representation might be either.[305] Representations can relate to the quality or providence of an item, as well as the defendant's state of mind[306] or another person.[307] Courts have not encountered any real difficulties with how juries determine whether representations are false or misleading in the case law. However, this will not be true for the falsity requirement assessed in religious fraud cases based on miraculous claims. In a different legal context, English courts have held that is it inappropriate to determine whether religious beliefs are untrue. In *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] (hereinafter *ex parte Williamson*),[308] a House of Lords majority (now the Supreme Court), declared that the correct approach in determining whether a religious exemption should be granted to generally applicable laws is

[302] s2(1)(b)(i)-(ii).
[303] s2(1)(a).
[304] s2(2)(a).
[305] s2(2)(b).
[306] s2(3)(a).
[307] s2(3)(b).
[308] UKHL 15; [2005] 2 W.L.R. 590.

to determine if the belief is sincerely held by the claimant, rather than if the belief is false.[309] This ruling established a continuing precedent for how courts determine the genuineness of religious beliefs in all areas of law.[310]

Williamson raises two concerns specific to religious fraud regulation where the defendant's allegedly fraudulent conduct stems from the manifestation of a legally recognised religious belief. Firstly, should defendants evade liability because the conduct alleged to be fraudulent is connected to a religious belief, and so cannot be tested for falsity by courts?[311] Alternatively, are courts justified with proceeding to test the falsity of the defendant's religious beliefs, and thereby most likely violating *Article 9 ECHR* and overruling domestic precedent,[312] to ensure those who are not genuinely acting upon religious motivations can be prosecuted? This second question is essentially unique to the context of religious fraud.[313]

Courts are likely to declare that certain categories of beliefs should be tested by juries in *s2 FA06* cases. English courts have traditionally been reluctant to grant religious exemptions to criminal laws.[314] Consequently, the "hands off" approach proposed by Justice Jackson in *Ballard* is unlikely to be accepted by English courts.[315] More specifically, it is a particularly

[309] *Ibid*, [22] (Lord Nicholls).
[310] It has since been followed in *R v Headteacher and Governors of Denbigh High School, ex p Begum* [2006] UKHL 15; [2007] 1 A.C. 100 [21] (Lord Bingham of Cornhill), *R. (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin); [2008] A.C.D. 88 [58] (Mr. Justice Selber) & *Mba v Merton LBC* [2013] EWCA Civ 1562; [2014] W.L.R. 1501 [13] (Lord Justice Maurice Kay).
[311] This chapter does not assess how courts will determine whether a belief is genuinely a religious belief and the problems this may pose for beliefs involved in religious fraud claims. That is a challenge for courts that will feature in the criminal and civil analysis of this thesis. It will, therefore, be treated as an overarching issue of this thesis and will be examined in a preceding chapter concerning how religion and religious belief is defined by courts in England and Wales. Instead, this chapter addresses the more significant challenges facing courts after they have determined that a belief is a religious one.
[312] This could lead to a declaration of incompatibility under *s4 HRA* since the *s2 FA06* could not consequently be read in line with ECtHR jurisprudence under *s3 HRA*.
[313] This question may also have wider relevance to alleged fraudulent conduct in homeopathy cases that are not discussed in this thesis.
[314] See Edge (n 5), 170-172.
[315] See pages 43-44.

unacceptable response for egregious cases of abuse of religious categorisation where there is clear evidence that a defendant does not believe in the representations and intends to make dishonest representations for financial gain. Racketeers should not receive the protection of the ruling in *ex parte Williamson* in the sorts of circumstances discussed. Representations made in these sorts of circumstances would foreseeably be captured by *s2 FA06* because the defendant misrepresents the state of their mind to adherents.[316]

However, in scenarios where there is no evidence of racketeering or lies, it is less clear how courts can prosecute religious representations alleged to be false by victims. Beliefs capable of testing could include "God will make you rich," and "religious slot machines are biofeedback devices if you know how to use them correctly."[317] These beliefs relate less to unworldly matters and could in practice be tested for falsity by considering how donations are used in Get-Rich-Quick-Schemes or through the experiences of adherents. In contrast, courts could rule that beliefs relating to the afterlife, such as "You will go to heaven" and "I will reduce your time in purgatory" that require payments for religious officials to pray for adherents, cannot be proven false due to their unworldly nature. Testing the falsity of these beliefs using conventional methods risks unduly violating the defendant's *Article 9(2) ECHR* qualified right to manifest their religious beliefs.

[316] s2(3)(b).

[317] Tolly Burkan, *Extreme Spirituality: Radical Journeys for the Inward Bound,* (Beyond Words 2001), 42-43 whether this is believed by Burkan is questionable; Burkan charges up thousands of dollars to attend his workshops typically entitled 'Unlimited Wealth' which seek to demonstrate with religious references how slot machines can be influenced by conscious thoughts, see 'Tolly Burkan's Casino Seminar on Inside Edition,' Published on 26 Feb 2009 <https://www.youtube.com/watch?time_continue=300&v=jlU_GLDhNkQ> Accessed January 2018. What this does reveal is that others may share this view which is significant for the future regulation of RF in England and Wales.

Consequently, further questions are raised about whether *all* religious beliefs can and should be tested for falsity in *s2 FA06* cases.[318] It is extremely unlikely that all beliefs will be considered justiciable since this is likely to violate the defendant's *Article 9(1) ECHR* right to belief. Accordingly, the "clearly culpable" theory followed by Chief Justice Stone and Justices Roberts and Frankfurter in *Ballard* is very unlikely to be followed by English courts.[319] Therefore, how should courts determine which beliefs are suitable for falsity testing? This is a challenging exercise that may result in accusations that the assessments of courts lack neutrality or are based on an alleged bias against particular religions. There is a real possibility of inconsistent treatment between some religions and more historical and widespread religions. Courts must be sensitive to the fact that certain religions, like Scientology, are structured on a belief system more capable of falsification. This includes beliefs on the ability to cure diseases and how the earth was created. Courts may subsequently determine that only certain categories of beliefs more capable of falsification should be tested for falsity in religious *s2 FA06* cases. In turn, there is a real chance that courts would be accused of discriminatory treatment between religions in cases through *Article 14* in conjunction with *Article 9 ECHR*.[320] Courts may, nevertheless, be considered justified in doing so where there is clear evidence that false representations have been communicated by defendants to make financial gains. Such evidence is far from guaranteed, however. Accordingly, this discrimination concern could prove very problematic when defendants attempt to show that they have not communicated false representations.

[318] This has also been questioned in relation to claims made by mediums that could be determined as false, see Greenfield et al (n 295), 110.
[319] See pages 42-43.
[320] This seems a high probability since such claims have been raised in the ECtHR involving the criminality of religious drug use, see *Alida Maria Fränklin-Beentjes and Ceflu-Luz Da Floresta v Netherlands* (2014), (Application no. 28167/07).

A third challenge raised by the *actus reus* relates to what methods could be used by courts to test the falsity of religious beliefs? Foreseeably, testing would involve a range of responses for different types of beliefs, depending on whether the content of beliefs concerns the supernatural or ecclesiastical history, for example. Courts may call for expert evidence;[321] ask for demonstrations of alleged powers; call witnesses to attest or disprove powers;[322] or examine ecclesiastical and historical records.[323] The Legislature could draw up legislation stating what areas of religious claims are justiciable.[324] Alternatively, judges could enforce the correct completion of the allegedly deemed fraudulent representation, rather than testing the truthfulness of the religious representation. For instance, courts may seek expert evidence on what constitutes the 'proper practice' of an exorcism and determine whether that approach has been followed by defendants.[325] If the defendant's practice does not match the correct approach, the defendant's conduct could satisfy the falsity element of the *actus reus*.

However, each of these approaches has evidential weaknesses specific to claims of the supernatural, and some approaches are even more prejudicial than probative. Many of the approaches listed raise concerns about evidential rules of admissibility, reliability, and the competency of witnesses, as well as the effectiveness and appropriateness of expert scientific evidence in supernatural claims.[326] Additionally, the denial of some of the approaches may give rise to claims that the defendant's *Article 9(2) ECHR* right is violated. A challenge could

[321] See *The Founding Church of Scientology* (n 40), at 86-87, where doctors were called to question whether E-meters used by Scientologists during auditing did generate health benefits; The Archbishop of Westminster was called to provide evidence on religious beliefs in *Re A* [2001] Fam. 417 (CA); [2001] 2 WLR 480. Professors have also been called to give evidence on religious beliefs, see *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175.

[322] This has been used to disprove allegations of fraudulent representations involving radionics, see case commentary of Philips v De la Warr Times, July 19, 1960, in Christmas Humphrey, *Both Sides of the Circle: The Autobiography of Christmas Humphreys*, (Allen & Unwin 1978), 204.

[323] A possible suggestion in Edge (n 15), 37.

[324] *Ibid,* 32.

[325] Example is taken from, *ibid*.

[326] Heins (n 17), 168. For example, there is no tried and tested legal method for contacting the dead so such supernatural representations could not be proven to be false, see Greenfield et al (n 295), 110.

be made where the prohibition is unnecessary and does not pursue a legitimate aim given the context the belief was manifested in.

Domestic courts will have to wrestle with this chronology of complex questions to determine whether the *actus reus* of *s2 FA06* can ever be satisfied in religious cases where there is no clear evidence of falsely held beliefs. Such considerations are not as problematic or common in non-religious cases, even though they may be relevant to cases involving homeopathic promises or mediums.[327] Courts are unlikely to find these sorts of cases non-justiciable due to the absence of religion. Accordingly, greater weight should be placed on resolving the challenges in religious contexts, which may, in turn, assist the regulation of other fraud cases.

Addressing the *actus reus* challenges is an extremely important task to establish how English courts should regulate religious fraud. *s2 FA06* is the broadest offence under the *FA06* and the most likely fraud offence that religious fraudsters will be charged with.[328] Therefore, disingenuous religious defendants could abuse religious categorisation if the truth of representations cannot be tested or effectively tested by courts. The same also applies where there is no clear evidence that defendants do not believe their representations. Parliament or the courts will eventually be required to determine if the US approach should be followed in English law,[329] that prosecutions depend on the defendant's sincerity, or whether religious *s2 FA06* should not be tried because of justiciability concerns.

As mentioned above, it seems unlikely that English courts would consistently create exemptions for all *s2 FA06* claims involving religious contexts. A sincerity-based approach

[327] See Greenfield et al (n 295).
[328] Ormerod (n 12), 196.
[329] See pages 88-94.

was the predominant focus of courts in previous legislation dealing with fraudulent spiritual practices.[330] In civil fraud contexts, it has been argued that sincerity is an obvious approach for regulating fraudulent religious practices.[331] Accordingly, it seems likely that courts would focus exclusively on the *mens rea* of the offence to determine whether defendants should be prosecuted for fraud where it cannot be proven that the defendant knew their representations were false. Therefore, the "religious reservation" approach of the majority decision in *Ballard* is likely to be followed by English courts.[332] I now consider the specific challenges raised by the *mens rea* of *s2 FA06* in religious cases and explain the important role the *mens rea* is likely to have in these cases.

3.2. *s2 FA06* and religious fraud: *mens rea* challenges

The *mens rea* of *s2 FA06* has three fault elements: intention to cause a loss or gain;[333] knowledge that representations are false, misleading, or might be either;[334] and dishonesty.[335] The first element is unproblematic in religious fraud cases, which invariably involve payments of property exchanged for religious promises that benefit victims or their family and friends. The defendant's intention to make a loss or gain property is established by the circumstances of exchanges, or the religious practices manifested by defendants relating to payments. The other two requirements will, however, raise considerable difficulties for courts deciding defendant liability.

[330] For instance, The Fraudulent Medium Act 1951, see Edge (n 15), 398.
[331] Concerning the regulation of providing religious good and services, see *ibid*.
[332] See pages 41-42.
[333] s2(1)(b)(i)-(ii).
[334] s2(2)(b).
[335] s2(1)(a).

3.2.1. Proving defendant knowledge on religious matters

Courts will experience difficulties when determining if defendants knew their representations were untrue or misleading. This problem is most apparent when claims are based on untrue representations; how will courts determine defendants knew that a religious representation relating to unworldly claims is untrue? Justice Jackson raised this very question in *Ballard*.[336] If courts are prevented from determining whether defendants knew their religious beliefs are untrue, courts cannot subsequently establish when defendants satisfy part of the knowledge requirement of the *mens rea*, unless the defendant misrepresents the state of their mind. Accordingly, racketeers are presented with another opportunity to escape liability if the challenge is left unaddressed.

The knowledge problem is a compounded doctrinal challenge, as it is uncertain how Parliament intended knowledge to be interpreted in the *FA06*. The *FA06* and the Law Commission Report published before the introduction of the *FA06* makes no useful reference to what the term 'knew' or 'knowledge' means. The Post-Legislative Scrutiny Report on the *FA06* does not refer to either term. The concepts of 'knowledge' and 'belief' are also generally overlooked by criminal law theorists.[337] There is little commentary on the concept of knowledge concerning the *FA06* in leading textbooks. For example, both Ormerod[338] and Herring[339] briefly examine the term in this context by mentioning the reasoning in *R v Augunas* [2013].[340] There, Lord Justice McCombe confirmed that the test for knowledge is subjectively decided based on the

[336] See page 24.
[337] Stephen Shute, 'Knowledge and Belief in the Criminal Law,' in Stephen Shute and Andrew Simester, *Criminal Law Theory: Doctrine of the General Part*, (OUP 2002), 171.
[338] David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law*, (OUP, 15th Edition, 2018), 1019.
[339] See Jonathan Herring, *Criminal Law: Text, Cases, and Materials*, (OUP, 18th Edition, 2018), 552.
[340] EWCA Crim 2046; [2014] 1 Cr. App. R. 17.

defendant's perspective;[341] it is not defined objectively by reference to whether the defendant 'ought' to have known or appreciated something might be.[342] It was also confirmed that it is not enough for the defendant to have reasonable suspicion.[343] However, if a defendant shuts their eyes to obvious doubts, this can amount to knowledge.[344] Accordingly, knowledge extends to wilful blindness under *s2(2)(b) FA06*. Lastly, Lord Justice McCombe ruled that judges should stick as close as possible to the words in the statute, as elaboration will rarely assist when a trial judge is summing up to the jury.[345]

In nonreligious cases, the knowledge requirement of the *mens rea* is typically uncontroversial. A defendant will generally know that they are using their credit card or have been given permission by another to pay for goods at a shop. Knowledge of whose card is being used can be easily established by prosecutions. Further, even in a more complicated factual scenario, the requirement of proving knowledge of an untruth is not problematic. Consider A, who states that their diet and exercise plans prevent aging. Courts can look at this statement to see what evidence is relied on to show the causative effect and result. If there is no evidence to support the representation, A will most likely satisfy the *mens rea*. The representation is false, and A seems to know it is untrue. A may argue that they did not know that the representation was untrue, and they truly believed it was true. However, the effect of the representation on individuals is something that could be tested by A personally, and by courts. Circumstantial evidence or expert evidence can be relied on in such cases. Even if A seems to genuinely believe in the effects of the plans, if A has not tested the possible curative effect, or found any

[341] *Ibid*, [9], (McCombe LJ).
[342] *Ibid*.
[343] *Ibid*.
[344] *Ibid*.
[345] *Ibid* [19]; this obiter statement is interesting considering the lack of case law on the *FA06* offences and limited judicial dicta on the statute's language. This section will assess the validity of this statement prospectively.

support from another source in order to gain financially, A satisfies the *mens rea* because they know that the representation might be untrue, or at least misleading.

A fictitious religious scenario demonstrates the difference between the assessments that courts could adopt for religious fraud cases. B, a religious official, submits they will use religious articles alongside regular prayer to cure A's cancer if they are paid for doing so. Here, both the result and causative element of B's conduct appeals to extra-temporal circumstances. Consequently, courts may not be able to prove the statement is false, as in *Ballard*, for example. Without clear evidence, such as witness testimony that B admitted they were lying to adherents, or proof that B had treated several adherents beforehand without success, B cannot be proven legally to know that the representation was untrue. Therefore, B would not satisfy one element of the *mens rea*, and subsequently, would not be found guilty of *s2 FA06*. As a result, religious defendants can escape liability through the *mens rea*. Foreseeably, B might satisfy the *mens rea* if the representation is misleading, but once again proving this might be evidentially challenging, and less likely in religious cases relating to miraculous representations.

Defendants can also satisfy the *mens rea* if they know that representations *might* be either untrue or misleading.[346] Accordingly, this requirement suggests that Parliament considered it a real possibility that defendants may escape liability when knowledge of falsity could not be proven by prosecutions. The wording of the fault element raises concerns of a different nature, relating to the defendant's religious freedom. A defendant may claim that this requirement combined with the other conduct and fault elements of *s2 FA06* unduly infringes their *Article 9(2) ECHR* right to manifest their religious beliefs. For instance, a belief alleged to be fraudulent may be construed as possibly untrue, which as previously discussed, may prove to

[346] s2(2)(b).

be an illegitimate task for a court to perform. Even if this was allowed, this seems a very broad *mens rea* requirement to limit the range of religious conduct considered non-fraudulent. Religion is considered as a 'cornerstone of society' by most liberal democracies and the *ECtHR*.[347] Further, strong normative foundations justify special treatment for religion in certain legal contexts.[348] From the perspective of the criminal law, and the view of religious liberty and human rights, criminal sanctions should be regarded as a last resort.[349] Consequently, it is unjust for such an important right to be trumped by the mere possibility of fraudulent conduct where there is no real evidence that the defendant knew that their representation was untrue.

I have argued that there is a clear problem with the knowledge requirement of *s2 FA06* that is compounded in religious fraud scenarios. To summarise, the lack of understanding of the term risks providing defendants with the opportunity to evade liability, where courts are unable to establish that defendants know their religious representations are untrue. Furthermore, courts may over-criminalise religious conduct by convicting defendants for representations that they know might be untrue. Failing to address the knowledge challenges will have serious consequences for the effectiveness of *s2 FA06* in regulating religious fraud, especially if English courts decide that the *mens rea* should determine the liability of defendants because religious beliefs cannot be tested for falsity.

[347] *Kokkinakis v Greece* [1994] (App No. 14307/88), [31]; also see the extra-judicial opinion of the current President of the European Court of Human Rights, Nicholas Bratza, 'Freedom of Religion Under the European Convention on Human Rights,' (2012) Ecclesiastical Law Journal, 14(2), 256-271.
[348] For example, dignity, autonomy and equality, see Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, (Hart Publishing 2008), 36-40.
[349] Piet Ein van Kempen, 'Freedom of Religion and Criminal Law: A Legal Appraisal,' in Johannes A. van der Ven and Hans-Georg Ziebertz, *Tensions Within and Between Religions and Human Rights*, (BRILL 2008), 63.

3.2.2. Dishonesty and juror bias

The dishonesty element of the *mens rea* for *s2 FA06* will also present a challenge where judges find it necessary to instruct juries on what dishonesty means under the *FA06*.[350] The challenge now explained, therefore, only applies to scenarios where a dishonesty direction is given.[351] Such a direction is likely to be common in religious fraud cases because of the other complexities of prosecuting these sorts of cases. Consequently, judges will want to safeguard their decisions by giving directions to reduce the possibility of an appeal based on inaccurate dishonesty directions. Accordingly, the dishonesty problem will be experienced more frequently in religious fraud cases than in nonreligious ones.

My concern about the nature of dishonesty assessments and directions is generated by the amendments to the dishonesty test made in 2017.[352] Originally, in criminal cases the defendant's dishonesty was assessed through the *Ghosh* test proposed in *R v Ghosh* [1982].[353] A two-limbed test was employed to identify whether defendants acted dishonestly and satisfied the *mens rea* of theft offences. Lord Lane LJ laid set out the test as follows,

"In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that

[350] It is not always necessary, see *R v Price* (1989) 90 Cr. App. R. 409, 411.
[351] Directions are rarely given, see Karl Laird, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club),' (2018) Criminal Law Review, 5, 396.
[352] See *ibid* & Graham Virgo, 'Cheating and dishonesty,' (2018) Cambridge Law Journal, 71(1), 20-22.
[353] Q.B. 1053; [1982] 3 W.L.R. 110 it clarified the position of dishonesty testing specified in *R v Feely* [1973] Q.B. 530; [1973] 2 W.L.R. 201. For commentary on this see Edward Phillips et al, *The Law Relating to* Theft, (Cavendish 2001), 24-26.

what he was doing was by those standards dishonest… where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly."[354]

The term 'dishonesty' was considered more appropriate than 'fraudulent,' on that basis that it was more likely to be understood by juries.[355] Jury decisions on dishonesty were initially considered more appropriate than judicially determined ones in *R v Feely* [1973].[356] Juries consist of 'ordinary decent people,' and were considered better suited to judging whether conduct is dishonest.[357] It was argued this provided a safeguard for defendants because judicial assessments of dishonesty may not match ordinary and reasonable standards.[358]

The *Ghosh* test has since been reformulated by the Supreme Court in *Ivey v Genting Casinos Ltd* [2017] (hereinafter *Ivey*),[359] a civil case involving professional gambler sued by the defendant casino for not paying his winnings. The defendant argued that the claimant had cheated. The Supreme Court focused on understandings of cheating and dishonesty in gambling settings. The significant parts of the decision are *obiter* comments made by Lord Hughes on the criminal understanding of dishonest set by the *Ghosh* test, which were affirmed by four other Lords. Lord Hughes submitted that the subjective limb of the *Ghosh* test did not suitably represent the state of the law.[360] The limb was criticised for having serious problems on six grounds, namely that the test is puzzling and too difficult to apply for juries, and that it

[354] *Ibid*, [E]-[G], 1064.
[355] The Law Commission, 'Conspiracy to Defraud,' (1987) Working Paper No. 104, [12.19]-[12.20].
[356] See n 353.
[357] *Ibid*, [H] 537.
[358] *Ibid*, [A] 538.
[359] UKSC 67 (SC); [2018] A.C. 391. Noted in Virgo (n 353), 20-22 & Matthew Dyson and Paul Jarvis, 'Poison Ivey or herbal tea leaf?' (2018) Law Quarterly Review, 134, 200-203.
[360] *Ivey*, (n 359) [74].

has the unintended effect that the more warped the defendant's standards of honesty are, the less likely they will be found to be dishonest.[361] Lord Hughes concluded:

"The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476… When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question of whether his conduct was honest or dishonest is to be determined by the fact finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."[362]

The civil test still consists of subjective and objective considerations but determines dishonesty on the grounds of objective ordinary and reasonable standards. The ruling of *DPP v Patterson* [2017][363] confirms that the test for criminal dishonesty is now set by *Ivey*, not *Ghosh*.[364] In *Ivey*, the Supreme Court did not refer to dishonesty in the *FA06,* but it is certain that the *Ivey*

[361] The other four grounds are: (1) It was based on the premise that it was necessary to give proper effect to the principle that dishonesty, and especially criminal responsibility for it, must depend on the actual state of mind of the defendant, whereas the rule is not necessary to preserve this principle. (2) It has led to an unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action. (3) It represented a significant departure from the pre-Theft Act 1968 law when there is no indication that such a change had been intended. (4) Moreover, it was not compelled by an authority. Although the pre-Ghosh cases were in a state of some entanglement, the better view is that the preponderance of authority favoured the simpler rule that, once the defendant's state of knowledge and belief has been established, whether that state of mind was dishonest or not is to be determined by the application of the standards of the ordinary honest person, represented in a criminal case by the collective judgment of jurors or justices." *Ibid*, [57]; whether these are justified, and forceful arguments have been disputed in Virgo (n 352), 20-22 & Dyson and Jarvis (n 350), 200-203.

[362] *Ivey* (n 359), [74].

[363] EWHC 2820 (Admin); [2017] 11 WLUK 46.

[364] *Ivey* is now considered the test for criminal dishonesty in Archbold, see James Richardson, *Archbold 2018: Criminal Pleading, Evidence and Practice*, (Sweet & Maxwell 2018), section 21-6.

test now applies to fraud offences, which erases the strict separation between criminal and civil conceptions of dishonesty.[365]

The new development in dishonesty understandings can detrimentally impact religious fraud cases when defendants are convicted by juries. One reason why the new development is problematic relates to whether an objective standard based on "ordinary and reasonable standards" is a justified way of assessing whether conduct is dishonest. There is a suggestion that dishonesty cannot truly be objectively defined in a way that develops a shared definition of the term between more than one individual. A long-term critic of *Ghosh* and objective standards of dishonesty states,

"[The *Ghosh* test] implies the existence of a relevant community norm. In so doing it glosses over differences of age, class and cultural background which combine to give the character of fiction to the idea of a generally shared sense of the boundary between honesty and dishonesty…"[366]

This criticism of the *Ghosh* test also applies to the *Ivey* test. Accordingly, when judges now give dishonesty directions, they ask jurors to determine whether the defendant's conduct was dishonest. Jurors can appeal to their subjective conceptions of what dishonesty means. Each juror is likely to hold a different conception of what dishonest conduct is characterised as and this may include prejudicial attitudes towards the characteristics and beliefs of defendants, for instance.

[365] *Ibid*, reason (2).
[366] Edward Griew, 'Dishonesty: The Objections to Feely and Ghosh,' [1985] Criminal Law Review, 431, 344.

A degree of knowledge may be required for jurors to get near the specified objective 'reasonable' standard laid out in *Ivey*. This concern was originally raised in relation to liability for theft involving intricate financial activities, but it also applies to the current analysis:

"It is neither reasonable nor rational to expect ordinary people to judge as 'dishonest' or 'not dishonest' conduct of which, for want of relevant experience, they cannot appreciate the contextual flavour… [it may be] that ordinary people have no standards in relation to the conduct in question."[367]

Judges cannot guarantee that an ordinary and *reasonable* conception of dishonesty can be determined by juries. This stands generally for one reason, the subjectivity of the definition. It also stands for a reason specific to religious fraud cases, namely the varying degrees of knowledge and understanding of the relevant religious beliefs held by jurors. Jurors may not have been exposed to particular religions before trials. The short period and the environment in which they have to consider it may subsequently impact on verdicts. Moreover, jurors may not be able to understand the subjective influence that religion can have on adherent's daily life. Consequently, jurors may consider that defendants have preyed on vulnerable adherents, rather than viewing adherents as autonomous and willing participants in religious experiences. Additionally, jurors may not consider the defendant as genuine in relation to particular types of representation, regardless of the specific facts of cases. Therefore, if a case arose and the *actus reus* could be established, the appropriateness and content of a direction should not be considered trivial, or analogous to general *s2 FA06* cases. Failing to do so, risks jurors undermining the safeguard offered by dishonesty testing.

[367] *Ibid*, 345.

Sociological research demonstrates that fringe religions categorised under some other label than religious like New Religious Movements or cults (which have typically featured in the US religious fraud claims) are perceived negatively by society and face widespread scepticism. Barker, a leading sociologist focussing on religion, considers that negative impressions created by opponents to NRMs have been a concern for scholars since 1970 in England.[368] Sociologists have appeared in courts as expert witnesses in an effort to mediate between opponents and New Religious Movements members in cases.[369] It is argued that prejudicial views still pervade English society; the terms 'cult' and 'sect' have decidedly negative overtones,[370] often resulting in sensationalised images of these groups.[371] Barkers considers that the labels:

"…can be to suggest that it is [the relevant group] a dangerous pseudo-religion with satanic overtones which is likely to be involved in financial rackets and political intrigue, to indulge in unnatural sexual practices, to abuse its women and children, and to use irresistible and irreversible brainwashing techniques in order to exploit its recruits. Furthermore, it is implied, it may well resort to violence, perform various criminal activities and, possibly, persuade its members to commit mass suicide."[372]

Media coverage of such movements has been influential to how such groups are defined.[373]

Similar prejudicial treatment is also experienced by more accepted religions in courtroom settings. In a 2016 experiment, quantitative data proved that the religion of victims and defendants to crimes influences whether parties are treated more favourably or less favourably by religious jurors.[374] The data was collected in the US using three hundred and forty mock

[368] Eileen Barker, 'The Not-So-New Religious Movements: Changes in 'The Cult Scene' Over the Past Forty Years,' (2014) Temenos- Nordic Journal of Comparative Religion, 50(2), 251.
[369] *Ibid*.
[370] *Ibid*, 236.
[371] *Ibid*, 247.
[372] *Ibid*, 237.
[373] *Ibid*.
[374] Casey Magyarics, 'The Effect of Victim Religion on Juror Perceptions of Hate Crimes,' (2016) Thesis and Dissertations—Psychology, 87.

Christian jurors, who were asked to assess the liability of defendants for hate crimes. The defendants were Christian, Muslim, Jewish, or Atheist. The study showed that Jewish or Muslim defendants faced a higher conviction rate,[375] and both groups were found to be more blameworthy and untrustworthy by the mock jurors.[376] In contrast, Christian and Atheist victims were found to be more blameworthy and experienced less sympathy by the mock jurors than Jewish, or Muslim victims.[377]

In the criminal context of religious fraud, this study connotes that defendants from particular religious backgrounds face a real possibility of prejudicial treatment by jurors. In turn, this increases the likelihood that defendants are considered to have acted unusually and are more blameworthy for their actions.[378] In the study, this was true regardless of whether the defendant's religious beliefs motivated the alleged criminal conduct. Individuals with a similar disposition to participants in the study could conceivably make up some part of juries due to the random selection of juries in England. This feature of controversial litigation may be more prominent in England than in other jurisdictions since jurors cannot be excluded from the jury for having strong religious convictions, which occurs in other jurisdictions.[379]

Further evidence to support the submission that religion is an influential factor in convictions stems from the treatment of Atheists in the study. Atheists were considered less likely to be involved in religiously motivated hate crime and received the lowest percentage of guilty

[375] *Ibid*, 41-42.
[376] *Ibid*, 34.
[377] Christians favour the "in-group,' *ibid*, 42 & Atheists scored lowest in all assessments, *ibid*, 43; for all quantitative results see, *ibid*, 34.
[378] This is corroborated by a range of psychological studies listed in Monica Miller and Jonathan Maskaly, 'The relationship Between Mock Juror's Religious Characteristics and Their Verdicts and Sentencing Decisions,' (2014) Psychology of Religion and Spirituality, 6(3), 188-189.
[379] For example, in the US where attorneys may use preemptory challenges before the start of jury trials to dismiss potential jurors who might favour the opposition, see United States v. DeJesus (2003) 378 FED.Appx. 112; more generally, see *ibid*, 188.

verdicts.[380] Accordingly, non-religious defendants may experience more favourable treatment from jurors compared to religious defendants. The problem identified here is, therefore, more likely to be experienced by religious defendants.

Some may argue that the study has limited application for principled reasons. Attitudes towards the same religious faiths may not be represented to the same degree in England. Similarly, attitudes may not be as intense for other crimes committed in religious circumstances. Moreover, some may argue that not all jurors will be religious, and so the results of the study cannot apply to non-religious jurors. Nevertheless, the study discussed suggests that religious defendants from any religion,[381] especially ones not practiced by jurors, will face real barriers to proving honest conduct, and subsequently avoiding convictions in jury trials. Indeed, this hypothesis has supporting evidence in contexts involving non-religious jurors.[382] Therefore, in a country, like England, that is predominantly Christian, this is a worrying prospect for defendants in religious fraud cases involving non-Christian religions.

In practice, the *Ivey* dishonesty test will allow negative perceptions and value judgments to infiltrate dishonesty testing because it eliminates the need for jurors to decide if the defendant considered that their conduct was dishonest compared to ordinary and reasonable standards. Accordingly, there are no principled and enforceable means to guard against these sorts of biases and prejudices in cases. This criticism would have also applied to the *Ghosh* test but

[380] Magyarics (n 374), 43.
[381] However, experiments using video evidence of domestic abuse of a female Muslim actor, abused by a male Muslim and the same actor as a female Anglo-Australian abused by an Anglo-Australian man suggest that religious contexts may reduce the perceived severity of the crime, see Krista De Castella et al, 'Retribution or restoration? Anglo-Australian's views towards domestic violence involving Muslim and Anglo-Australian victims and offenders,' (2011) Psychology, Crime & Law, 17(5), 403-420; more generally see, James Richardson & Francois Bellanger, *Legal Cases, New Religious Movements and Minority Faiths*, (Routledge 2016), 254-255.
[382] Multiple studies have found that jurors can be biased against religious defendants, see Monica Miller et al, 'The Effects of Deliberations and Religious Identity on Mock Jurors' Verdicts,' (2009) Group Processes & Intergroup Relations, 14(4), 517–519.

applies more forcefully to the *Ivey* test because of the differences in tests. The possibility of bias follows logically, especially in religious contexts, where it is more likely to influence decision making. Jurors are likely to hold their own conceptions of what counts as religious. Some jurors may agree with the likes of Edgar Allan Poe that "All Religion, My Friend, Is Simply Evolved Out of Chicanery, Fear, Greed, Imagination and Poetry."[383] Others may consider that no religion is inevitably fraudulent, but some instances of the offence are more likely within certain religions. Therefore, conceptions of dishonest religious conduct could be more forceful than someone cheating a Bookmaker out of money, for example.[384]

Jurors are also likely to have their conception of exploitation and vulnerability, which is likely to be discussed by prosecutions. Both considerations could become particularly developed and inflamed during each juror's determination of dishonesty because of their views on the facts. Jurors may 'gang up' on certain religious practices that they consider illegitimate and do not match up to their religious practices or their conceptions of what religious practices should consist of. The objective test now ultimately centres on majoritarian conceptions of dishonesty.

This concern has academic support from a leading criminal law scholar writing before *Ivey* was decided. Horder asserts that in a multicultural society with widely different degrees of wealth, like England and Wales, those who are perceived as poor or make up a minority community, may have their conduct characterised as dishonest by relatively wealthy people and members of the majority community.[385] It is also noted that dishonesty testing may give rise to an element

[383] John Alexander Joyce, *Edgar Allan Poe*, (F.T. Neely Company, 1901), 107-108.
[384] Ardent and passionate responses by jury members are not limited to religious contexts exclusively. Similar perspectives could foreseeably be witnessed in cases involving elderly people being defrauded.
[385] Jeremy Hoarder, *Ashworth's Principles of Criminal Law,* (OUP, 9th Edition, 2018), 404.

of hypocrisy; members of business communities are prone to practices within that sector, which outsiders may more broadly consider to be dishonest,[386] but are widely practiced in that field.

Individual conceptions of dishonest may be greatly altered depending on the context in which the allegedly fraudulent behaviour occurs. Specifically, a religious context could conceivably alter the way jury members define dishonesty. High intakes of donations explicitly asked for by ministers to help God's work could theoretically mirror many of the requests made by charities to help those institution's charitable activities. However, jurors may consider that the conduct of the religious defendant does not compute with their conception of religion,[387] making them more likely to consider the defendant's conduct as dishonest.

Contexts involving minority religious communities may also impact on the members of the jury's perceptions of the legitimacy of certain religious practices. It is conceivable that jurors, who form part of majority communities may consider that certain religious claims featured in a *s2 FA06* case are preposterous, or even abhorrent. This is foreseeable where religious defendants face allegations for promising to heal diseases in exchange for property, or that the defendant is related to religious deities. Majority views on dishonest conduct are never guaranteed to match up to the views of a minority community standard. Accordingly, recent statements made by the Court of Appeal in *Wingate v Solicitors Regulatory Authority* [2018],[388] that the dishonesty test is premised on accommodating values of our multicultural society,[389] should offer very little comfort for defendants in religious fraud cases. It is especially true

[386] *Ibid*. The Court of Appeal has realised this possibility, see *R v Hayes* [2015] EWCA Crim 1944; [2018] C.R. 1 App. R. 10 [32] (Lord Thomas of Cwmgiedd CJ).
[387] Some religions do not consider giving money as a legitimate part of religious life, see Edge (n 15) citing Lucy Jones, quoted at news.bbc.co.uk/1/hi/magazine/7354089.stm (accessed 29 April 2009). See further Jeremy Carrette and Richard King, *Selling spirituality: The Silent Takeover of Religion*, (Routledge 2004), 6, ft 8.
[388] EWCA Civ 366; [2018] W.L.R. 3969 [93].
[389] *Ibid*, [93] (Lord Justice Rupert Jackson).

where the defendant forms part of a minority religious community. Accordingly, the main beneficiaries of the new test are likely to be city traders, not multicultural groups.

More generally, the *Ivey* test also leaves certain questions unanswered that could affect the ability of defendants to show they acted honestly in religious fraud cases. In the subjective part of the *Ivey* test, what facts of the relationship can be considered? Additionally, how far is the defendant's subjective knowledge relevant in dishonesty analysis? For instance, what if the defendant intended to pay the victim back? What if the defendant made it explicitly clear that money would be required in exchange for religious promises before a trusting relationship developed? What if no other followers of the same religion have brought similar claims? In the *Ghosh* test, such considerations were relevant to the subjective limb but not the objective limb. It is now questionable whether the removal of the subjective limb after *Ivey* has shifted such awareness on the defendant's part into the objective analysis, or whether it is just circumstantial evidence unconnected to dishonesty analysis.[390] In *Ivey*, the Supreme Court did not consider this point and so it is uncertain whether courts will continue to consider such facts. Accordingly, commentators and courts are in flux over what the subjective requirement can add to the dishonesty assessment without further judicial guidance. Consequently, juries lack adequate guidance to inform their already difficult task of determining whether defendants have acted dishonestly.

At the other end of the spectrum, judges may go too far and wrongly inform juries what should not be considered when determining dishonest conduct. After the Court of Appeal decision of *R v Hayes* [2015][391] commentators were concerned about the content of *Ghosh* directions given

[390] Dyson and Jarvis (n 359), 203-205.
[391] See n 386.

by judges. The appeal was premised on several grounds, most significantly, how the judge directed the jury to assess the dishonesty of the defendant's conduct. The judge stated what facts could not be considered under the objective limb, that the objective standard could not incorporate the conduct of people in the same industry as the defendant. The main concern of this decision was that the Court of Appeal did not disapprove of the direction which departed from the standard *Ghosh* direction.[392] It was consequently argued that the decision gives rise to the possibility that similar directions can usurp the function of jurors to determine what ordinary standards of reasonable and honest people are.[393] In formulating the requisite standard for dishonesty, judges may wrongly influence jurors[394] who could be "placed in a straightjacket, devoid of the very latitude that they have hitherto been expected to exercise."[395]

The extent of the problem following the *Ivey* test remains uncertain. Nevertheless, it could legitimately be argued that the test offers no safeguard from judges making a direction similar to the one in *Hayes*. This could greatly impact religious fraud claims, where a defendant might be prevented from showing evidence to suggest their conduct was objectively honest. In *Hayes*, the tribunal judge was considered justified in saying that the sharp practice of the defendant, which was generally practised by fellow members of the same sector, could not be revealed to suggest that the defendant was acting objectively honestly. Such a modified direction could foreseeably be given under the *Ivey* test for religious cases. Consequently, defendants may be prevented from showing evidence of what features as part of their religion, and possibly what other religions practice, to suggest that they should not be found to have acted dishonestly.

[392] Nicholas Dent and Aine Kervick, 'Ghosh: a change in direction?' (2016) Criminal Law Review, 8, 556.
[393] *Ibid*.
[394] *Ibid*.
[395] *Ibid*, 557.

My concern seems even more likely in religious fraud cases, especially those involving minority religions for the reasons already mentioned. Judges are likely, but not guaranteed, to fear that jurors may consciously or unconsciously determine what a legitimate religious practice should be on their own convictions, rather than accepting the judge's categorisation inspired by *Article 9 ECHR* and domestic jurisprudence. To guard against this possibility, judges risk giving more detailed directions and limiting what considerations can be taken into account by jurors. The concern, which may have had little justification after *Hayes*, still seems apt under *Ivey* and more forceful in religious fraud contexts.

The analysis in this section is not definitive and will not apply universally to all religious fraud cases. It will only be proven on a case-by-case basis. Juries may not get as far as a dishonesty direction in certain cases if the *actus reus* cannot be proven, or that the defendant knew that their representation was false, or misleading. However, the new dishonesty test distinctly allows for the possibility that juror bias will influence decisions more readily than the previous dishonesty test set by *Ghost*. Consequently, it also raises strong objections from the perspective of the rule of law. A dishonesty analysis that consists of an objective element increases the risk that different courts will reach different verdicts based on similar facts and leave room for the consideration of irrelevant factors by jurors.[396] Although, this statement is qualified by noting that it cannot be supported by any evidence,[397] it seems theoretically possible for inconsistent decisions to be made more frequently in religious cases for the reasons listed. Undoubtedly jurors are more likely to feel comfortable and familiar when assessing religious practices that are more apparent in the collective consciousness of English society or that have received

[396] Hoarder (n 385), 405.
[397] *Ibid*.

public acceptance like Christian or Sikh practices, compared to religions who have historically been viewed negatively or with scepticism, like Satanism or Thelema.[398]

Ultimately, the new dishonesty test creates a greater likelihood that outcomes in cases might not always be just; honest and sincere individuals may be found dishonest and subsequently guilty. Under the new dishonesty test "… a person's deeply held conviction in their own honesty cannot insulate them from being considered dishonest by wider society or indeed in the eyes of the law."[399] In contrast, intentionally dishonest individuals may avoid liability, either because their conduct is deemed an honest action of a majority practice, which faces less prejudice generally, or because the circumstances of the representation convince the jury of honesty. The difference in treatment should be a real concern for the Court of Appeal and Supreme Court now that religious fraud cases are beginning to be brought under the *FA06*, even though such cases are rare. The issue is of paramount importance to ensuring that just outcomes are consistently achieved.

3.2.3. Religious defendants and sincerity of beliefs

In the US, religious fraud cases are decided based on the dishonesty question, namely whether defendants sincerely believe in the religious representations communicated to victims, as outlined in chapter 2.[400] The approach set by *Ballard* is specifically focused on sincerity testing

[398] The founder of this religion, Aleister Crowley was once described by the British press as the "the most evil man in the world," InfoFreedomFighter 'SATANIST Aleister Crowley ~ The Most Wicked Man In The World~Great Documentary,' <https://www.youtube.com/watch?v=jsm6WI5i7p0> between minutes 2.18- 2.22, 14 Aug 2013. First aired on BBC TV on 19 February 2002. Accessed June 2018.
[399] Matt Hall and Tom Smith, 'The Disappearing Ghosh Test,' (2017) Criminal Law and Justice Weekly, 181(42), 756.
[400] See section 1.2.

rather than dishonesty,[401] although the two concepts overlap. To determine how religious representations should be prosecuted using *s2 FA06*, English courts are likely to examine how courts in other jurisdictions, like the US, have examined the defendant's sincerity, in an attempt to avoid juror or judicial bias influencing convictions. It seems likely that English courts will adopt a similar approach to the US for assessing the *mens rea* of *s2 FA06*. The aspect of the *Ivey* dishonesty test asks juries to look at the genuineness of beliefs motivating the defendant's conduct.[402] Explicit analysis of a defendant's sincerity would help to distinguish between fraudsters and religious officials subject to vexatious litigation because of suspicions held by aggrieved former believers and nonbelievers. However, the sincerity-based approach could also prove problematic in practice.[403] Jurors and judges may wrongly determine that representations are based on insincerely held religious beliefs.[404] On the other hand, such an approach may allow defendants pretending to hold sincere religious beliefs to escape liability.[405] Both possibilities raise concerns that defendants may abuse religious freedom protections or courts may unlawfully restrict the religious freedom rights of defendants.

Before any specific religious fraud analysis is made, it is important to explain why sincerity testing is different from dishonesty testing. There are differences in context between how both concepts are considered and in the outcomes of negative findings. Sincerity testing determines if defendants believe in the religion they allege to practice. Whereas dishonesty testing establishes whether the defendant's conduct suggests they lied or misinformed victims. Accordingly, defendants can be found insincere and dishonest. In other jurisdictions, proof of

[401] *Ibid*.
[402] *Ivey* (359) [74] (Lord Hughes).
[403] See Justice Jackson's comments in *Ballard* on pages 43-45.
[404] Heins (n 17), 186.
[405] *Ibid*.

sincerity in criminal litigation prevents defendants from being found dishonest.[406] However, in current domestic law, religious defendants could conceivably be found both sincere and dishonest. An English court may decide that a defendant who believes in their conduct by subjective standards nevertheless acted dishonestly according to the objective standard set out in *Ivey*. Lack of sincerity may, therefore, be sufficient for liability for *s2 FA06* but will not always be adequate for liability. The jurisprudence of ECtHR does not specify that genuine religious beliefs cannot be considered dishonest in criminal contexts. The semantic distinction between the two concepts demonstrates why sincerity is an important separate consideration to dishonesty testing in religious contexts.

Sincerity is very likely to contribute instrumentally to a court's assessment of the fault elements considered in *s2 FA06*, especially for dishonesty testing under *Ivey*. Regulatory approaches based on the defendant's sincerity have featured in domestic jurisprudence on criminal liability in religious cases since 1875.[407] This approach was favoured over falsity testing in deception cases featuring miraculous claims because "Such a subject would be a very improper one for argument and decision in a court of law."[408] *Farmer v Hill* [1948][409] demonstrates that English criminal laws have decided similar criminal cases based on the sincerity of the defendant's beliefs, rather than questioning the falsity of those beliefs. Lord Justice-General noted that liability for pretending to profess to tell fortunes under the *Vagrancy Act 1824* was initially

[406] For instance, in Ballard, the USSC decided that if the defendant was found sincere in religious fraud cases, then they could not be criminally liable.
[407] Although not all cases favoured this approach in a range of astrology fraud cases, consider *Penny v Hanson* [1887] 18 Q.B.D. 478, per Denman J, "It is absurd to suggest that this man could have believed in his ability to "predict the fortunes of another by knowing the hour and place of his birth and the aspect of the stars at such time. We do not live in times when any sane man believes in such a power," 480. Accordingly, subsequent chapters will consider the role, and the possible influence of old case law supporting a sincerity-based approach, as well as dissenting judicial dicta mentioned in miraculous claims that feature in deception-based cases.
[408] See *Monck v Hilton* (1887) 2 Ex. D. 268, 275 (Cleasby B). The case related to a Spiritualist who conducted seances and told fortunes in exchange for money. The defendant was tried for s4 of the Vagrancy Act 1824.
[409] J.C. 4.

determined through the sincerity of the defendant's supernatural claims and beliefs.[410] Despite being decided by a Scottish court, this judgment shows a preference for sincerity testing over falsity testing when English criminal laws have applied to miraculous cases. Lord Justice General also stated that English courts only began favouring a falsity-based test in more modern cases after *Stonehouse v Masson* [1921].[411] In that decision, the court interpreted *s4* of the *Vagrancy Act 1824* to apply *malum prohibitum*, meaning that the conduct was unlawful because it was considered to be by statute.[412] This applied regardless of the defendant's sincerity and a lack of intent to deceive, so long as conduct fell under the wording of *s4*.[413]

The distinction between the appropriateness of falsity and sincerity testing was also considered by English courts in civil religious claims in the past. In *R v Downes* (1875),[414] the defendant, a member of the 'Peculiar People,' believed that medical aid was a sin and not as effective as spiritual aid. The defendant failed to take their child to a hospital when they fell sick and prayed for the child to get better. The illness eventually killed the child, and the defendant was found guilty of manslaughter for failing to call a doctor who could treat the illness. Lord Coleridge did not consider the defendant's religious motives in relation to intention but rather focused on the sincerity of the beliefs and whether they were honestly held by the defendant.[415] The defendant was found to be sincere but had intentionally, not maliciously, disobeyed the law by relying on their beliefs. If it had not been for the wording of the statute, the other judges agreed

[410] *Ibid,* 8-9.
[411] 2 K.B. 818.
[412] *Farmer* (n 409), 8-9; this is evidenced by the *obiter dicta* statements of Darling J in *Davis v Curry* [1918] 1 K.B. 109, 116-117.
[413] *Farmer* (n 409), 8-9; the decision in Stonehouse can be summarised by the opinion of Avory J, "The result is that it was not necessary for the magistrate in this case to inquire whether or not the appellants believed in this kind of "fantastic imagination,'" *Stonehouse* (n 411), 823. The majority decided that this case was one of the narrow ranges of criminal offences where *mens rea* (no need to prove an intention to deprive) need not be proven, 823 (Lawrence J)
[414] 13 Cox CC 111.
[415] *Ibid*, 25-28.

with Lord Coleridge that the case would have been much more difficult to decide because of the defendant's beliefs.[416]

The sincerity-based approach to determining the genuineness of beliefs was similarly adopted in nineteenth century civil law spiritual claims.[417] Although there are differences between civil and criminal regulatory frameworks, the frequency to which sincerity was examined in these cases suggests the approach can work in both areas of law. This conclusion is reinforced by two other considerations. Firstly, the modern approach in criminal law theory and court judgments is premised on subjectivity, rather than objective reasonableness standards.[418]

Secondly, contemporary cases involving questions on the genuineness of religious beliefs considered in the context of religious exemptions to generally applicable laws adopt a sincerity-based approach. In *ex parte Williamson*,[419] Lord Nicholls endorsed a Canadian Supreme Court ruling which adopted a sincerity-based approach that essentially replicates the Supreme Court ruling in *Ballard*.[420] Lord Nicholls stated:

"When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. *The court is concerned to ensure an assertion of religious belief is made in good faith:* 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* (2004) 241 DLR (4th) 1, 27."[421]

---

[416] *Ibid*, 30 (Bramwell, B.& Mellor J.).
[417] *Morris v Associated Newspapers* (1932) The Times, April 1932 & Phillips v De La Warr (1960) The Times, July 1960, cited Edge (n 15), ft 26.
[418] Edge (n 15), 32.
[419] See n 308.
[420] Interestingly, the sincerity analysis conducted in *Syndicat Northcrest v. Amselem* (2004) 241 DLR (4th) 1, 27 has been endorsed by the ECtHR in *Eweida v United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (2013) 57 E.H.R.R. 8, [42].
[421] *Ex parte Williamson* (n 308) [22].

In the same decision, Lady Hale declared, "The court's concern is with what the belief is, whether it is sincerely held, and whether it qualifies for protection under the Convention."[422] Lord Walker also cited the *Employment Division v Smith* (1990),[423] a US Supreme Court decision, which examined sincerity and the 'good-faith' test[424] in a concurring opinion.[425] Accordingly, it seems very likely that sincerity testing will be incorporated into dishonesty assessments in religious *s2 FA06* cases. Litigation would, therefore, follow the "religious reservation approach" of the majority decision in *Ballard*.[426]

However, as discussed in chapter 2, US courts and commentators have questioned the appropriateness of a sincerity-based approach in religious fraud and exemption cases.[427] Domestic courts should reassess whether it is an appropriate approach in *s2 FA06* cases for two reasons. Firstly, there is no real contemporary assessment of sincerity in religious fraud cases under *ECHR*[428] or *HRA*. Consequently, it is uncertain how sincerity testing in religious fraud claims would fare under both pieces of human rights legislation.

Secondly, there is significant disagreement between commentators about the use of sincerity tests generally and in this specific context, as discussed in chapter 2.[429] This debate suggests that the approach does not necessarily provide the most principled means of determining the genuineness of religious beliefs in religious fraud cases and whether a defendant satisfies the *mens rea* elements of *s2 FA06*. For instance, as mentioned, the subjectivity of what amounts to sincerity can lead to adverse consequences; for example, defendants can try their luck with the

[422] *Ibid*, [76].
[423] 494 U.S. 872.
[424] *Ibid*, 14 (Justice Scalia) & 25 (Justice O'Connor).
[425] *Ex parte Williamson* (n 308) [57].
[426] See pages 41-42.
[427] See pages 48-51.
[428] Bernadette Meyler, 'Commerce in Religion,' (2009) Notre Dame Law Review, 84(2)(9), 890.
[429] [429] See pages 48-51.

jury[430] and sincerity testing may reveal inarticulate defendants, rather than insincere ones.[431] Defendants may be considered insincere because of juror bias, rather than the evidence advanced by counsels for victims. Further, the approach may allow defendants to determine their religious freedom protections against criminal laws by using a religious cloak to dodge liability.[432] More problematically, sincerity testing can easily give rise to falsity testing by jurors.[433] Such a possibility will have greater force if English courts decide that the religious beliefs involved in cases should not be tested for falsity and the only the *mens rea* requirements should be assessed.

The controversy surrounding sincerity testing in religious accommodation claims has not gone unnoticed in *ECt*HR jurisprudence. Sincerity testing is regarded as a live and practical concern for the European study of law and religion.[434] In particular, Su declares that judges and commentators must go beyond an uncritical embrace of the approach; sincerity poses considerable challenges for courts that cannot always be overcome such as those just listed.[435]

The problems of determining a defendant's sincerity apply more readily to dishonesty assessments considered in religious *s2 FA06* cases than in other areas of law and religion. The offence may wrongly punish defendants where their genuine beliefs are considered insincere and dishonestly acted on by jurors. The possible negative consequences of sincerity testing are felt more strongly in religious fraud contexts compared to decisions where a religious exemption is not granted to neutrally applicable laws. The latter sort of decision only impairs

[430] A possibility considered in Heins (n 17), 182.
[431] *Ibid*.
[432] Anna Su 'Judging Religious Sincerity' (2016) Oxford Journal of Law and Religion, 5(1), 30.
[433] See Justice Jackson's comments on the difficulties of separating falsity and sincerity testing in *Ballard* on pages 43-45.
[434] Su (2016), 30.
[435] *Ibid*.

the appellant's ability to manifest their beliefs in particular environments. In contrast, a conviction for *s2 FA06* can lead to imprisonment of up to ten years, which would significantly restrict a religious defendant's general and religious liberty. Therefore, a nuanced analysis of dishonesty and how sincerity-test would apply is necessary to ensure that religiously sincere defendants are not wrongly punished for their beliefs and religiously insincere defendants are rightfully convicted.

Ivey makes it clear that the genuineness of a defendant's beliefs should be considered in dishonesty assessments in criminal cases. Consequently, English courts must address the considerations discussed and consider the possible consequences of how the *mens rea* of *s2 FA06* could be interpreted in religious fraud cases given the concerns about sincerity testing. In particular, courts must be sensitive to assessments to prevent sincerity testing from turning into falsity testing. In turn, this exercise would also help to maintain levels of religious toleration on how religious institutions receive property from adherents[436] and prevent defendants from using religious practices as a pretext and a sign of sincerity to escape liability.

3.2.4. Group sincerity

My analysis of the challenges posed by religious fraud regulation has so far focused on individual defendant's liability for *s2 FA06* cases. There is, however, a broader concern about how English courts will regulate religious fraud perpetrated by multiple parties or religious organisations that have legal personality. I now identify how the hierarchies of religious groups

[436] The ECtHR expects pluralist liberal democracies to foster religious toleration as much as possible, see *Serif v. Greece*, no. 38178/97, §53 ECHR 199-IX.

and institutions make it more difficult for courts to effectively identify the extent of fraudulent funding schemes based on false religious representations. Here I question what role group sincerity could have in determining liability in *s2 FA06* cases.

Multiple religious defendants involved in religious fraud cases may further complicate sincerity assessments adopted by courts in *s2 FA06* claims. If senior religious figures, ministers and congregation members of the same religion are jointly charged for false religious representations intending to make a gain or cause a loss to another, it should be questioned whether courts would look to determine each defendant's sincerity and liability separately, or would seek to determine aggregative sincerity and liability? Foreseeably, an aggregative approach would be implemented to test the genuineness of the group as a whole, which would help courts to assess the *mens rea* elements of dishonesty and intention. Such an approach would mirror what has been described as a "sociological strategy" for determining what is religious by courts when considering what a religious community sees as religious.[437]

If this approach were adopted as part of dishonesty assessments for *s2 FA06* in religious cases involving multiple defendants, several questions are raised: how can group sincerity be effectively tested? Must all defendants have the same degree of belief, or will official representatives and employees of religious institutions be expected to demonstrate greater sincerity? Moreover, will parties, characterised as less than full believers be treated as insincere by juries,[438] and does this have implications on the other defendants? In adopting a sociological strategy, decisions may fall outside the trend in *ECtHR* jurisprudence which considers religion

[437] See Edge (n 15), 416-418 citing *Ghai* (n 310) [117] (Justice Cranton), *Azmi v Kirkless Metropolitan Borough Council* [2007] UKEAT/009/07; [2007] IRLR 484 & *Eweida v British Airways plc* [2010] EWCA Civ 80; [2010] 2 WLUK 376 as evidence where this approach has been adopted by courts.
[438] This question about the degree of sincerity was raised also by Justice Jackson in *Ballard*, see pages 43-45.

that religion is subjectively determined, and possibly even a solitary practice.[439] Accordingly, courts who advise jurors to take this approach to determine the defendant's dishonesty may be subject to criticisms that they are not taking their interpretive obligation under s3 *HRA* seriously.

The notion of group sincerity is not, however, unique to religious fraud contexts. This approach is also foreseeably relevant for addressing the liability of secular organisations. For example, determining the group sincerity of defendants from an organisation could be looked at for sales assistants in high street shops promoting electrical items as "the best on the market for battery life." All employees may be expected to recite the representation to customers in branches nationwide. Employees may be aware that this sales pitch is incorrect or misleading. Alternatively, employees may not care whether the product is even fit for purpose and recite the representation in sales pitches to meet their sales targets. In theory, the employees reciting this sort of false claim could be subject to a *s2 FA06* claim and possibly considered insincere and dishonest according to objective standards by jurors if the representation is not considered a mere trade puff.

Nonetheless, the notion of group sincerity presents greater complications in religious contexts. Differences exist between secular and religious contexts that demonstrates why group sincerity testing poses a more acute problem for religious contexts and why some believers could be found insincere, and subsequently guilty, without acting on fraudulent intentions in any real sense. Firstly, adherents may not actively choose to join or participate in religious practices. Participation may be expected of the individuals by their religious parents[440] and the

[439] See Edge (n 15), 419-420 & Su (n 432), 29-30.
[440] John A. Saliba and Gordon Melton, *Understanding New Religious Movements*, (Rowman Altamira 2003), 81.

community they are part of. As a result, individuals may be pressured to attend and participate in religious events without truly believing in the beliefs fearful that a less than full believer will be shunned or excommunicated. Furthermore, individuals may fear that their family will be subjected to the same treatment. Religious shunning or pressuring can have particularly serious consequences.[441] For example, Scientologists traditionally promoted the 'fair game' doctrine, whereby individuals who left the religion or were ex-communicated could be deprived of property or injured by any means by other Scientologists.[442] In less extreme instances, adherents may be stigmatised and chastised by their community.

Secondly, adherents may take a more agnostic approach to their faith. Adherents may consider that not all of a particular religion's beliefs make sense to them or apply to them as they do to others. But regardless of those considerations, they do not want to risk the consequences of not believing at all, or of not belonging to the religion.[443] An individual may conceivably adopt this position through fear that if they do not, they will be punished in the afterlife for a complete lack of faith.

Thirdly, religion is often a subjective practice, and some adherents may legitimately interpret the same beliefs differently to other adherents.[444] In turn, both an internal (members of the same faith) and external (members of the jury) examination of the defendant's beliefs may suggest insincerity. This seems likely if one or a number of the defendants holds a particularly

[441] For further commentary on religious shunning and ex-communication in contemporary US cases and scholarship see John Witte et al, *Religious Human Rights in Global Perspective: Religious Perspectives, Volume 1*, (Martinus Nijhoff Publishers 1996), 219-233.
[442] See *Wallerstein v. Church of Scientology*, 212 Cal. App 3rd; 260 Cal. Rptr. 331 (1989).
[443] Many individuals in contemporary society "believe without belonging" meaning that they do not attend religious places of worship or event, but still take comfort from perceiving themselves as belonging to a particular religion, see Gracie Davie, *The Sociology of Religion: A Critical Agenda*, (Sage, 1st edition, 2007), 138-141.
[444] *Begum* (n 310) [21] (Lord Bingham) & Mark Freedland and Lucy Vickers, 'Religious expression in the Workplace in the United Kingdom,' (2009) Comparative Labour Law and Policy Journal, 30(3), 597.

loose interpretation of the fundamental beliefs of a religion involved in allegations of false representations that have resulted in large financial gains.

Lastly, individuals may join a religion largely for social reasons to overcome a feeling of alienation from society[445] and not because they consider the beliefs have an intrinsic value for their spiritual wellbeing. One possible explanation for this is that the individual enjoys the communal aspects of a religion and attends religious events to speak with like-minded people sharing the same moral norms as them. In such scenarios, defendants are manifesting religious beliefs primarily for community reasons to feel part of the group, not for true religious reasons. Additionally, in the same way described above, these individuals may not believe in the religious beliefs and representations, but it is questionable whether they act insincerely in a strong sense even when their conduct results in a religious institution receiving donations.

The concerns over such defendants being found guilty of *s2 FA06* are intensified if sincerity testing becomes the main way religious *s2 FA06* claims are decided. As discussed, this could involve an aggregative assessment of sincerity as a principled means of establishing dishonesty in religious cases. However, this raises several difficulties for courts in regard to how religious communities influence adherents and how this impacts their sincerity and subsequent liability. Failingly to take account of the differences between the sorts of adherents described here increases the likelihood that genuine and honest adherents will not be considered to match up to the sincerity and honesty threshold conceived of by juries that could apply more harshly to certain religions. Consequently, defendants could be punished for their perspective on their faith and what it requires of them, rather than truly dishonest or fraudulent intentions. The

[445] Saliba and Melton (n 440), 81.

challenges mentioned here, therefore, compound the challenges of examining the sincerity of the religious beliefs of individual adherents.

3.3. Conclusions

This chapter demonstrates that English courts face a number of hurdles to regulating criminal religious fraud cases in a principled way. Under the current understandings of *s2 FA06*, questions were raised about how courts can establish a defendant's liability while giving adequate respect to their religious freedom rights. These cases are, therefore, hard cases to decide. Regulation of the offence presents unanticipated challenges for the *FA06* and reinforces the weaknesses of the doctrinal and precedential understandings developed by criminal courts. Moreover, I have identified how English courts face unique challenges in regulating religious fraud. I explained how the *actus reus* and *mens rea* requirements of *s2 FA06* may allow religious defendants to evade liability, or in contrast produce wrongful convictions. Consequently, decisions in cases could be unprincipled and unjust without further developments in legal knowledge. Engaging specifically with the religious aspects of cases would benefit understandings of *s2 FA06* and contribute to debates on sincerity testing in broader areas of human rights jurisprudence. I discuss how English courts or Parliament could engage with these challenges in chapter 7. I show that claims involving more obvious abuses of religious capital resulting in financial gains can be regulated in a principled way through my rationale for *s2 FA06*.

Chapter 4: The Challenges of Religious Undue Influence for English Civil Law

4. Introduction

Undue influence claims arising from religious contexts have occurred for centuries in England.[446] Despite this, the common law doctrine does not effectively address how courts can determine when religious influence becomes undue. The doctrinal tests applied by courts fail to provide adequate guidelines and a means of considering relevant factors to decide hard cases of religious undue influence. In judicial assessments of actual and presumed undue influence in equity (the main focus of the following civil law analysis), and actual undue influence in probate, courts are afforded a great deal of discretion to determine when the inevitable religious influence of an adherent's religious experience becomes unlawful. Consequently, the doctrinal tests, in particular the test for presumed undue influence, risk judicial misunderstandings, and the devaluing of religious practices featured in cases. On this basis, cases have been decided in an unprincipled way over the years. This conclusion will continue to apply under the current understandings of the law concerning presumed undue influence.

This chapter firstly discusses how the test for presumed undue influence can produce unprincipled decisions on defendant liability, and secondly, explains why the challenges examined are practically and normatively important considerations that have typically been overlooked by most commentators on the doctrine, including the Law Commission. I begin by setting out the relevant tests for how undue influence applies in equity and probate. I subsequently identify a number of categories of challenges that establish why courts may find

[446] The earliest reported case is *Norton v Relly* (1764) Eden 368; 28 ER 908. The doctrinal distinction between actual and presumed undue influence was established in *Allcard* (n 6), 183.

that any religious influence is undue in contexts involving *inter vivos* gifts due to the discretion afforded to judges set by the doctrinal test for presumed undue influence. Some of these challenges stem from Ridge's analysis of religious undue influence in Australian and English jurisprudence. Other challenges are new to discussions of religious undue influence that have not featured in judicial reasoning or scholarly commentary. The challenges now discussed apply most directly to hard cases of religious presumed undue influence, but they also apply to other presumed undue influence cases of any nature in a less troubling way.

I argue that decisions made on the basis of the test for presumed undue influence risk religious institutions being wrongly stripped of gifts, even where they have spent the money on furthering religious causes previously agreed upon by the parties. Decisions may also create discriminatory treatment between religious practices of certain religions, which are deemed to take advantage of donors, and consequently, found unlawful by courts when similar practices of other religions are not. As a result, the current understanding of presumed undue influence should be reassessed and developed to produce more principled decisions in religious cases.

Ultimately, this chapter sets the agenda for the discussion that follows in chapters 6 and 7. In those chapters I consider what doctrinal and normative options are available to address the common challenges of regulating religious undue influence. The analysis conducted in the later chapters elaborates on the specific context of religious undue influence and on understandings of presumed undue influence, more generally.

4.1. The doctrine of undue influence

Undue influence is a common law doctrine of long historical pedigree in England. It has been described as an elusive concept,[447] that no court has ever tried to define.[448] The doctrine can only be defined by appealing to judicial dicta, rather than clear legal rules or principles. Accordingly, as a legal doctrine, undue influence has little substantive shape and offers very little guidance for judges as to how it should be understood and interpreted in cases. I now explain how the doctrine is considered in equitable cases relating to *inter vivos* gifts and contracts, and in probate cases concerning testamentary dispositions.

4.1.1. The equitable understanding of undue influence

In equity, undue influence is used to challenge *inter vivos* gifts and contracts under two separate categories of influence, actual or presumed undue influence. Often cases involve both claims, but only one category of influence can be proven. Whether the undue influence is actual or presumed is a question of fact, dependant on the circumstances of cases.[449] In *Etridge (No 2),* Lord Nicholls described actual undue influence as:

"…an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will… Actual undue influence does not depend upon some preexisting relationship between the two parties though it is most

[447] Rick Bigwood, *Exploitative Contracts*, (OUP 2003), 378.
[448] *Allcard* (n 6), 183, (Lindley J).
[449] *Etridge (No.2)* (n 22) [13] (Lord Nicholls).

commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it."[450]

An example of this conduct involving religious relationships is evident in *Morley v Loughan* [1891].[451] The defendant, a clergy member of the Plymouth Brethren, received numerous gifts from the claimant to use at the defendant's disposal. At a later time, the claimant became unwell and the defendant became their unofficial carer. Part of their carer role was to look after the claimant's finances. The defendant made similar payments to the previous gifts given by the claimant to his bank account, until at one point when the claimant changed their mind on the character of the defendant and asked for the gifts to be returned. The claimant argued that he had been unduly influenced by the defendant. Wright J considered that during the period of ill-health the claimant was extremely weak, which had made his preexisting mental and physical difficulties worse. The claimant was considered to be "morbidly retarded"[452] at this time. A number of factors were examined by the court, including the claimant's health, the fact that the defendant received blank cheques and could write any amount of money on them, and that they had tried to prevent friends from seeing the claimant and later giving evidence in court.[453] The defendant was consequently found to have had actually unduly influenced the gifts.[454]

Religious undue influence cases have and continue to be made more frequently on the grounds of presumed undue influence,[455] an expression of undue influence based on different principles.

---

[450] *Ibid*, [103] (Lord Hobhouse).
[451] Ch 736.
[452] *Ibid*, 752.
[453] *Ibid,* 754-757.
[454] *Ibid,* 756.
[455] Only one claim has successfully proven actual undue influence, see *ibid*. All other cases have argued presumed undue influence given the automatic of presumption of influence that applies in religious and spiritual contexts, see *Nottidge v Prince* (1860) 2 Giff. 245, *Allcard* (n 6); *Cocks v Manners* (1871) LR 12 Eq 574, 581, *Chennells v* Bruce (1939) 55 TLR 422, *Tufton v Sperni* [1952] 2 TLR 516, *Catt* (n 24), *Hollis v Rolfe* [2008] EWHC 1747; [2008] 7 WLUK 681, *Curtis* (n 24) & *Kliers* (n 24). For spiritual cases see *Lyon v Home* (1868) LR 6 Eq 655; *Roche v Sherrington* [1982] 1 W.L.R. 599 & *Nel v Keane* [2003] EWHC 190 (unreported) & *Azaz* (n 4).

Courts look for: 1) that a relationship of trust and confidence existed between the claimant and defendant and; 2) that the transaction calls for an explanation where it cannot be explained by ordinary motives.[456]

If 1) is proven to exist by claimants, it is established that some level of influence existed within that relationship and a factual presumption of influence applies. The law has always been wary of certain kinds of relationships involving degrees of influence, which led to the introduction of automatic presumed categories of influence in select relationships. For example, between beneficiaries to trustees;[457] between patients to medical advisers;[458] and most relevantly, between adherents to religious or spiritual advisers.[459] Where one of these presumed relationships of influence exists, a presumption of influence arises automatically. If a presumption of either nature applies, claimants establish that the transactions may have been influenced. Consequently, the defendant must explain why their influence was not undue under requirement 2).

The court is then directed to see whether the transaction 'calls for an explanation.' Requirement 2) is inspired by *Allcard*, where Lindley J first made a distinction within the doctrine between small and large gifts made to defendants. Where "the gift is so large as not to be reasonably accounted for on the ground of friendship, charity, or other ordinary motives on which ordinary men act,"[460] undue influence is considered subsequently more likely. Accordingly, when gifts

[456] *Etridge (No 2)* (n 22), [22]-[24], (Lord Nicholls).
[457] Law Commission, Consultation Paper 231, *Making a Will* (2017), [7.40].
[458] *Ibid*.
[459] *Allcard* (n 6); the relationship between a priest and his penitent was one where undue influence would be presumed even before *Allcard*, see *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App Cas 1218 [1230] (Lord Penzance) & *Parfitt v Lawless* (1869-72) [468] (Lord Penzance).
[460] *Allcard* (n 6), 185.

or contracts can be explained by ordinary motives there can be no undue influence, for instance, when the gift is a birthday or Christmas gift.[461]

To discharge a presumption of influence, courts must be satisfied "that the donor was acting independently of any influence from the defendant and with full appreciation of what he[/she] was doing."[462] This is a different question from that raised under requirement 2).[463] Instead, this requires evidence that the transacting party acted with "full, free and informed thought" when completing the transaction.[464] Where this is shown the transaction is treated as having not been unduly influenced by defendants. The most common way for defendants to rebut the presumption of influence is to show that the transacting party received independent advice before completing the transaction.[465] *Etridge (No 2)* decided that whether the presumption is rebutted is a question of fact determined on the evidence heard.[466] If the presumption is not rebutted, the gift is voidable and can be set aside by claimants,[467] which is the most common outcome in cases.

Allcard is the leading example of a religious case of presumed undue influence. Both the facts and judgments are important to the following analysis of the doctrine and to later chapters on what should constitute religious undue influence in English law. In *Allcard*, the claimant held multiple positions in a religious sisterhood between 1868 and 1879. From 1871 the claimant donated large sums of money and railway stocks to the defendant, who led the sisterhood. The claimant's money was used to further religious practices, agreed to by both parties and the

[461] *Etridge (No.2)* (n 22) [24] (Lord Nicholls).
[462] *Inche Noriah v Sheik Allie Bin Omar* [1929] AC 127, 135 (Lord Hailsham L.C.).
[463] Law Commission Consultation Paper (n 457), [7.48].
[464] *Zamet v Hyman* [1961] 1 WLR 1442, the phrase is frequently repeated by Lord Evershed at 1444, 1446 & 1450.
[465] Law Commission Consultation Paper (n 457), [7.49].
[466] *Etridge (No2)* (n 22) [20] (Lord Nicholls).
[467] Law Commission Consultation Paper (n 457), [7.30].

railway stock was held onto by the defendant. A considerable amount of money was given between 1871-1874 when the claimant was a professed member. This position required her to take vows of obedience and poverty. The claimant subsequently renounced her beliefs and left the sisterhood in 1879 to join the Church of Rome. In 1885, the claimant sought to recover all of the gifted property totalling £10,171 on the grounds of undue influence.

At first instance, the Court of Chancery examined six gifts of money made to the defendant after 1871 and until 1876, valued at £8,500. The claimant did not seek to recover the other gifts made, some of which were of considerable amount.[468] Kekewich J decided that the gifts had not been procured by undue influence. Much focus was placed on the gifts made in September 1871 in reaching this conclusion.[469] Kekewich J considered the timing of the gifts alongside the state of the relationship between the parties at those stages in time.[470] The most significant stage in the party's relationship was found to be when the claimant initially became aware of the sisterhood and their vows. At this stage, the claimant had received advice from her brother, who was a barrister. It was held that this fact indicated that the claimant had acted without undue influence and had made the gifts on the basis of "intelligent intention" and external advice.[471] The possibility that there had been changes in influence when each of the gifts was made was not considered at first instance. Additionally, Kekewich J did not explicitly mention a distinction between presumed and actual undue influence. Accordingly, the relationship was not subject to a presumption of influence in a strict sense.

The appeal judgment decided by the Court of Chancery was limited to two gifts of railway stock given to the defendant in 1874. The Court of Appeal judgment created the first distinction

[468] *Allcard* (n 6), 175.
[469] *Ibid*, 167-168.
[470] Also highlighted by Bowen L.J. in the appeal judgment, *ibid*, 191.
[471] *Ibid*, 167.

in categories of influence. The Court of Chancery noted that there were two categories of undue influence, one that gave rise to a presumption of influence, and one now known as actual undue influence.[472] A presumption of influence was held to have arisen in the party's relationship because of the religious circumstances.[473] However, it is unclear precisely at what point the presumption of influence arose, as little time was spent on this part of the judgment.[474] It seems to have arisen either when the claimant first held the associate position in 1868, or as a postulant in 1870. The presumption of influence was subsequently applied to all gifts, although the court was limited to assessing the legality of railway stock gifts by nature of the appeal.

Cotton L.J. submitted that courts could interfere in presumed undue influence cases because of public policy and not on the basis of any wrongful act committed by defendants.[475] Lindley J confirmed that no pressure had been put on the claimant when entering into, or subsequently living at the sisterhood to make the gifts.[476] The court found it significant that the claimant had not received independent legal advice before making the gifts of railway stocks and held that the defendant could not rebut the presumption of influence. Relief was, however, denied due to the time lapse between the claimant leaving the sisterhood and bringing the claim.[477]

The main challenges in *Allcard* related to how can religious influence be distinguished from undue influence? Is it necessary to receive legal advice before gifting large sums of property for such gifts to be legally valid? Did it matter that the defendant did not pressure the claimant into making the gifts? When should a presumption of influence apply in religious relationships?

[472] *Ibid*, 171-172.
[473] *Ibid*, 171.
[474] Lindley L.J. explains the test for both classes of undue influence and interpretations of factors examined in cases without considering the real nature of presumed undue influence, see *ibid*, 181-183.
[475] *Ibid*, 171.
[476] *Ibid*, 178.
[477] *Ibid*, 172 (Cotton L.J.)

I discuss these and other similar challenges below I after considering the understanding of undue influence in probate.

4.1.2. The probate understanding of undue influence

In probate undue influence is used to challenge testamentary dispositions. Claims are typically brought by family members, other beneficiaries to wills, or those who would benefit from the will in a successful challenge. In this context, it is only possible to plead actual undue influence, which bears a significantly higher evidential standard than the equitable test for actual undue influence. The particulars of the test must be proven by claimants for the claim to succeed.[478] There are no other differences between the two understandings of actual undue influence. If the challenge is successful, the will, or a relevant section of it, is declared void and subsequently has no effect.[479]

The leading authority describing the test for actual undue influence in probate is *Edwards v Edwards* [2007]:[480]

"… Whether undue influence has procured the execution of a will is therefore a question of fact…In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud; Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished

[478] *Ibid*; this may change if the Government decides to follow the responses heard by the Law Commission, which will be published sometime in 2020. A consultation report was published by the Law Commission suggesting ways in which the two areas of law may be brought in line with one another. The Law Commission mentioned a statutory and flexible scheme for introducing presumed undue influence into probate. For the moment, however, not much more can be said about this possibility, see Law Commission Consultation Paper (n 457), 149.
[479] See *ibid*, [7.31].
[480] EWHC 1119 (Ch); [2007] 5 WLUK 72. Followed in *Cowderoy v Cranfield* [2011] EWHC 1616 (Ch); [2011] 6 WLUK 592 & *Schomberg v Taylor* [2013] EWHC 2269 (Ch); [2013] 1 WLUK 200. It is also endorsed as the main test for explaining actual undue influence in probate by the Law Commission Consultation Paper (n 457), [7.55]-[7.53].

from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense; the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will... A "drip drip" approach may be highly effective in sapping the will…The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."[481]

Actual undue influence is not discussed further in this thesis at any real length.[482] Most of the challenges of regulating religious undue influence arise in equitable claims of presumed undue influence since probate cases of this nature are much rarer.[483] Therefore, presumed undue influence is an area of far greater legal concern.

4.2. What makes religious influence 'undue'?

Legal scholars continue to discuss and debate undue influence cases like *Allcard*.[484] The discussion remains constant despite a reduction in cases of religious undue influence. In 2017, the doctrine was the focus of a Law Commission consultation paper. The Law Commission hinted at the great complexity of establishing undue influence in religious claims. The Law Commission noted that examination of the particular relationships between adherents and

[481] *Edwards* (n 480) [47].
[482] Although I discuss actual undue influence and coercion in chapter 7 where I set out the dualist rationale's conception of exploitation, see pages 255-256*
[483] See *Parfitt v Lawrence* [1872] LR 2 P and D 462 where actual undue influence was not found.
[484] See Richard Hedlund, 'Undue influence and the religious cases that shaped the law,' (2016) Oxford Journal of Law and Religion, 5(2), 298-318; Charlotte Smith, 'Allcard v Skinner Revisited: Historical Perspectives on Undue Influence' in Elisabeth Cooke, *Modern Studies in Property Law, Volume 3*, (2005 Hart Publishing), Chen-Wishart (n 23); Ferris (n 25); and the work of Ridge (n 6 and n 11).

religious or spiritual advisors could develop understandings of the doctrine, more generally.[485] The report also requested consultation on the possibility of the creation of a new statutory approach to presumed undue influence in probate, and whether this would give rise to a presumption of influence over a testator's gift to spiritual advisors.[486] Accordingly, the report demonstrates that religious undue influence is an area of concern for the Law Commission under the modern interpretation of the doctrine. At the time of writing, the report has not been published.

The complexities of regulating religious undue influence have been most notably examined by Ridge, who is the definitive reference point in this area of law across the common law world. Ridge's work offers considerable insight into what challenges arise in religious undue influence cases in England, as well as Australia, which I have already examined in chapter 2. Ridge's work demonstrates that undue influence has a continuing role in regulating gifts made to religious groups and institutions, domestically and in other common law jurisdictions.[487] In this section, I assess some of the challenges mentioned by Ridge in greater detail by considering more recent English jurisprudence. Additionally, I discuss some new contributions to civil law commentary on religious undue influence. Overall, this section demonstrates the fundamental challenges of regulating religious undue influence in England. In doing so, I illustrate why the Law Commission was correct to consider this as an area of legal concern for parties involved in litigation, as well as legal institutions, such as courts and Parliament.

[485] Law Commission Consultation Paper (n 457), [7.115].
[486] Consultation question 38, *ibid*, [7.129].
[487] A similar response has been called for in Hedlund (n 483), 317.

4.2.1. The grounding principle problem

In chapter 2, I argued that the main challenge for correctly identifying when religious influence becomes undue through a principled means is determining what the correct grounding principle of presumed undue influence is and how well it can be defined.[488] I contend that the same conclusion applies to the English understanding of the test in equitable and probate settings.[489] Commentators are split into four diverging perspectives on what the correct rationale for undue influence is. One view suggest that the doctrine is premised on 'impaired will' (claimant-sided accounts) and that the doctrine applies where claimant lose a sufficient degree of autonomy in transactions.[490] Other commentators consider the doctrine is based on 'unconscionability' (defendant-sided accounts),[491] and claim that transactions are unduly influenced by a defendant's wrongful conduct. A third view proposes that the doctrine is grounded on public policy grounds,[492] and seeks to address transactions that go against relevant policies such as protecting the vulnerable from victimisation.[493] Lastly, some commentators combining the impaired will and unconscionability approaches[494] submit that transactions caused by the defendant's wrongful conduct, which causes another party to enter into a transaction without their full consent should be set aside for undue influence.

[488] See pages 69-71.
[489] Understanding the correct rationale is viewed by other commentators as a suitable way of addressing the challenges of regulating religious influence, see Ridge (n 6), 73-75.
[490] Birks and Chin (n 23) & *Niersmans v Pesticcio* [2004] EWCA Civ 372; [2004] 4 WLUK 62 [20] (Mummery J).
[491] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, (Sweet & Maxwell 2012). Some judges state that wrongdoing is not required, see *Niersman*s (n 490) [20] (Mummery J).
[492] Ferris (n 25).
[493] *NatWest Bank v Morgan* [1985] AC 686, 705 (Lord Scarman).
[494] Chen-Wishart (n 23).

The House of Lords decision in *Etridge (No 2)*, which resulted in a restatement of the doctrine, failed to effectively clarify the doctrine's rationale in a suitable way.[495] To be clear, the House of Lords did not intend to set out a structured definition of what constitutes either actual or presumed undue influence. Lord Nicholls described presumed undue influence by stating,

"The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."[496]

However, the Lords did not stick to focusing on the free will of claimants, most likely because of the lack of any real definition on the concept, but also referred to the defendant's wrongdoing in separate judgments. Lord Scott stated "The transaction will not be "wrongful" unless it was procured by undue influence. Its "wrongful" character is a conclusion, not a tool by which to detect the presence of undue influence."[497] In contrast, Lord Hobhouse referred to the need to protect individuals from "oppression" and "exploitation",[498] mentioning that equitable wrongs "…may be an overt wrong, such as oppression; or it may be the failure to perform an equitable duty, such as a failure by one in whom trust and confidence is reposed not to abuse that trust by failing to deal fairly with her and have proper regard to her interests."[499] These *obiter* comments signal that overt acts of wrongdoing by defendants may play some role in judicial reasoning in judgments alongside the analysis of the claimant's consent.

---

[495] Edwin C. Mujih, 'Over ten years after Royal Bank of Scotland Plc v Etridge (No.2): Is the Law on Undue Influence in Guarantee Cases Any Clearer?' (2013) International Company and Commercial Law Review, 24(2), 61.
[496] *Etridge (No 2)* (n 22) [7].
[497] *Ibid*, [155].
[498] *Ibid*, [98].
[499] *Ibid*, [107].

The uncertainty and discretional consideration of either of the four perspectives, or a combination of them, by courts is significant to religious undue influence cases. By confirming the correct grounding principle of the doctrine and limiting how it should be interpreted, courts are better placed to identify the appropriate threshold of when religious influence becomes undue in presumed undue influence cases. This would also confirm what evidence indicates a sufficient degree of impaired will to determine when unlawful influence occurs[500] or whether courts should also look for a particular type of wrongful conduct.

Moreover, settling the grounding principle of the doctrine would develop a means to address related challenges unique to religious influence contexts discussed in the rest of this chapter. As a consequence of deciding the doctrine's proper foundation, judges would have a greater potential to apply the doctrine in a more principled and consistent way in religious cases. I explain in chapter 7 why my rationale is capable of doing this, after considering the rationales mentioned at the start of this section in chapter 6. There I explain why these rationales are unable to provide justified responses to the unique religious challenges and general doctrinal chapters identified here. I subsequently demonstrate that Lord Nicholls was wrong to consider that it is not possible to be more precise about when a person's free will is overborne in undue influence cases.

[500] This already occurs on a discretionary and subjective basis, consider *Laurence v Poorah* [2008] UKPC 21 [20] (Lord Walker of Gestinthorpe).

Understanding the role of vulnerability policies in religious undue influence cases

It has already been mentioned that some commentators consider that the doctrine is based on policy considerations.[501] Historically, policies guided courts on how to decide cases of religious undue influence[502] but such policies are also considered in other sorts of contemporary cases.[503] The use of policies by courts intensifies my concern about how the grounding principle problem of presumed undue influence should be understood generally.[504] I now consider how policies endorsed by courts in religious undue influence cases can result in biased or unprincipled reasoning determinations of liability. The uncertainty over how policies should be used in religious cases, combined with the general unstructured and subjective nature of policies, risks unprincipled decisions on defendant liability. I agree that policies employed by courts in religious undue influence cases are neither conclusive nor sufficient to determine decisions.[505] I now argue why relying on policies to decide cases is both practically and normatively inappropriate.

The policy most heavily relied on by English courts in deciding early cases of religious undue influence related to the vulnerability of adherents.[506] Courts sought to protect persons from exploitation in the practice of their religious and spiritual beliefs. In *Norton v Relly* (1764),[507] the defendant was described as an individual who "…preys upon his deluded hearers and robs them under the mask of religion."[508] The defendant was found guilty of unduly influencing the

[501] Ferris (n 25), 7 ft 42.
[502] *Ibid*.
[503] See for example the reference to the public policy of preventing the potential abuse of certain confidential relationships mentioned by Lord Scott in *Etridge (No 2)* (n 22), [158].
[504] Including, do certain policies form the basis of the doctrine, or rather merely feature in judicial assessments? What weight are policies given by judges when deciding cases, and are they compatible with other rationales suggested to form the basis of the doctrine?
[505] Ridge (n 6), 86.
[506] *Ibid*, referring to *Norton* (n 445), *Nottidge* (n 445), *Lyon* (n 455) & *Morley* (n 455).
[507] See n 455.
[508] *Ibid*, 909 (Lord Chancellor). Example from Ridge (n 6), 86.

claimant's gifts. A similar tone of the reasoning was applied in most historical religious undue influence cases.[509] During the late nineteenth century courts began to find genuine ministers were also capable of manipulating their position to gain financially.[510] In *Nottidge v Prince* (1860),[511] Sir John Stuart V-C approved of the French law prohibiting all gifts by a penitent to his confessor or the confessor's religious community.[512] Moreover, in *Allcard*, Lindley LJ stated that religious influence is the most powerful influence of all, and because of this power is often subtlety administered, a presumption of influence should apply as a matter of public policy to protect vulnerable adherents.[513]

In these cases, English courts viewed exploitation in its general sense. The continued use of exploitation in this way in decisions is potentially problematic for religious undue influence cases. This understanding of exploitation does not provide an adequate definition or guidelines to help separate religious influence from undue influence. Some factual circumstances may suggest a severe degree of exploitation that rightfully result in findings of actual undue influence. However, these sorts of cases are rare. Presumed cases of undue influence based on subtle religious influence have been much more common. As a result, these cases require courts to take a more nuanced approach to the role the policies in judicial reasoning. Without doing so, courts may fail to see that the defendant's conduct represents what is expected in that religion, which has been freely consented to by adherents, and is thus not exploitative.

The use of exploitation policies may also hide a judge's conscious or unconscious religious prejudices. Such a possibility is made more likely if the correct grounding principle is not

[509] The only exception is *Parfitt* (n 455). The court did not find evidence of actual influence in equity, for commentary see Ridge (2007) (n 6).
[510] Ridge (n 6), 86.
[511] See n 5.
[512] *Ibid*, 113.
[513] *Allcard* (n 6), 183.

expanded on by courts. In *Norton*, the court justified intervention on grounds of public policy and utility. However, in the judgment the Lord Chancellor frequently expressed his views on the practices of the defendant who was a Methodist preacher: "Men who go about in the Apostles' language, and creep into people's dwellings, deluding weak women: men who go about and diffuse their rant and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare."[514] Additionally, in *Allcard*, Kekewich J submitted, "I have endeavoured, to the best of my ability, to treat this as a question of law, regardless of feelings which might otherwise sway the judgment..."[515] Smith has rightly suggested that judges who explicitly attempt to avoid bias by saying they have in the context of justifying intervention usually suggests a real probability of bias.[516] This view can be corroborated by comments made by Kekewich J in the Church Times during the trial that suggest he considered the defendant's behaviour immoral.[517]

Accordingly, my argument that an exploitation policy may allow judicial bias to sway decisions has a grounding in historical religious undue influence cases. The discretional nature of the doctrine and usage of policies risks bias influencing decisions, although, it is more likely to now occur in less obvious ways. Similar language used by judges in the historical cases would not be allowed under domestic human rights obligations. Nevertheless, the subjective nature of the policy and the doctrine's equally subjective framework does not guard against unconscious religious bias negatively impacting on how a defendant's liability is assessed.

Wider commentary supports the idea that unconscious religious bias may feature in undue influence cases. For instance, judges typically appeal to what amounts to Christian rhetoric to

[514] *Norton* (n 455), 908-909.
[515] *Allcard* (n 6), 168.
[516] Smith (n 484), 136.
[517] *Ibid*.

explain community standards in undue influence claims.[518] There is also commentary indicating that judges may use their personal views on religion to determine what is religious.[519] There are clears dangers to this approach since judges may not be familiar with the religion in question and rather than taking account of differences between religions may homogenise religions.[520] Accordingly, a judge's perspective on the acceptability of religious practices and what constitutes an unlawful degree of victimisation may only match up to Christian standards. Such a perspective may exclude other religious perspectives of smaller religious communities that do not fit those standards. Consequently, this sort of conduct is more likely to be found to have unduly influenced gifts.

Another concern on the use of the term exploitation in judicial reasoning arises because of its subjective nature, which has not been limited by a definition in this area of law. As a result, courts may lower the threshold for what it considers exploitative conduct to amount to in order to capture certain religious practices viewed as disagreeable or wrongly connected to religious worship. The subjectivity problem is compounded in religious contexts where judges view the practices of adherents as perverse and influential. In such instances, the threshold of unlawful conduct could be lowered to an unjustifiable standard capturing conduct that is not wrongfully exploitative or conduct where the donor's loss of will is so minimal that it could hardly be considered an illegitimate loss of autonomy. Without greater clarification on the grounding principle, it seems that the doctrine cannot prevent these misunderstandings of exploitation from being made in practice. As a result of the degree of subjectivity afforded by the policy, and the potential for judges to lack literacy on religious practices, it seems that defendants are unlikely to retain gifts where this policy is considered.

[518] Ridge (n 6), 83-84.
[519] Edge (n 12), 404-405.
[520] *Ibid*.

The doctrine does not provide a clear understanding of the threshold between acceptable conduct, sharp practice and exploitation. Therefore, the usage of exploitation policies in cases does not capture the complex normative nature of exploitation endorsed by scholars as a principled means of justifying legal intervention.[521] For instance, courts have not sought to distinguish between passive and active instances of exploitation considered in legal theory literature, which could help to determine unlawful conduct in cases.[522] Arguably, there is some distinction between exploitation in the understandings of actual and presumed undue influence, but the tests for each category of influence do not explicitly consider exploitation. In the context of religious influence, passive relationships of exploitation would constitute morally wrongful conduct not considered by that individual as wrongful, possibly because they believe it is a necessary practice of their religion. Active exploitation is morally wrongful conduct intended by an individual to make a gain. In light of certain factors, passive exploitation can suggest that the degree of influence is insufficient to amount to undue influence. Alternatively, it may suggest a lower degree of culpability that should be considered by courts in remedying the claimants' loss. Omitting to make these kinds of distinction when the exploitation policy is considered by courts intensifies my concern that courts are unable to principally and justly decide when religious influence is exploitative and undue.

The argument developed in this section reaffirms why the grounding principle problem should be suitably addressed in order for religious undue influence to be justly regulated. By resolving the problem, judges will be better informed on how to decide when religious influence becomes

[521] See Joel Feinberg, *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing*, (OUP 1988). For more recent criminal fraud commentary, see Jennifer Collins 'Exploitation of Persons and the Limits of the Criminal Law,' (2017) Criminal Law Review, 3, 169-186.
[522] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, (OUP 1983), 204-205 & Bigwood (n 447), 132-140.

undue. Courts will also have a better understanding of how the exploitation policy should be interpreted to decide cases.

4.2.2. Religious literacy of judges

The level of discretion afforded to judges in deciding presumed undue influence cases raises another category of challenges concerning the religious literacy of judges. I now question whether judges really examine the subjective value of the religious beliefs held by parties and treat the religious contexts of claims with adequate respect when applying the test presumed for undue influence.

Uncertainty over the role of independent advice

The role of independent advice in presumed undue influence cases creates concerns about judicial religious literacy. Generally, it is not clear whether advice is always sufficient to rebut presumptions of influence.[523] It is important to know the role of advice to establish when religious undue influence arises; advice concerning the unworldliness and improvidence of gifts may simply confirm the donor's intention,[524] rather than causing the donor to reflect on their motivations for gifts. Two views were identified in the Australian experience on the function of advice in cases.[525] These views also apply to the English understanding of presumed undue influence. View (I) considers that if the advice was given to donors, but not followed, a

[523] Ridge (n 6), 76.
[524] *Ibid.*
[525] *Ibid*.

presumption of influence can still be rebutted by defendants.[526] View (2) contends that unless advice is followed by donors, it is almost impossible for the presumption to be rebutted by defendants.[527] Recent English general and religious undue influence cases do not confirm which view is the correct interpretation. Advice was not received by the claimants in *Roche v Sherrington* [1982][528] and *Catt v Church of Scientology Religious Education College Inc* [2000],[529] which were decided on procedural aspects of law, rather than on this substantive issue. Similarly, the role of advice in presumed undue influence cases was not discussed in *Azaz v Denton* [2009].[530]

The discretion held by judges to decide what role of independent advice should have on a case-by-case basis could negatively affect presumed religious undue influence cases. If adherents are unlikely to accept legal advice on gifts, which seems likely in many religious scenarios, legal advice is unlikely to have any impact on transactions. In such circumstances, it will be very hard for defendants to rebut presumptions of influence. Accordingly, defendants will have to produce some other form of evidence to rebut presumptions of influence. Yet other evidence may not exist or lack the same ability to show that donors acted autonomously when gifting property. Religious defendants may consequently be placed in a more disadvantaged position because of a judge's interpretation of what role advice has. Consequently, cases may be decided in an unprincipled way if view (2) is more regularly adopted by courts; absence of advice or ignored advice does not automatically indicate reduced autonomy. Furthermore, judges would overlook the religious reasons for not following any legal advice. This approach fails to appreciate why evidence of such advice should be treated differently compared to non-religious

[526] *Ibid*.
[527] *Ibid*, 77.
[528] See n 24
[529] *Ibid*. No reference is made to any independent advice heard by the donor.
[530] *Ibid*.

cases. A religiously motivated donor will have a specific worldview that may not match up to the views of legal advisors. The donor's religion may even promote distrust of non-believers, especially concerning financial matters. Whereas non-religious donors are unlikely to share this predisposition. Although they may think advisors are untrustworthy, their perception of the advice is likely to make them consider it more thoroughly. Advice is, therefore, more likely to affect the decisions of these donors by making them question the efficacy of transactions. If judges treat both claims similarly, judges fail to see the differences in how advice is viewed and internalised by both the two types of donors. The result of this failure means judges may place too much weight on the evidence that advice was not received by donors. Consequently, this increases the risk that religious defendants will be found to have unduly influenced transactions where advice is ignored or not received, even though the influence may not strictly be undue because the donor's will has not been impaired.

The role of independent advice may only prove to be a limited challenge in religious cases, as not all donors will receive independent advice before making gifts. However, reported religious and spiritual cases have included legal advice.[531] The issue could, therefore, undermine the legitimacy of the presumed undue influence test in religious cases where donors receive advice before claiming they were unduly influenced.

Understanding the significance of improvidence of religiously motivated gifts

Judicial literacy on religious matter can also affect the threshold question of when religious influence becomes undue in cases involving improvident transactions. Religious and legal

[531] See *Lyon* (n 455) and *Azaz* (n 24).

conceptions of gift-giving and the motivations for gifts may not match up in practice. The discretion afforded to judges by the presumed undue influence test may mean judges ignore how religious conceptions of gift-giving change a donor's conception of legitimate gift-giving. The test risks courts finding religious defendants guilty of unduly influencing gifts, largely on the basis that they received a large sum of money, rather than identifying behaviour that signifies undue influence.

The improvidence of transactions is a necessary consideration of the threshold question of whether gifts should be subject to a presumption of influence because they cannot be explained by ordinary motives.[532] At one level, the threshold test makes sense; readily explicable transactions are unlikely to have resulted from undue influence, and thus, the presumption would be unrealistic.[533] The doctrine is not intended to apply to commonplace gifts, such as Christmas or birthday gifts.[534] On the other hand, the law as restated in *Etridge (No 2)*, may be entirely incompatible with religious or charitable conceptions of gift-giving. I now build on Ridge's analysis of Australian cases discussed in chapter 2, which demonstrated how improvidence and conceptions of "ordinary motives" give rise to differences in what constitutes ordinary motives in the particular contexts of gifts.[535]

It not clear whether improvidence is enough for a transaction to be set aside by English law.[536] Ridge states that the only real indication of an answer is found in *Re Brocklehurst's Estate*

[532] Originally, the threshold consideration arose in *Allcard* (n 6). Lindley LJ made a distinction between small and large gifts. If the gift was large, and could not be explained by ordinary motives, this suggested a greater likelihood that the transaction was unduly influenced, page 185. This test later became the manifest disadvantage test in *Morgan* (n 493), 705 [A], (Lord Clyde). After *Etridge (No 2)* (n 22), the manifest disadvantage test was abolished. The threshold test now only plays an evidential role and is included within the second limb of the current test for presumed undue influence, see Muhji (n 495), 64. This is however disputed by some as mentioned by Muhji at 57-58.
[533] Ridge (n 6), 83.
[534] *Etridge (No.2)* (n 6) [24] (Lord Nicholls).
[535] See pages 63-67.
[536] Ridge (n 6), 83.

(1978).[537] The Court of Appeal held that a very generous gift of shooting rights over the donor's property could not be set aside solely because it was improvident where no other evidence of unduly influencing was found.[538] Subsequent decisions have considered the role of improvidence briefly in non-religious claims arising from carer relationships. In *Langton v Langton* [1995],[539] Charles QC was concerned about an extremely improvident transaction, where the testator essentially placed his assets and future in the hands of the defendants.[540] Charles QC asserted in an *obiter* comment,

"…that the rationale of the jurisdiction—the justice of protecting those in need of ready money or a similar benefit from their own folly at the hands of third parties who, being in a position to provide such a benefit, are in a position to take advantage of the needy—applies to a bargain but *"does not apply to a gift, which is a different type of disposition and one where the donor is not by definition seeking a return."*[541]

This judgment was considered in *Evans v Lloyd* [2013].[542] Judge Keyser QC disagreed with the separation effect of gifts and bargains and reached the opposite conclusion.[543] This comparison reveals that recent cases attempting to address the role of improvidence in undue influence cases are yet to determine the exact role it plays or what weight the factor can have.

The possible incompatibility between religious and legal conceptions of gift-giving created by a lack of judicial literacy on the party's religious practices could lead to two consequences in presumed undue influence cases. Firstly, the incompatibility may unfairly disadvantage defendants when rebutting presumptions of influence. Judges may consider that the value of

[537] 1 Ch 14.
[538] *Ibid*, Lord Denning dissented on this line of reasoning. Cited in Ridge (n 6), 83.
[539] 2 FLR 890.
[540] *Ibid*, 905.
[541] *Ibid*, 908.
[542] EWHC 1725 (Ch); [2013] 6 WLUK 637.
[543] *Ibid*, [52].

the property gifted cannot be explained by ordinary motives without taking into account religious viewpoints associated with religiously motivated gift-giving. Judicial scrutiny is, in fact, likely to be much stricter where the donor holds strong religious beliefs or where religious practices are viewed as particularly severe by judges.[544] As mentioned in chapter 2, the threshold test of what constitutes ordinary motives can be considered an extension of the problem identified by Bradney in how the law treats "obdurate believers."[545] Religious defendants are more likely to be found guilty of presumed undue influence where gifts cannot be explained by ordinary motives but can be explained by religious motives, which have given less weight by courts.

Secondly, the threshold test can discriminate between the size and social acceptability of religions.[546] Judging from the jurisprudence on religious undue influence, it cannot be said with any degree of certainty that there has been discrimination between faiths in domestic cases. It seems that all religions involved in cases have had a similarly bad experience. Nevertheless, it could be argued that as the reported cases relate to religions which at the time were deemed controversial or new to English society, there has been a degree of bias in the type of cases heard by courts.

Past ill-treatment in religious cases may not need to be proven to support this argument, rather bias may still be present judicial reasoning because of the religious circumstances surrounding gifts. I mentioned above how there are problems with judicial fact-finding on newer religions and the possible role that bias has in how judges determine what is legally recognised as

[544] Ridge (n 6), 84.
[545] *Ibid*.
[546] Ridge (n 6), 84-85.

religious.[547] Consequently, analysis of what counts as religious conduct creates a greater possibility that courts will wrongly find that religious influence is undue.

The two consequences examined are a real possibility in cases. The ordinary motives test does not indicate how courts should assess the social acceptability of religious practices concerning gifts. Worryingly, the test gives judges considerable discretion to decide cases according to their views on what counts as ordinary motives in light of precedents on what constitutes religious and nonreligious undue influence.

Anomalous cases of non-benefitting donees

Gaining a personal benefit from gifts usually, but not inevitably, suggests a greater likelihood that donors have been exploited by donees. In many instances, the donee's gain will be the leading motivation for their unduly influencing conduct. In most religious and spiritual undue influence cases defendants financially benefit from their conduct. However, in cases like *Allcard*, the defendant did not. Four of the six gifts were spent on charitable purposes that the claimant agreed to, and two gifts of railway stock were held by the defendant on behalf of the sisterhood.[548] Accordingly, in *Allcard*, only third parties benefitted from the gifts. The defendant would have been found to have unduly influenced the two gifts of railway stock if the claim had been brought sooner, however.

[547] See pages 141-142.
[548] *Allcard* (n 6), 170, (Cotton LJ).

Cases where defendants do not directly benefit present a unique problem that arises from the benevolent circumstances of religious undue influence cases. In religious contexts, the motive of defendants who does not benefit from the gifts may be different from the motives of non-religious defendants. Gifts motivated by religious faith may be given to support the functioning of religious institutions. In *Allcard*, the need for gifts was promoted by the defendant for spiritual development and to further the sisterhood's religious and charitable causes that the claimant agreed with at the time of the gifts. Accordingly, it can be questioned whether the defendant's conduct warranted the possibility of equitable intervention.[549] Undue influence is less likely in these contexts compared to contexts where a defendant directly benefits or does not care about the claimant's motives for transactions. It is, however, unclear whether courts give weight to a lack of benefit where there is a sincere religiously grounded relationship held between the parties. Leading contemporary presumed undue influence cases have all involved defendants directly benefitted from their unduly influencing conduct.[550]

Understanding the possible role, a lack of personal benefit could have in judicial reasoning is significant. Equity does not exist to prevent foolish or unwise transactions,[551] a maxim that has applied by courts for centuries.[552] Equity ensures justice is achieved by recompensating those who have been unconscionably and fraudulently duped.[553] Establishing the significance of a lack of benefit in presumed undue influence cases would help to ensure the principles of equity

[549] A transaction can be set aside even where there is no wrongdoing by defendants, see *Niersman* (n 490) [20] (Mummery J) and so for present purposes, this may weaken the current argument. However, Mummery J specifically mentions this where the recipient of the transaction has benefitted. Accordingly, that ruling can be distinguished from the current analysis.
[550] See *Etridge (No 2)* (n 22) where the defendants persuade the claimants to sign mortgage agreements to gain access to loans used for the defendant's businesses.
[551] John McGhee, *Snell's Equity*, (Sweet & Maxwell, 33rd Edition, 2015), chapter 1.
[552] "… for our laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families… every man may give a part, or all of his fortune to the most worthless object in the creation; and this Court never did, nor ever will rescind or annul donations merely because they are improvident…" *Bridgeman v Green* (1757) Wilm 58; 97 ER 22 [60] (Lord Commissioner Wilmot) .
[553] *Ibid*, [60]-[62].

are appropriately applied. The need to understand the role of a lack of donee benefit is compounded in religious contexts because of the grounding principle problem; the role of defendant wrongdoing is not clear in practice and may be wrongly considered by courts. Greater clarity on both aspects would help to determine when religious influence becomes undue when defendants do not benefit from their conduct. In doing so, courts have less discretion to determine this question and are more likely to give greater respect to the religious practices featured in claims, and to donor autonomy.

Just remedies in cases involving non-benefitting donees

The impact of a lack of personal benefit for donees may also be relevant to remedies awarded by courts. In particular, what is the just remedy for claimants where the donee has not benefitted directly from the unduly influenced transaction? Ridge briefly comments that if a modern case arose along similar lines to *Allcard*, the most likely remedy awarded would be compensation.[554] Equity's jurisdiction to award damages and compensation has now become widely used,[555] even though the primary remedy remains rescission.[556] But what would be the correct quantum of compensation given the possible altruistic intentions of both parties? Would this be affected by the lack of benefit to the donee or the donor's enthusiasm? Lastly, are courts likely to take these considerations into account when deciding the remedy, given their usual unwillingness to take a nuanced approach to religious influence claims in the other ways identified? These questions are created both by the wide-ranging discretion afforded to judges by the doctrine and the uncertainty of how non-benefitting donees should be treated.

[554] Ridge (n 6), 80 ft 68.
[555] The possibility of awarding equitable damages has been put into statutory footing in s50, Senior Courts Act 1981.
[556] McGhee (n 551), 226.

Generally, the aim of equitable relief is that "each party should be returned as near to his original position as is now possible" and in attempting to meet this aim "equity as a court of conscience will look at all the circumstances and do what fairness requires."[557] Those circumstances can include the degree of faith of defendants if they knew that there was a risk of undue influence.[558] Courts can thus incorporate the lack of benefit to defendants in assessments of the correct quantum of compensation or damages.

Yet it is uncertain whether courts would give much weight to this consideration because of the nature of the test for presumed undue influence. In *Allcard*, certain factors were relied on and given weight by Cotton LJ when assessing the appropriate remedy if a claim had been brought soon, which is problematic. Cotton LJ considered that the claimant had participated in spending the funds, and as a result, was entitled to a more limited remedy than if they had not done so. However, this approach fails to recognise that the claimant could have been under the influence of the sisterhood at that point. This demonstrates that in religious contexts courts may have given weight to specific irrelevant factors, rather than focusing on more significant relevant ones, for example, a lack of wrongdoing or exploitative conduct. Judicial discretion afforded by the presumed undue influence test can, therefore, be problematic for judicial assessments of remedies. Accordingly, claimants may be unjustly remedied at the expense of defendants or religious institutions.

Unique cases like *Allcard* raise other difficulties when courts seek to achieve a just remedial outcome where donees have not benefitted. Equitable rescission may become only one possible remedy in cases amongst a "basket of remedies."[559] Indeed, domestic courts have awarded

[557] *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA) [136]-[137] (Nichols V.C.).
[558] McGhee, (n 551), 227.
[559] Ridge (n 6), 80 ft 68.

successful claimants rescission[560] and compensation,[561] and have considered awarding damages for a personal injury caused by undue influence.[562] Such a development would likely create problems for courts protecting defendants who identify with the interests of a religious beneficiary, rather than their private interests, where the rescission is impossible and courts choose to award compensation, instead.[563] It is uncertain from the case law whether this remedy is able to accommodate factors such as a delay by claimants in bringing claims, *bona fides*, and irretrievable expenditure.[564] More generally, it is unclear whether compensation can be awarded where defendants are not under a fiduciary duty because of the type of relationship they had with donors.[565]

Moreover, the uncertainty identified is intensified further by the lack of understanding on the actual basis for relief in equity, more generally. The Court of Appeal has asserted that that basis for relief is unjust enrichment.[566] Significantly, this basis can allow good faith defendants to receive a degree of protection from unjust remedies.[567] However, controversy exists over whether unjust enrichment is the correct basis of relief in equity. The controversy is generated by commentators arguing that unjust enrichment cannot consistently ensure just outcomes in every case.[568] Therefore, the extent to which the defendant's good faith can be incorporated into all equitable remedies considered in undue influence cases is uncertain.

---

[560] *Curtis* (n 24).
[561] *Mahoney v Purnell* [1996] 3 All E.R. 61.
[562] See *Azaz* (n2 4)
[563] Ridge (n 6), 80 ft 68.
[564] *Ibid*.
[565] If there is, compensation can be awarded where the fiduciary duty has been breached, see *Mahoney* (n 561). More generally, commentators suggest that it should be awarded even where there is not a fiduciary duty or resulting breach, John Heydon, 'Equitable Compensation For Undue Influence,' (1997) Law Quarterly Review, 113, 9. However, it is also argued that this seems problematic and difficult to justify in some cases where they may be no duty, which can be breached, see McGhee (n 551), 228.
[566] *Hart v Burbridge* [2014] EWCA Civ 992; [2014] 7 WLUK 786 [43] (Vos L.J.).
[567] McGhee (n 551), 227.
[568] *Ibid*, 227-228, especially ft 253.

Taking the two areas of uncertainty identified into account, it is plausible that courts may order rescission instead of awarding compensation, which they have complete discretion to do. However, rescission does not guarantee a just result for sincere religious defendants. The injustice is created by the uncertain current state of the law on remedies, and the discretion it affords judges. If there was greater clarity, judges would be more capable of awarding suitable remedies where appropriate. Moreover, the lack of clarity over the two factors listed may equally create an unjust result for defendants even if full rescission is not ordered by courts. The quantum of both could still be disproportionate to the defendant's conduct.

Further analysis into this area of law is necessary to ensure that rescission is just and that defendants are only required to pay damages or compensation for what is fair. If courts do not enter into these discussions, they will ignore the potential distinction in culpability between the conduct of malevolent defendants and altruistic defendants. Ultimately, this area of law would arguably be clearer and easier to apply if, as Ridge notes, the court in *Allcard* "…were able to lay down a strict prophylactic rule, comfortable in the knowledge that the limitations of rescission would mitigate harsh outcomes."[569]

4.2.3. Inappropriate interpretations of presumptions of influence

Historical and contemporary religious undue influence cases suggest that the presumed undue influence test has led domestic courts to conflate a donor's religious fervor with undue influence. The test creates the possibility that courts find relationships of sufficient influence between the parties where one does not exist in fact. One way this occurs is through the

[569] Ridge (n 6), 80, ft 68.

conflation of undue influence and unconscionable dealing in decisions where religious fervour motivating transactions is found unlawful. As mentioned in chapter 2, Ridge has argued that some religious undue influence cases, decided in Australia, should have been assessed as cases of unconscionable dealing.[570] In these cases, judges have strained the interpretation of particular facts to fit within the presumed undue influence framework,[571] instead of identifying that defendants have taken advantage of the donor's religious enthusiasm.[572] Ridge considers that English courts have also done this in cases like *Tufton v Sperni* [1952].[573] A property developer was found to have taken advantage of the claimant, a recent convert to Islam, by selling the claimant a property on highly disadvantageous terms. The claimant believed that he needed to purchase the land to fulfill a religious obligation. The Court of Appeal found that the claimant's enthusiasm for his new faith and beliefs made his decision to enter into the transaction "credulous and unbusinesslike."[574] The defendant was subsequently found guilty of presumed undue influence.

In *Tufton*, the transaction was motivated by the claimant's belief in a religious obligation. Consequently, it can be questioned whether it was likely that the claimant would have acted more wisely regardless of the defendant's conduct. Given the force of the obligation that he imposed upon himself, it is unlikely that he would have done. Accordingly, Ridge is right to contend that the claimant's religious enthusiasm was taken advantage of by the defendant and that there was not a sufficient relationship of influence for a presumption of influence to arise.

[570] *Ibid*, 81. For an Australian case see *Hartigan* (n 151) discussed in chapter 2, pages 71-72.
[571] *Ibid*, 82.
[572] *Ibid*.
[573] See n 455.
[574] *Ibid*, 517 (Morris LJ).

A second way that courts fail to account for religious fervour in relationships is through how presumptions of influence are understood to operate in religious contexts. In most cases of this nature, courts do not consider the party's entire relationships when finding that a presumption of influence applies. *Azaz v Denton* [2009] is an example of where this has occurred. Azaz, a medical doctor, was interested in alternative healing therapies. In 1990, he encountered the defendant who told him about her spiritual practices. Later in 1991, Azaz and his wife began a yearlong healing course in France. Azaz and his wife later joined the defendant's healing centre. In 1993, Azaz and his wife were advised by a solicitor to think carefully about moving to the centre and to consider whether they should give their entire savings (£100,000), to the defendant. Azaz replied that he and his wife had thought about it and the advice did not change his mind. Azaz started working at the centre in October 1992. Later in 2009, Azaz claimed that he was unduly influenced by the defendant on her own behalf, and on behalf of the centre, to gift all of his assets. The court reasoned that too much time had passed between Azaz leaving the centre and bringing the claim, and subsequently dismissed the case on the grounds of laches.

The court's assessment of the party's relationship raises an important question about the application of the first limb of the presumed undue influence test. In religious and spiritual contexts an automatic presumption of influence applies because of the high degree of influence,[575] and foreseeably because these relationships involve frequent contact between the parties. But was the court correct to find that a sufficient relationship existed between the parties in *Azaz*? Also, should the automatic presumption apply to gifts made over the full course of the party's relationship? The facts do not mention the intimacy or the frequency of the contact between the parties before the gifts were made. The facts do, however, indicate that Azaz first had contact with the defendant in 1991. Azaz then spent roughly 12 months in France

[575] *Allcard* (n 6), 171.

away from the defendant. During that time, it appears he had no real contact with the defendant. Also, the claimant did not appear to have much contact with the defendant at the centre when he moved there. It is uncertain how long Azaz lived at the centre before making the gifts to the defendant. The duration could have been up to four months. Accordingly, it seems that Azaz spent little time with the defendant before his stay at the centre and during the period he lived there. However, the court did not examine the party's relationships or how it changed over the course of its duration when each of the gifts was made.

Furthermore, the facts do not reveal how the court could find that the defendant had unduly influenced each of the gifts to the centre made by Azaz. The court either found that a suitable relationship of trust of confidence existed between the two parties, where arguably there does not appear to be one, or more likely, the court relied on an automatic presumption of influence without examining whether it is justified. Whichever view was adopted by the court, the court was eager to find a suitable relationship without much consideration for the facts. The court spent a greater amount of time assessing the laches defence raised by the defendant.

However, courts have not always been as willing to find suitable relationships in nonreligious claims where claimants are required to prove that one existed. In most scenarios, claimants cannot rely on automatic presumptions of influence[576] but must prove that a suitable relationship of trust and confidence existed between them and defendants. On occasions, courts have taken a nuanced approach when assessing a party's relationships in cases. In *Evans* v *Lloyd* [2013],[577] the claimant alleged that his deceased brother gifted his farm to the defendants, his employers, on the basis of undue influence and unconscionability. The donor had lived and

[576] For the categories of automatic presumptions of influence see page 129.
[577] See n 442.

worked on the farm for sixty-five-year. He inherited this property and later gifted the property to the defendants, after which he continued working on the farm. The court dismissed the claim on the basis that no undue influence was found. The court reached this decision even though the donor had always lived on the farm and did not have much contact with the outside world. (Interestingly, the court's perspective of this fact is at odds with the treatment of the claimant's isolation from the outside world in *Allcard*.[578]) Judge Keysler QC submitted:

"That the relationship between Wynne and the Lloyds was extremely close is beyond doubt. So too is the fact that it was characterised by mutual love and trust… It is also true that he depended on them for his accommodation, food and transport and, by the age of 70, was not equipped to live independently. *However, these matters do not in my view establish dependence in the relevant sense* …[579] I agree with Mr Jones's submission that the evidence in the present case does not indicate that in a relevant sense Wynne was in a relationship of dependence towards the Lloyds, or they had ascendancy over him, or his position vis-à-vis them was vulnerable, or he reposed trust and confidence in them in respect of the management of his affairs...[580] It is for the claimants to prove the factual basis of their case, and I do not find that basis established by the evidence. That it is not established is also suggested, first, by the improbability that thoroughly decent people created such a relationship of ascendancy over Wynne and, second, by a consideration of the reasons for the gift."[581]

This reasoning raises another question concerning religious undue influence cases, what is the significance of a donor's religious fervor to relationships of influence? Cases like *Evans* suggests that a donor's enthusiasm for making gifts is a relevant factor for judges in decisions. But as noted above in cases like *Tufton* and *Azaz*, the court did not consider the claimant's

[578] *Allcard* (n 6) 190 (Bowen L.J.).
[579] *Evans* (n 422), [58].
[580] *Ibid*, [59].
[581] *Ibid*, [60].

enthusiasm for making gifts to the defendants which were motivated by religious faith. Courts usually treat the religious and spiritual contexts as determinative for the presence of undue influence. I have already shown how this takes place in limb one of the presumed undue influence test when automatic presumptions of influence apply. In the presumed undue influence test, there is no specific mention of the role of enthusiasm in relationships of influence. Consequently, the donor's enthusiasm is purely a discretional factor in cases that may or may not be considered by courts. Accordingly, the general guidance for courts on how presumptions of influence arise in religious contexts affords judges a great deal of latitude in establishing a sufficient relationship, regardless of the defendant's relationship with the donor over time. This has led Ridge to question:

"…what of those cases where the relationship is not the prime motivation for the weaker party's transaction, but rather the reason is their own religious convictions? Is there any need for equitable protection, and if so, is undue influence the appropriate doctrine?"[582]

The justness of intervention in *Tufton, Azaz*, and other scenarios involving a degree of religious or spiritual fervour, is therefore open to scrutiny. In circumstances such as *Azaz*, a mutual relationship that appears to have been motivated by altruistic motives resulted in a large gift. This scenario does not seem the correct basis for just equitable intervention, at least for undue influence for two reasons. Firstly, the centre owned by the defendant was legally registered as a charity. Large gifts made by individuals are not unusual in charitable contexts. In 2015 the largest single donation in the UK from an individual given to a charity was £60.75m, the second largest was £42.88m.[583] Judge Keysler QC, in *Evans*, echoes this by noting:

[582] Ridge (n 6), 81.

[583] Coutts, '2016 Report: UNITED KINGDOM, The Number of £1m+ Gifts Increases by 19%,' <http://philanthropy.coutts.com/en/reports/2016/united-kingdom/findings.html> (Accessed May 2018); this money may not be gifted on a purely individual level. The money could have been generated by fundraisers hosted by the donator. For present purposes, it nevertheless demonstrates my point.

"*The fact that the nature of the transactions—a gift of practically all one's property—is highly unusual does not mean that they cannot be accounted for in terms of normal human motivation; it merely illustrates that the circumstances of cases are almost infinitely various and that this is an unusual case*. I would reject any contention that Lindley LJ's dictum in *Allcard v Skinner*… means that gifts of a certain size or amounting to a certain proportion of a person's wealth *ipso facto* are inexplicable by normal human motives."[584]

Consequently, the considerable size of gifts made to the defendant in *Azaz* can also be explained by ordinary motives.

The second reason to suggest why equitable intervention may not always be justified concerns how individuals act and moderate their behaviour in a pluralistic and interconnected society. A constant part of life for many is to consciously assess and reflect on personal beliefs and judgments. This normally results in changes in values and views. Even if we are not aware of this occurring, our environment and circumstances will usually have some impact on our decision-making processes. Applying this to *Azaz*, it seems unjust to allow a claim to be brought where the claimant's enthusiasm for alternative healing existed before meeting the defendant, who then subsequently allowed this practice to occur to the intensity to which he desired. Moreover, as already noted, there is no mention of impaired consent, exploitation or any real relationship of influence between the parties. Consequently. it can be questioned if *Azaz* is actually an example where the claimant's enthusiasm for the practices reduced and this caused him to slowly reassess and change his beliefs on alternative healing. It seems that this process occurred extremely slowly since the claim was brought six years after the claimant left the centre. Yet, the court omitted to consider whether this was a motivation for the claim.

[584] *Evans* (n 422) [63].

I am not suggesting here that the conduct of the claimants in *Tufton* and *Azaz* is the only factor contributing to findings of presumed undue influence, and that the defendant is entirely innocent (it may be argued that it was merely a sharp practice within commercial spheres[585]). However, there seems to be a legitimate distinction between two kinds of claimants that this analysis draws out, which has gone unnoticed or deemed insignificant by courts. Firstly, vulnerable or elderly individuals are taken advantage of because of the particular characteristics they possess.[586] Secondly, an enthusiastic believer devoted to religious, or spiritual practices seeking to please either a minister, or deity, who is *possibly* influenced by the attendance to religious institutions, or not actively influenced by other adherents. The latter group is most apparent where the donor thinks that their faith imposes upon them a moral obligation to fulfill certain transactions, as in *Tufton*. It is not just for claimants to be able to rely on equity to intervene in similar claims in this scenario. The influence is an inevitable consequence of following a particular religion, the degree of which will evidently not always be unlawful. Additionally, the conduct experienced by adherents in such scenarios is either what they believed was expected of them by their faith or what was typical of their religious beliefs.

Resolving how courts may restructure assessments of presumptions of influence and donor enthusiasm is important, especially in a modern consumerist society, where individuals have widespread access to goods, services and ideologies. Courts should not simply find some form of relationship between the parties and rely on automatic presumptions of influence to satisfy

[585] Courts have recently drawn a line between undue influence and sharp practice, see *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch); [2016] 10 WLUK 301 where Rose J stated "Having considered all these factors, I am not satisfied that the relationship that developed between the two parties crossed the line from being a strong, cordial business relationship between a buyer and a seller of financial services to being the kind of relationship of trust and confidence giving rise to a duty of candour and fairness on the part of the bank to its client, [278]. The commercial context of the arrangement could, however, have been a significant factor in the case as opposed to a contractual arrangement between Tufton and the defendant where it is likely that he had less knowledge of contractual arrangements.

[586] For instance, in the successful claim of *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin); [2011] 5 WLUK 172 where the donor was "deaf, dumb, barely educated and illiterate" [54] (Silber J).

the first limb of the test, as considered in chapter 2 in the US experience of regulating undue influence.[587] Courts should be required to examine the state of the party's relationship for each gift made to see if it was one of sufficient trust and confidence. If courts continue to apply the current test without giving greater focus to the nature of religious relationships and the role of donor enthusiasm, equitable intervention in presumed religious and spiritual cases of undue influence will often be unjust. In practice, courts may merely find in favour of former enthusiasts who have subsequently changed their mind on the gifts they have made.

4.3. Conclusions

In this chapter, I have discussed the most pressing challenges relating to how religious undue influence can be effectively regulated by the test for presumed undue influence. I have shown how English law shares common challenges with the regulatory approaches of Australia and the US. The main challenge identified in all three jurisdictions was the grounding principle problem. The understandings of presumed undue influence discussed do not provide clear answers to determine how hard cases of presumed religious undue influence should be decided. Instead, courts are left with discretion to decide a defendant's liability on the basis of a vague account of what constitutes impaired consent. I have reinforced my view in this chapter that this discretion risks unprincipled reasoning and decisions on liability. In particular, I have identified how the English test for presumed undue influence does not require courts to take account of religious reasons for gifts or religious community norms on gifting. Instead, the law uses policies to determine what constitutes ordinary motives for gift-giving and whether presumptions of influence can be rebutted by defendants.

[587] See pages 74-76.

Changes to the presumed undue influence test must be made by English courts to ensure firstly, that the religious contexts of cases are given adequate respect and secondly, that judgments are based on defined principles rather than public policies or a judge's own conception of appropriate gift-giving. I explore how my rationale is capable of introducing such changes in chapter 7.

Chapter 5: The Hybrid Challenges of Regulating Religious Influence

5. Introduction

My analysis of the two different legal wrongs examined in chapters 2, 3 and 4 reveals commonalities in the sorts of religiously influential relationships involving gift-giving that have been subject to legal challenges. These are: (1) gifts or donations to religious officials are unilaterally given by donors; (2) there is a temporal exertion of the victim's or claimant's autonomy at the time of transactions; (3) victims and claimants agree to participate under religious beliefs, rules or lifestyles for a temporal period; (4) the nature of the religious relationship between the parties involves some degree of influence exerted by religious officials; (5) donors have a free choice to leave religious orders or change their beliefs and; (6) donors later realise a detriment or loss of property upon leaving a religious order or changing their beliefs.

I now demonstrate that my separate analysis of criminal and civil law oversimplifies some of the challenges of regulating gifts motivated by religious faith. I argue that there are challenges of greater generalisation in regulating religious influence and multiple common challenges feature in both areas of English law considered in religious contexts. (Foreseeably, the common challenges identified also have greater application to other areas of law not considered in this thesis, including contract,[588] tort,[589] and wider aspects of property law.[590]) The following discussion selects the most pressing aspects of the common challenges with regulating religious

[588] This includes misrepresentation, mistake, duress and the developing usage of good faith in domestic jurisprudence (it has not yet been accepted as a fundamental principle of domestic contract law), see Roger Brownsword et al, *Good Faith in Contract: Concept and Context*, (Dartmouth 1999).
[589] Namely, the tort of deception, for commentary see Jenny Steele, *Tort Law: Cases, Texts and Materials*, (OUP 2017), 98-101.
[590] For example, unconscionable conduct, duress, misrepresentation.

fraud and undue influence through English law. I reemphasise that there is a lack of judicial understanding of particular elements of offences and the relevance of factors in litigation involving either of the legal wrongs. I focus on the grounding principle problem, defendant-centered and claimant-centered challenges. I examine how courts can effectively identify defendants and whether courts take account of changes in religious beliefs and relationships motivating gifts to religious institutions or officials. Ultimately, my analysis bolsters my argument that the challenges identified risk unprincipled outcomes in both areas of law for victims, claimants and defendants. I reaffirm how understandings of the concepts fundamental to the operation of *s2 FA06* and presumed undue influence must be reassessed for courts to justly decide defendant liability in religious cases.

5.1. Understanding the grounding principle of both legal wrongs

Determining when religious influence becomes undue or fraudulent has been an overarching challenge of my analysis in the previous chapters. Following current understandings of both legal wrongs, it is not clear how courts should interpret the wrongs to determine the liability of religious defendants. In the civil context, I termed this the grounding principle problem.[591] In chapters 2 and 4, I discussed the diverging views of scholars on the correct rationale of undue influence. I also considered how the impaired will rationale accepted in each of the three jurisdictions is vague and does not really assist practical determinations of when influence becomes undue.[592] The problem has existed in scholarship for many years and remains

[591] See pages 135-143.
[592] See chapter 2, pages 68-72 & chapter 4, pages 135-143.

disputed.[593] I also considered how different policies, such as exploitation and vulnerability are relied on by English courts, in particular, to help decide religious and nonreligious cases.[594]

In Chapter 4, I considered that developing a means of addressing the grounding principle problem would have a significant practical impact on how English courts could address the legal challenges discussed.[595] The necessity of this task was shown by the general inability of courts to effectively and consistently address the challenges arising in religious cases. I stated that English courts could not address the challenges by simply appealing to judicial reasoning on relevant matters found in other precedents. As a result, assessments of liability could be moved by judicial attitudes on the defendant's religious beliefs and practices. A more developed rationale for undue influence would help to reduce the degree of discretion afforded to judges engaging with factors and determining the outcomes in hard cases of presumed religious undue influence.[596] In turn, this would also reduce the potential that religious bias can unconsciously motivate judgments.

The grounding principle problem is a particularly challenging issue; it concerns aspects of doctrinal law and jurisprudential understandings of concepts, such as autonomy and exploitation, and their limits. In chapter 2, I highlighted that the US had long since confirmed that undue influence is based on the claimant's free will and whether it had been impaired.[597] Despite the long-time acceptance of this rationale in US law, my analysis identified that religious influence still posed considerable questions on how the rationale applies in practice.

[593] See pages 136 & 180 n 624.
[594] See pages 82-83.
[595] See pages 135-138.
[596] A similar need was identified and explored with the duty to make restitution for being unjustly enriched, Prince Saprai, 'Unconscionable Enrichment?' in Robert Chambers et al, *Philosophical Foundations of the Law of Unjust Enrichment*, (OUP 2009), 417-436.
[597] See page 57.

Many of these challenges were also present in my analysis of Australian and English understandings of presumed undue influence. This suggests that even with an allegedly clear understanding of the doctrine's rationale, challenges still arise in religious contexts in regard to how courts can effectively determine when religious influence becomes undue. Consequently, it is not sufficient to just determine the doctrine's general rationale to address these challenges. A rationale must be developed by focussing specifically on the challenges identified in religious contexts. I explore what this would look like in chapters 6 and 7.

The grounding principle problem is also relevant to regulating religious fraud using *s2 FA06,* although it does not feature explicitly within the criminal literature in much detail.[598] The problem of deciding how far *s2 FA06* should be interpreted was explored in chapter 3 concerning falsity testing, dishonesty assessments and more generally, how courts can correctly identify defendants in religious structures.[599] The grounding principle problem has equal significance to the regulation of all claims of *s2 FA06* regardless of whether they are religiously grounded.[600] Accordingly, providing a means of addressing these challenges would provide greater clarity on the scope of the statutory wording and the offence's justified boundaries. Arguably, there is a greater need for this in religious cases because of the religious freedom dimension. This feature of religious cases requires that attention is paid to the possible violations of *Article 9 ECHR*, depending on how *s2 FA06* is interpreted by courts, and to the potential that juror bias may have an influence on convictions.

Theorising both legal wrongs would help to ensure the challenges identified in this thesis can be considered and addressed in a principled way by courts. For religious undue influence, this

[598] See Collin's theorisation of s4 FA06 (n 521), 167-184.
[599] See pages 88-123.
[600] Collins has called for more attention to be paid to theorising other *s1 FA06* offences, see Jennifer Collins, 'Fraud by Abuse of Position and Unlicensed Gangmasters,' (2016) Modern Law Review, 79(2), 513-523 & n 51.

task is long overdue and is one that courts have had the opportunity to address but have failed to do. Accordingly, in light of decisions in the last ten years, and the global growth of cases, now is the time to develop a suitable domestic response. In doing so, this will help to reduce the possibility that criminal regulation of religious fraud will mirror the problematic historical regulation of religious undue influence.

5.2. Common defendant centered challenges

A common practical problem posed by regulating both religious fraud and undue influence is how English courts can identify defendants from genuine adherents manifesting the same religious practices. I call this the 'identification problem.' In chapter 3, I considered whether group sincerity would be used in *s2 FA06* cases to help single out insincere individuals using religious beliefs and internal structures to hide fraudulent intentions.[601] This discussion pointed to the concern that genuine religious believers may be found insincere and that racketeers may be found sincere by juries. The *mens rea* requirements may not limit which religious officials or congregation members are susceptible to claims because of the risks of dishonesty assessments discussed.[602] A jury's assessment of a defendant's mental state may not act as an effective filter in practice, as was clearly intended by Parliament. Accordingly, genuine and honest adherents may be wrongfully convicted of *s2 FA06*.

In the civil context, the identification challenge was touched on in relation to how automatic presumptions operate in religious contexts and how courts take account of a donor's religious

[601] See pages 118-123.
[602] *Ibid*.

enthusiasm for making gifts to religious institutions or officials.[603] The law recognises that religious influence is particularly strong and might be abused by officials for financial gain[604] and so automatic presumptions of influence are imposed in relationships between religious advisors and adherents.[605] It is unclear how the equitable understanding of presumed undue influence differentiates between direct and indirect sources of influence that give rise to gifts. Consequently, it is questionable which parties should be susceptible to single influence claims instead of third-party influence claims where one party is aware or should be aware of other parties' unduly influencing conduct and fails to prevent the conduct or to take appropriate steps to do so.

The Australian case of *Khan* is of some assistance to this point. In *Khan*, an Imam acted as a mediator for the parties disputing the contract to sell a property. The claimant did not argue that he had unduly influenced the transaction.[606] Instead, it was argued that the defendant unduly influenced the transfer because they knew what impact the Iman's attendance would have on the claimant. (It is also likely that a claim was not brought against the Imam as they did not benefit from the transaction, which suggests, but does not guarantee that the Imam had no interest in the property and acted purely on religious motives.)

However, the reasoning of decisions is likely to be different where claims are made against multiple religious parties, some of which are acting officials and others are simply adherents of the same faith. For example, consider congregation members, who alongside a minister, whip adherents into a state of passion viewed by all as a euphoric experience at the time, and this causes some adherents to donate large sums of money. Here, the gifts are made to the

[603] See pages 98-111.
[604] *Allcard* (n 6) 183 (Lindley L.J.).
[605] *Ibid*.
[606] For the facts of the case see page 79.

religious minister, but the sources of influence stem from both congregation members and the minister. Therefore, who has influenced the donors? Should both parties be treated as influencers? Both parties are highly influential on the donor's reasons for the gifts and could foreseeably satisfy a presumption of influence; the minister would do so automatically, and certain congregation members could have a suitable relationship of trust and confidence with the donors.[607] Also, the transactions are spontaneous and large, so they are unlikely to be explained by ordinary motives.[608] This scenario becomes even more complicated when senior religious officials also have a role in promoting the beliefs motivating donations. An automatic presumption of influence would also likely apply to religious officials in these circumstances. Accordingly, courts would be required to determine if any of the parties could rebut the presumption of influence.

The only similar English case of religious undue influence involving multiple parties alleged to have unduly influenced a transaction is *Kliers v Schmerler & Anor* [2018].[609] The claimant argued that their parents and relatives unduly influenced their decision to sign a mortgage agreement. The influence was claimed to have been supported or at least initiated by the Rabbi of the claimant's Hasidic community. The influence was described as patriarchal and commonly found in this "dominant community-led culture."[610] The influence experienced by the claimant was considered an inherent part of the sect.[611] The court held that the claimant's father and other parties had unduly influenced her to consent to the mortgage agreement by promoting what the Rabbi believed should be done. Actual undue influence and presumed

[607] For the test requirements see page 128.
[608] *Ibid*.
[609] See n 24. Several other claims were also made. A procedural claim was made on the grounds that witnesses should be cross-examined, a claim was made for a debarring order against another defendant (Mordechai), and an illegality claim was made against Mr Kliers to explain why he was the sole legal owner.
[610] *Ibid*, [68] (Mr M H Rosen QC).
[611] *Ibid*, [92].

undue influence were considered by the court. The judge commented on the degree of pressure exerted on the claimant by her father and "others", which suggests that actual undue influence was found. But it is not clear whether the test applied by the court was presumed or actual.

Kliers does not make it clear what other parties, other than the claimant's parents, unduly influenced the claimant. Additionally, the decision does not explain why the Rabbi was not also a defendant. The reference to "others" when describing relevant parties seems to cover family members, community advisors and religious leaders. Pragmatically, this makes sense as these parties were not defendants in the case. However, the court could have made it clearer what parties were involved in the unduly influencing conduct in the lead up to the agreement and how those parties had or had not influenced the claimant to enter into the agreement. Such a discussion would have helped to differentiate between lawful and undue forms of religious influence when one party relates the religious advice of other influential parties. This determination is also significant to understanding when religious influence becomes undue if it is decided that those who unduly influence transactions need not benefit from transactions.[612]

The equitable test for presumed undue influence ultimately requires greater clarity on how to determine undue influence in relationships involving multiple parties that influence a donor's motivations for gifts. Developments to current understandings would help to establish what constitutes more direct sources of influence, which in turn would reduce the risk of unprincipled determinations on which influential party is held liable for undue influence.

[612] Discussed on pages 150-151.

5.3. Common claimant centered and defendant centered challenges

Another common challenge of regulating religious fraud and undue influence touches on both claimant centered, and defendant centered challenges. The understanding of temporality is important to how defendants, claimants, and victims view their conduct over the full course of relationships, and how this is accounted for by the relevant laws mentioned. Assessing how relationships and influence may change over time is imperative to effectively distinguishing between lawful and unlawful religious influence.

More specifically, temporality as a claimant centered focus is relevant to understanding when unlawful influence produces a gift; undue influence may motivate some gifts made to defendants but not all, especially in religious relationships which typically last for long periods. In *Allcard*, the party's relationship lasted for eight years and in *Azaz* the parties were in contact for twelve years. During lengthy relationships, the donor's circumstances are highly relevant. At times, donors may rely more on religious communities due to changes in their circumstances. Additionally, donors may inherit large sums of money or property, which allows them to make gifts to religious institutions and individual officials more frequently at a later stage in relationships. On the other hand, at other times, adherents may distance themselves from their faith or may fall on hard times and not have the disposable income to make the donations they would like to make to religious institutions. Accordingly, what is an improvident gift for a donor on one occasion may not be on a different occasion.

Temporal considerations are relevant to other aspects of presumed undue influence cases. For instance, in regard to the role of independent advice and how this may alter over time when a donor's circumstances change. Changes may subsequently make gifts more unwise or the

promised benefit of the gift may seem less likely. Temporality is also relevant to determinations of when undue influence wears off and donors act freely. A greater understanding of how changes in influence and relationship affect influence would enable courts to determine whether the claimant has left too long between the unduly influencing conduct and bringing a claim. Consequently, a greater focus on temporal considerations when addressing the claimant centered challenges of regulating religious undue influence would reduce the likelihood that the doctrine can be used as a generous returns policy at a later date for gifts motivated by faith.

The temporal focus of my undue influence analysis also touches on defendant centered challenges. It is relevant to understanding if defendants must benefit from their unduly influencing conduct and whether the benefit must be immediate, or whether it can subsequently occur indirectly through how the institution uses gifted property. Additionally, the theme of temporality was present in my discussion on the identification problem mentioned above and in more detail in chapter 4. Courts need to take account of how influence changes over time where presumptions arise automatically in religious contexts. It may be appropriate for certain gifts to be severed from presumptions of influence where changes in influence or relationship have occurred. This would mean that certain gifts would be challenged for undue influence. Alternatively, a claimant could make a claim against another religious party who they had a sufficient relationship of influence with and had motivated their gifts. Accordingly, on a better understanding of presumed undue influence, it may be more justified for claims to be brought against multiple parties, including ministers or fellow adherents, rather than one minister where gifts are made over time.

Despite the criminal law's familiarity with temporality, defendant centered challenges were identified in relation to how the *mens rea* of *s2 FA06* applies to religious fraud cases. I

mentioned how difficult it will be to prove that defendants know that their religious representations are false, misleading, or might be either.[613] This examination involves courts considering how a defendant's knowledge may have changed over time. For example, where a religious representation promising better health does not come true for one adherent, should defendants reveal to other adherents that the representation is false or might be? Similarly, should defendants subsequently question and disclaim other representations founded on the same beliefs for falsity? Answers to these questions would have a significant impact on the *actus reus* assessment of whether the representations are false or misleading. However, courts should be careful about how far they require religious officials and adherents to question the truth of their beliefs. Changes in knowledge of religious beliefs and the consequences of representations would impact dishonesty and sincerity assessments. Juries may question how a minister could honestly believe in their representations when on occasions the representations do not come to fruition, which could mean they stray into falsity testing. The jury's assessment of the *mens rea* requirements is even more troublesome when the representations are alleged to be true by some adherents and not by others over time.

My concern about how courts understand temporality and changes in religious influence largely stems from the uncertainty about what the correct rationale is for both legal wrongs. In the civil context, greater conceptual clarity must be developed to understand the role of causation and influence over time. In the criminal context, a greater understanding of temporality would affect how courts consider defendant knowledge and determine whether they acted dishonesty and sincerely when making religious representations. This could also have significant consequences on the *actus reus* assessment in religious fraud cases, as it would

[613] See pages 86-93.

open up the possibility of showing that defendants consider that some of their religious representations are untrue.

5.4. Conclusions

In this chapter, several common challenges were identified in both areas of law. The purpose of this was to consider how widespread and divergent the challenges are and to explain the possible implications of them for effective legal regulation of religious influence. The common challenges apply across different sub-disciplines of law. The claimant centered, and the claimant and defendant centered challenges examined are ripe for analysis due to the numerous adverse consequences that could be experienced by defendants, claimants and victims.

It is clear that there is no principled way of addressing these challenges using current laws. This is not purely the fault of English courts and Parliament. In the criminal context, there have been no reported cases involving religious contexts under the contemporary fraud framework. The unreported case of *Phillips* is unhelpful for assisting the analysis of the challenges identified. The dismissal of the case merely reveals how courts are extremely uncomfortable with regulating such a controversial area of conduct using the *FA06*. Similarly, modern religious undue influence cases are currently in a lull and those that have been heard by courts have produced little reasoning that engages directly with the specific challenges considered in this thesis. Without a suitable basis to inform how courts should address these issues, the law will continue to produce unprincipled outcomes in religiously grounded cases. Consequently, it is clear that doctrinal and remedial clarity must be developed to allow the law in both areas to combat unlawful financial gains in religious contexts.

PART II

Chapter 6: Evaluating Undue Influence Rationales in Religious Contexts

6. Introduction

In this, and the next chapter, I look at how jurisprudential and legal theory scholarship can inform the understanding of both legal wrongs examined in this thesis and reduce the effects of the legal challenges examined in part I. My use of this methodology is instrumental to the overall contribution of this thesis because:

"Primarily, [legal theory seeks] to clarify the means by which the law expresses and attains the resolution of controversy. From which follows the role of illuminating within the continuing practice of the law the potential directions which that resolution might take, and within the past practice of the law the alternative directions which that resolution might have taken."[614]

My use of legal theory addresses each part of this quote, as the methodology enables me to satisfy my aim of establishing what should constitute religious undue influence and religious fraud, in the hope that regulation in England becomes more legitimate. By considering the jurisprudential debates surrounding both areas of law, I establish how the law can be better understood in a way that balances the intended aims of the legal wrongs with the variety of interests held by defendants, victims and claimants.

[614] Andrew Halpin, 'The Methodology of Jurisprudence: Thirty Years off the Point,' (2006) Canadian Journal of Law and Jurisprudence, 19(1), 91.

I begin my jurisprudential analysis by discussing existing arguments of what constitutes presumed undue influence. In the following analysis of this chapter, I do not discuss *s2 FA06*.[615] I pick up this assessment and apply my rationale to the offence later in chapter 7.[616] The current chapter assesses the different rationales for undue influence developed by leading theorists within the field. I focus on the three most frequently discussed, and arguably leading rationales:[617] Birk's and Chin's impaired will account;[618] Bigwood's wrongdoing as exploitation account;[619] and Chen Wishart's hybrid account of relational autonomy grounded in a Perfectionist framework.[620] In each section I outline the rationales and examine the commentary of *Allcard* conducted by each theorist. I then establish how the foundational principles of each rationale help to explain certain aspects of judgments yet fail to explain the reasoning of courts fully or justify why cases should continue to be decided in a similar way. I demonstrate why each of the rationales is unable to address the unique challenges of regulating religious undue influence, and the more general compounded challenges of regulating undue influence in a principled way. Further, I consider why each of the accounts offers very little guidance on how courts can effectively and consistently apply the rationales to religious cases. In doing so, I demonstrate how the rationales discussed are unsuitable options for reforming the understanding of presumed undue influence in English law. I conclude the chapter by submitting that although aspects from each approach are helpful to explaining when religious influence becomes undue, the factors considered in each account need to be defined in more

[615] In the criminal context, there have been no such attempts of theorising s2 FA06. Accordingly, the intended and justified boundaries of the offence have not yet been normatively assessed. The only similar exercise has been conducted by Collins who has sought to theorise s4 FA06, abuse of position (n 521 and n 600).
[616] See pages 266-283.
[617] Public policy has also been advanced as a suitable rationale, see generally Ferris (n 25). However, I do not consider this rationale. The account offers the least effective means of addressing challenges pervading the doctrine given the normative and practices aspects of certain challenges examined. It has also gained much less traction in discussions on the correct rationale.
[618] Birks & Chin (n 23).
[619] Bigwood (n 27), 503-515 & Bigwood (n 23), 65-96.
[620] In the *Morality of Freedom* (OUP 1986) by Chen-Wishart (n 23), 231-266.

detail and be set within a different conceptual framework to justifiably decide hard cases of religious undue influence.

The insights gained from assessing the ability of each of the rationale to explain when religious influence becomes undue forms the foundation of chapter 7. There I construct a more justified account of presumed undue influence to explain when influence becomes undue in religious contexts. I follow this discussion by applying my rationale to *s2 FA06* and explaining how English courts should litigate religious representations alleged to be false.

6.1. Presumed undue influence: rationales and grounding principles

Debates on the correct rationale of presumed undue influence have proliferated in equity and contract scholarship.[621] A number of leading civil law scholars have attempted to address the conceptual problem of how to decide hard cases of undue influence by advancing different fundamental principles to explain how courts should assess cases. These efforts seek to create greater doctrinal clarity by providing courts with a principled means for deciding cases.[622] There is a refreshed interest in this important area of scholarship.[623] The rationale debate has

[621] See Birks & Chin (n 23); Peter Birks, 'Undue influence as wrongful exploitation,' (2004) Law Quarterly Review, 120, 34-37; Bigwood (n 27); Bigwood (n 447); Bigwood (n 23); Chen-Wishart (2006) &; Ferris (n 25).
[622] Determining a legitimate rationale can also have additional benefits not discussed. For example, an accepted rationale would also help to create a crystalline distinction between other vitiating doctrines such as unconscionability and duress. Creating such a distinction is however outside the scope of this thesis. The thesis has a specific focus on addressing challenges with the doctrine of undue influence in religious contexts and not which vitiating doctrines is the most appropriate, or likely to succeed. It is established in the next chapter why the rationale developed achieves greater success than those discussed, in determining lawful and unlawful religious conduct in the context of gifts and money exchanged for provision of services. In turn, confusion between the usage of undue influence and other vitiating doctrines would be reduced. For discussions on such confusion see, Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator,' (2000) Cambridge Law Journal, 59(2), 310-344 & 'Undue Influence and Testamentary Dispositions: A Response,' (2012) Conveyancer and Property Lawyer, 2, 129-144.
[623] The impact of which could influence the usage of undue influence in contractual litigation and scholarship also. This is however beyond the remit of this thesis.

resurfaced in recent restitution scholarship, which is now predominantly focused on the role of the defendants' conduct.[624] These approaches reinvigorate what has been termed a "stalemate" debate.[625] Such disagreement between commentators, combined with a reengagement with this complex topic, confirms that the rationale debate is far from settled.

The following section considers three different rationales that have examined religious cases of undue influence. I evaluate a claimant-sided account, a defendant-sided one, as well as a hybrid approach that combines both points of view. I argue that the rationales fail to account for the differences in nature between religious and nonreligious relationships involving gift-giving and explain why this distinction is important to the success of the rationales. I also submit that each of the rationales lacks conceptual clarity due to the limited definitions of fundamental principles advanced.

A three-tiered analysis of the different focuses of the rationales also makes it clearer that other attempts at formulating a rationale, which adopt a one-dimensional focus of the parties' conduct are as unlikely to succeed in showing when religious influence becomes undue in a legitimate way.[626] Monist accounts, like the first two discussed below, fail to account for important factors typically present in cases, regardless of whether the account is defendant-sided or claimant-sided.

---

[624] A conception which seems to have lost favor in relevant scholarship since Bigwood made a distinction between active and passive exploitation in the context of contract law and undue influence, see Bigwood (n 27), 508 & (n 447), 132-136. Examples of this approach include Sheehan's defendant-sided account delves further into conceptions of wrongdoing by examining the meta-physical analysis of decision-making and intention forming, see Duncan Sheehan, 'Defendant-sided Unjust Factors,' (2016) Legal Studies, 36(3), 415–437. Additionally, Saprai's defendant-sided approach introduces a broader notion of what constitutes unlawful wrongfulness and exploitation, see Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law*, (OUP 2019), 113-121.

[625] Chen-Wishart (n 23), 222-223.

[626] Neither seeks to achieve this explicitly, yet in developing their nonreligious focused rationales *Allcard* is a frequent point of reference. They could have entered into these sorts of debates covered in the previous chapters, but they omitted to do so.

6.1.1. Birks and Chin on impaired will

The idea of a claimant's will being impaired is often considered in domestic undue influence judgments, most notably *Etridge (No 2)*.[627] This principle has also been discussed by judges in the High Court of Australia since 1937, where it is treated as a significant element in deciding cases.[628] In the US, the claimant's impaired will has been confirmed as the definitive rationale of undue influence.[629] Based on such reasoning, Birks and Chin have advanced an 'impaired will' rationale for presumed undue influence. This rationale is arguably the definitive reference point on autonomy in undue influence contexts.[630] It has been the subject of much scholarly debate, regardless of whether it has been accepted as the correct rationale,[631] endorsed alongside other principles in a rationale,[632] or rejected entirely for being misplaced.[633]

Birks and Chin characterise undue influence as a means of relief for transactions where the relationship between claimants and defendants impairs the claimant's capacity to make independent decisions.[634] The impaired will rationale is 'claimant-sided'[635] or 'plaintiff-sided.'[636] Following this approach, courts should look at the impact of the relationship of influence on donors or promisors and whether their will has been impaired, rather than the

[627] See n 22. Lord Nicholls stated, "The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will" [7]. Similarly, Lord Scott describes how in *O'Brien* (a surety case) the claimant's "…will had not been overborne…" [162].
[628] See *Johnson* (n 155) [119] (Latham J) but note that wrongdoing was also deemed an essential part of proving claims by other Justices at [134] (Dixon J). More recently, in *Thorne* (n 154), the High Court of Australia declared that trial judges are required to make evaluative judgments on whether a person lacked will when entering into a transaction [43] (Kiefel CJ). The majority considered that assessing the propriety of pressure should be conducted in claims of duress, not undue influence [57].
[629] See page 57.
[630] For example, the rationale is cited in *Thorne* (n 154) [32] (Kiefel CJ).
[631] Sheehan (n 624).
[632] Chen-Wishart (n 23).
[633] Bigwood (n 27), (n 23) & Enonchong (n 491), para 9.005.
[634] Birks and Chin (n 23), 60.
[635] Bigwood (n 447) 236.
[636] Birks and Chin (n 23), 59.

defendant's specific conduct. The rationale is not concerned with whether the conduct should be considered wrongful.[637] Consequently, this rationale should not be confused with 'defendant-sided' rationales.[638] Birks and Chin argue that instances of wrongdoing or pressure involved in transactions should be challenged through duress, not undue influence.[639]

To determine whether a transaction has been unduly influenced, Birks and Chin specify that four stages must be satisfied: a) donors or promisors have a relevant weakness or vulnerability such as ill-health or old age; b) some form of relationship existed between donors or promisors and defendants when the gift was made; c) donors or promisors are excessively dependent on defendants, which includes subtle forms of relational conditions that impair autonomy; d) donors or promisors consequently lack the capacity for self-management to an *exceptional degree*, but need not have surrendered their will absolutely.[640] The last stage provides the main justification for intervention in the rationale.

In elaborating upon this final crucial stage, Birks and Chin discuss the Court of Appeal judgment in *Tufton v Sperni* [1955][641] (already mentioned in chapter 4[642]). They submit that Mason J was wrong to suggest that "overborne will" is required by the doctrine since this interpretation is too extreme. Birks and Chin commend the majority judgment, however, for rejecting the usage of the term "dominated" in explaining the doctrine on the basis that it "…is unreliable, above all because its meaning is unstable… [and] therefore contains the danger, repulsed in *Tufton*, of requiring too absolute a loss of autonomy."[643] In their view "… adults

[637] *Ibid*, 58.
[638] Advanced in Bigwood (n 27) & (n 23).
[639] Birks and Chin (n 23), 60.
[640] *Ibid*, 67-68.
[641] See n 445.
[642] See page 156.
[643] Birks and Chin (n 23), 69.

come under all sorts of different influences, and again they have to be assumed able to cope. The law relieves only an extreme loss of autonomy."[644] The threshold of what constitutes undue influence in this account is intentionally set at a particularly high level conceptually.

A presumption of influence arises because of a loss of autonomy or "judgmental disability not unconscionability."[645] To rebut the presumption defendants must show that at some point before the transaction they emancipated donors or promisors from their excessive dependence on them.[646] It is unclear at what point before the transaction this is necessary or whether this only needs to be done once, depending on changes in circumstances. Birks and Chin state that emancipation can be achieved but is not necessarily guaranteed through independent advice and "information."[647] The latter is vaguely described and seems to amount to other relevant facts evaluated by courts on a case-by-case basis. The presumption gives defendants the ability to show courts that donors or promisors had been thinking for themselves at all times before the transaction.[648] It is not clear how exactly defendants would do this simply by showing that donors or promisors received advice.

Birks and Chin consider a selective range of domestic and Australian cases to establish why their rationale best explains how courts should interpret presumed undue influence.[649] This examination also explains why the account is strongly focused on claimant-sided justifications and why those justifications could not effectively be combined with defendant-sided ones. Their analysis extends to religious cases like *Tufton*, and most importantly, *Allcard*. They argue

[644] *Ibid*, 87.
[645] Evidence of this cited in *ibid*, is *O'Sullivan v Management and Music Agency Ltd* [1985] QB 428, 73-74 ft 22.
[646] *Ibid*, 70.
[647] *Ibid*.
[648] *Ibid*, 75.
[649] Cases in England and Wales cited include *Goldsworthy v Brickell* [1987] 1 Ch 378, 69-72 & *Simpson v Simpson* [1992] 1FLR 601, 71-72. For the Australian cases see *Amadio* (n 155), 59-60; *Stivactas v Michaletos* (No 2) Court of Appeal of NSW, 31 August 1993, BC930187, 72-73.

that relief would have been appropriate in *Allcard* if the claim had been brought sooner. It is stated that the claimant's autonomy was impaired to an "exceptional degree" before making the gifts to the defendant because the claimant agreed to vows of obedience, and also because the claimant was prohibited from seeking advice from outside of the sisterhood.[650] Birks and Chin state it was not enough for the defendant to simply show that there was no wrongdoing, or advantage taking when they tried to rebut the presumption of influence that arose automatically because of the religious context.[651]

The focus on *Allcard* is significant in explaining the rationale of presumed undue influence. Analysis of hard cases, where there is no clear indication of inappropriate behaviour, only accepted religious practices manifested based on sincerely held religious beliefs, will help to clarify what should constitute undue influence in naturally influencing relationships. *Allcard* is viewed by many, including Birks and Chin, as the classical case of undue influence. Therefore, if it is argued to be a true case of undue influence, the rationale seeking to explain the case must demonstrate why this view is justified. However, as now demonstrated, this rationale fails to achieve this.

Chen-Wishart rightfully claims that talk of impaired will or consent within this account is more conclusory than explanatory.[652] The rationale does not effectively explain when an individual's autonomy has been impaired to an exceptional degree, nor does it seem to have the potential of justifiably doing so without wholesale amendments to the four-part test, as I now argue. Birks and Chin state that courts should not look for a relationship that has made them an

[650] Birks and Chin (n 23), 68.
[651] *Ibid*, 75.
[652] Chen-Wishart (n 23), 245.

"automaton"[653] or evidence of "an absolute surrender of one will to another."[654] Beyond this understanding of autonomy, the rationale is of reduced practical assistance to courts in hard claims of presumed undue influence regarding when a donor's or promisor's will was sufficiently impaired.

Evidence of some form of defective consent will not always be found in presumed cases and this stands for Birk's and Chin's discussion of *Allcard*. The claimant entered into the order of nuns knowing what the sisterhood expected of adherents. This included knowledge of the vows of poverty and obedience. Before the claimant gifted her assets to the defendant,[655] the claimant sought advice from her family, including her brother, a barrister, a fact overlooked by Birks and Chin. In seeking advice, the claimant must have exercised some degree of autonomy in asking for external opinions before making multiple gifts to the defendant. The claimant must have considered that her actions could have severe consequences on her future and assets, as she sought advice before making the first gift. It seems fair to assume that this advice was reflected upon before the gifts were made to the defendant in some way, even if it was minimal and had no real effect on the claimant's motivations for the gifts. Even if this assumption is incorrect, asking for external advice, even if not legal, shows that the claimant exercised more than a minimal degree of autonomy, even under Birks and Chin's account. To say they did not is rightly characterised as unrealistic and insulting.[656] Accordingly, the claimant's autonomy could not have been impaired to an exceptional degree at all points when the gifts were made.

[653] Birks and Chin (n 23), 69.
[654] *Ibid*.
[655] Two gifts of railway stock were made at a later stage in the relationship and after the advice was given. For the full facts of *Allcard* (n 6) see pages 130-131.
[656] Chen-Wishart (n 23), 243.

The analysis of the claimant's autonomy may have had a more persuasive effect on the consideration of the latter two gifts of railway stock made after the claimant received advice. However, Birks and Chin do not make this distinction. But for the claimant's delay in bringing the claim, each of the gifts would have been found to have been unduly influenced because it was considered to have occurred at some point in the party's relationship; causation between undue influence and transactions need not be established.[657] On this reasoning, the rationale does not stick to its conceptually high threshold in determining when autonomy is impaired, and Birks and Chin do not explain *Allcard* as they intend to. If the claimant had brought the claim sooner, the rationale would grant relief on "an implicit judgment about the normative acceptability of the transaction[s]…"[658] not the donor's impaired will in any real sense.

For this reason, the rationale can be criticised for allowing illegitimate considerations to decide a defendant's liability. The rationale allows reasoning based on legal moralism to determine the outcome in hard cases like *Allcard*. It is especially important to guard against moralistic intervention in religious contexts. I have already discussed the problems caused by the imputation of objective conceptions of vulnerability and exploitation into the doctrine in my analysis of English cases.[659] Further, chapter 2 examined the consequences of including objective standards of gift-giving in the Australian jurisprudence on gifts motivated by religious faith.[660] Moralistic standards considered alongside the main principle of this rationale creates the possibility that judges would omit to consider why adherents may believe that their will is enhanced by following strict religious beliefs and practices.

[657] Birks and Chin (n 23), 87-88.
[658] Chen-Wishart (n 23), 238.
[659] See pages 82-83.
[660] See pages 63- 64.

The rationale can also produce unjustifiable outcomes when applied to the typical sorts of religious motivations for making gifts to religious institutions and officials. Crucial distinctions should be made in the assessment of facts in religious undue influence cases that are omitted by Birks and Chin, which is mainly caused by their usage of the term 'excessive dependence.' They refer directly to religious contexts stating, "Religious enthusiasm … might be thought to be distinct from dependence."[661] This statement hints that the special nature of religious relationships has been considered within their account to some extent. However, they stopped short of dealing with a deeper understanding of religious motivations and considering why 'dependence' may be an important aspect of determining when dependency should be recognised as lawful conduct. In this way, the rationale ignores relational accounts of autonomy.[662] This seems odd considering that presumed undue influence was termed as "relational undue influence"[663] by Birks in his seminal work on the law of restitution written before the rationale was formulated. Chen-Wishart has been equally critical of this element of the rationale, accurately arguing that it is wrong to characterise dependence on others as resulting in a loss in autonomy.[664] Relationships can enhance a donor's autonomy, a consideration that is largely overlooked by Birks and Chin.[665]

The differences between nonreligious relationships and religious relationships are also not given specific recognition by Birks and Chin. Dependence on religious figures in cases like *Allcard* can often be different from dependence in nonreligious relationships. In the former scenarios, dependence is created by authoritative statements generated by, or at least based on,

[661] Birks and Chin (n 23), 67.
[662] See for example, Jennifer Nedelsky, *Law's Relationships,* (OUP 2012); Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, (OUP 2000) & John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves,' (2004) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition, 117(1), 143-164.
[663] Peter Birks, *An Introduction to the Law of Restitution,* (Clarendon Press 1985), 184.
[664] Chen-Wishart (n 23), 243.
[665] *Ibid*, 240-242.

the interpretation of religious beliefs. Dependence is commonly grounded in a shared belief system of religious motivations and practices, where there is typically an equal division of autonomy, even if there is some form of hierarchy between positions. Adherents look to religious figures for advice on all sorts of matters. Heightened degrees of dependence motivated by faith is readily apparent in real-life experiences. Spiritual care is a growing area of clinical research due to the demand for it in hospitals and other care institutions.[666] There is an increased presence of Chaplains in care facilities offering "in-depth spiritual counselling" to treat 'spiritual distress' experienced by patients diagnosed with cancer.[667] It extends to helping patients with feelings of hopelessness, existential distress and anger at God.[668] Similarly, research shows that care is sought by individuals suffering from PTSD and those recovering from traumatic experiences.[669] Additionally, in England, a range of Christian care homes are offered by the Pilgrims' Friends Society.[670] The tagline of the organisation is "Christians Supporting Older People & shaping the issues that affect them."[671] In reality, individuals in need of daily care turn to institutions that reflect their religious views. Accordingly, individuals possessing some kind of vulnerability, namely ill-health, regularly depend on religion and religious institutions as a means of dealing with difficult situations.

Instances of religious dependence, which are likely to be found to satisfy stage (c) of Birks and Chin assessment, does not *prima face* establish that strong forms of dependence impair an individual's autonomy to an exceptional degree. Dependence on religious figures may enhance

---

[666] See Christina M. Puchalski et al, 'Interprofessional Spiritual Care in Oncology: A Literature Review,' (2019) ESMO Open, 4(1), <https://esmoopen.bmj.com/content/4/1/e000465.citation-tools> Accessed October 2019.
[667] *Ibid*, 2.
[668] *Ibid*, 7-8. There is a vast body of research on the role of and understandings of religiously based pastoral care, see generally Carmen Schuhmann and Annelieke Damen, 'Representing the Good: Pastoral Care in a Secular Age,' (2018) Pastoral Psychology, 67(4), 405–417 & Carrie Doehring, *The Practice of Pastoral Care: A Postmodern Approach*, (Westminster John Knox Press 2015).
[669] Kent Drescher and David W. Foy, 'When Horror and Loss Intersect: Traumatic Experiences and Traumatic Bereavement,' (2010) Pastoral Psychology, 59(2), 153-157.
[670] https://www.pilgrimsfriend.org.uk/christian-care-homes> Accessed October 2019.
[671] *Ibid*.

an individual's autonomy, as already mentioned. Dependence could help adherents to reflect upon their condition and make decisions that are more consistent with their interests or aspirations, both in the short-term and long-term. Such a consideration is also true for dependence on individuals susceptible to automatic presumptions of influence,[672] for example, solicitors, professional trustees and medical advisors. This is not captured by Birks and Chin's definition of excessive dependence. Accordingly, the rationale risks defining natural dependence, commonly found in many religious environments, as excessive and subsequently, unlawful. Therefore, when applied specifically to religious contexts, there is a genuine chance that excessive dependence is construed as having a detrimental impact on autonomy. The rationale could then collapse into a three-tiered test in practice and the autonomy analysis- the crucial stage in the rationale- could be given an inappropriate degree of scrutiny by courts. Accordingly, the rationale offers little to guard against unprincipled judgments on dependence in religious cases, whereas in other legal settings such dependence receives great support.

Moreover, the impaired will rationale allows strong forms of paternalistic reasoning to determine judgments. Such reasoning is offensive morally, as it overrides the individual's realm of personal autonomy.[673] Attempts at preventing harm to an individual by claiming that it is for the individual's own good should rarely constitute a sufficient reason for preventing them from acting in contexts where they have no judgmental disability,[674] especially in gift-giving contexts. Paternalism protects individuals from the harmful consequences of their conduct, even if their choices are fully informed and voluntary.[675] At many points in *Allcard*, the claimant exercises their own will when deciding to make the gifts on different occasions, as mentioned. However, following this rationale, that conduct would not be construed as a

[672] See page 129.
[673] Feinberg (1983), 27.
[674] Gerald Dworkin, 'Paternalism,' (1972) The Monist, 56(1), 64.
[675] *Ibid*.

'true' choice. The account consequently argues for a decision that is internally inconsistent. If autonomy is a fundamental area of concern for Birks and Chin, paternalistic reasoning should not be allowed to impact on judgments in the way it does given its great potential to undermine the freedom to make gifts that are later regretted by donors, for instance.

Overall, the impaired will rationale fails to alleviate my concerns raised in part I concerning the discretion given to judges to decide cases by the presumed undue influence test. Decisions based on the rationale could easily give rise to strong forms of legal moralism and paternalism. Additionally, Birks and Chin have not considered the temporal nature of cases and the potential differences between the nature of religious and general cases of undue influence, which could help to determine which gifts are unduly influenced in religious cases.

Despite my strong critique of the rationale, I believe that autonomy, and how it can be violated, is a fundamental feature in undue influence cases. I explore more detailed conceptions of autonomy in chapter 7 and outline how this principle fits within my rationale. The analysis conducted in that chapter provides a more complete explanation of how impaired will should be understood in undue influence contexts.

6.1.2. Bigwood on wrongdoing as exploitation

The second most commonly discussed rationale for undue influence is 'defendant-sided.'[676] The leading proponent of this approach is Bigwood, who submits that presumed undue

[676] See Bigwood (n 27) & (n 447); Sheehan (n 624) & Saprai (n 625).

influence is based on wrongdoing.[677] On this understanding, courts should focus on the defendant's misconduct and assess whether it has caused the completion of transactions.[678] Bigwood asserts that all loses of consent experienced by donors or promisors can be unified as objectionable forms of advantage taking by defendants.[679] This conduct is defined as someone who has "…superior information, intellect, judgment, in the monopoly he enjoys with regard to a particular resource, or possession of a powerful instrument of violence or a gift."[680] Bigwood's rationale explicitly does not seek to make improvident, bad bargains, or regretted transactions unlawful.[681] Advantage taking is a form of wrongdoing that encompasses two forms of exploitation.[682] Active exploitation occurs when defendants knowingly disadvantage claimants.[683] Whereas, passive exploitation is experienced when defendants knowingly or having a reason to, stops themselves from taking steps to correct the power imbalance existing within relationships.[684] Bigwood's conception of exploitation is slightly narrowed by his comments on Birk's and Chin's rationale. Bigwood is critical of their usage of "wicked exploitation" (which they object to) and argues that this conception of exploitation is too strong since it would not cover passive instances of exploitation that warrant legal intervention.[685]

Determining exploitation begins by assessing whether donors or promisors possess any specific vulnerabilities that defendants could have taken advantage of.[686] It is unclear how the term "specific vulnerabilities" is defined. The only elaboration on what this means in the rationale

[677] Bigwood (n 447), 440. In Bigwood (n 27) consider the exploitation rationale in contractual settings and does not consider how it applies to actual and presumed undue influence separately.
[678] Bigwood (n 27), 509.
[679] *Ibid*, 507.
[680] Quoting Anthony Kronman, 'Contract Law and Distributive Justice,' (1980) Yale Law Journal, 89, 480 at *ibid*, 508.
[681] Bigwood (n 447), 438.
[682] *Ibid*.
[683] Bigwood (n 27), 508.
[684] *Ibid*.
[685] *Ibid*, 511.
[686] *Ibid*, 509.

is contained in a footnote stating, "…all disabilities relied upon will be such that the vulnerable party is seriously unable to preserve her own best interests in the transaction in question."[687] Bigwood's later work on undue influence does not clarify what the term means any further.

Exploitation is considered in the context of strict fiduciary duties. These duties are imposed on relationships legally presumed to give rise to influence.[688] Within these relationships, defendants are held to the same rules of loyalty that apply to fiduciaries in other areas of law:[689] fiduciaries must not profit from their relationship with those whom they owe a duty to,[690] and they must not put themselves in a position where their fiduciary duties and personal interests conflict.[691] Bigwood argues that relief should be granted where defendants breach either rule and this results in financial gains.[692] Causation between undue influence and transactions must be proven for claims to succeed.[693] Fiduciaries duties are breached in the context of undue influence where: (a) the circumstances of the transaction show conflict or a substantial possibility of conflict between a fiduciary's personal interests and the interests of whom they owe a duty to; or (b) if the transaction indicates to a "reasonable mind" a reason why a fiduciary may have used their influence.[694] Where (a) or (b) are satisfied a presumption of influence arises. Bigwood submits that this is justified since the fiduciary has used their position to gain

[687] *Ibid*, ft 39.
[688] *Ibid*, 510 & Bigwood (n 23), 440. For example, trustees.
[689] These are strictly enforced by courts even where the fiduciary has benefitted those, they owe duties to, see *Boardman v Phipps* [1967] 2 AC 46 (HL). For further commentary see Tamar Frankel, 'Watering Down Fiduciary Duties,' in Andrew S. Gold and Paul B. Miller, *Philosophical Foundations of Fiduciary Law*, (OUP 2014).
[690] Bristol and West Building Society v Mothew [1998] Ch1, [18], (Millet LJ). For general commentary see Robert Pearce & Warren Barr, *Peace & Stevens' Trust and Equitable Obligations*, (OUP, 7th Edition 2018), 680- 702.
[691] *Ibid*.
[692] Bigwood (n 447), 440-446.
[693] *Ibid*, 440.
[694] *Ibid*, 446. The following critique of Bigwood's rationale does not touch on reasonableness standards which involve objectiveness standards covered in chapters 2 and 4. Although relevant, there are more pressing issues that establish why the account fails to capture the essence of religious undue influence cases and is thus an incomplete rationale.

some form of benefit from those whom they hold duties to,[695] regardless of the substantive fairness of transactions.[696]

Bigwood claims that the rebuttal stage of the presumed undue influence test is based on public policy.[697] It allows the defendant to demonstrate the propriety of both relationships and transactions to courts.[698] Bigwood does not develop further helpful discussions on the possible role of independent advice or particular facts that can assist defendants attempting to rebut presumptions of influence. Accordingly, the rationale is unclear about how independent advice should be examined by courts.

Bigwood makes some attempt at identifying how the wrongdoing rationale narrows down the range of conduct that can unduly influence transactions. This is important to the current analysis, as the limitations bleed into the rebuttal stage of the test for presumed undue influence.[699] Bigwood includes two limitations in an effort to prevent the test from becoming overly inclusive. Defendants can show there was no conflict or possibility of conflict between the fiduciary's duty and their personal interests where: (1) the inducement is too remote from the context of a fiduciary's responsibilities owed to others, even if it is strong enough to be counted as an inducement (the '*proximity limitation*'); (2) the inducement is too weak to count as a determining motive for a fiduciary, even it is sufficiently proximate to their responsibilities owed to others (the '*incentives limitation*').[700] The two limitations are separate assessments

[695] *Ibid*.
[696] *Ibid*.
[697] *Ibid*.
[698] *Ibid*.
[699] Bigwood is concerned that without these limits, it may be applied "to the point of unreality disutility" *Ibid*, 448.
[700] *Ibid*.

and need not be jointly satisfied.[701] Through showing the presence of either limitation defendants are provided with evidence to rebut presumptions of influence.

In his earlier work on the rationale, Bigwood does not engage in any detailed analysis of particular undue influence cases, nor are there discussions on religious cases. Commentary is limited to judgments which comment that unconscionability and wrongdoing are relevant to understandings of undue influence.[702] Bigwood omits to consider how his account would decide notable cases like *Allcard.* Such an omission is partly explained by Bigwood's general focus on undue influence in contractual settings. Additionally, given Bigwood's scholarly background in private law, it is unsurprising that there is not a specific focus on the different nature of religious undue influence. The omission to discuss *Allcard* and why relief may have been justified is nevertheless surprising, considering it is often described as "the venerable classic example of undue influence."[703]

Bigwood's later work deals with this omission and briefly discusses *Allcard*. He claims that the defendant was a fiduciary in the relationship with the claimant.[704] Additionally, he touches on the role of the ordinary motives test of small and large gifts that remains in domestic jurisprudence from the judgment.[705] However, he does not explain why *Allcard* involved instances of exploitation or when the conflict between the defendant's personal and fiduciary duties occurred. Accordingly, it is difficult to see how the wrongdoing rationale can

[701] *Ibid*.
[702] For instance, English cases are introduced briefly, see *Morgan* (n 493), and *O'Brien* (n 22). Australian cases are also discussed *Johnson* (n 155).
[703] Chen-Wishart (n 23), 235.
[704] *Etridge (No 2)* (n 22) is the predominant focus of his 2002 article on the rationale. Yet it also fails to apply the rationale to the facts of the case in a detailed and structured manner. More simplistically, Bigwood considers that a fiduciary relationship could be found in *Etridge (No 2)* between the plaintiff and the defendant bank, which was exploited in order to gain an advantage.
[705] Bigwood (n 447), 448.

legitimately explain hard cases of undue influence like *Allcard*.[706] Even if Bigwood developed a more complete account explaining how *Allcard* involved exploitative conduct that unduly influenced the claimant's gifts, the rationale would still be an unjustified account to explain decisions in similar religious cases, for the reasons now discussed.

Where religious figures receive money to benefit their religion, either for a specified cause or to be used as they see fit, that person will hold a fiduciary duty under the rationale, and it is inevitable that they will breach their duty of loyalty owed to adherents. This is demonstrated by considering an example. A Sikh gives money to a Gyani (a Sikh scholar) to set up a Gurdwara (place of worship) with the intention that both Gyani and Granthi (ceremonial leaders) use it for accommodation or a place to eat. Here, the presumption of influence based on fiduciary principles would subsequently be raised in the rationale, as the religious figures have received a benefit as a result of the positions held. The presumption of influence arises regardless of whether donations are typical of the religion or specified by religious beliefs; a conflict inevitably arises between the religious interests and the strict duties of loyalty owed by fiduciaries.

Foreseeably, the rationale also captures many other instances of religiously motivated gift-giving. The proximity limitation applies less readily in contexts where gift-giving is an inherent part of an adherent's religious experience, as discussed below.[707] This is not *de facto* objectionable, as not all religions are funded in this way. Additionally, not all breaches of fiduciary duties in the way conceived of by Bigwood will be legally challenged. However, where gifts to religious officials or institutions are motivated by religious faith, there is little to

[706] Chen-Wishart (n 23), 237 who describes these as "clean cases."
[707] For instance, this is part of religious experiences for Muslims and one means of helping to achieve salvation upon death, see Mona Moufahim, 'Religious gift giving: An ethnographic account of a Muslim pilgrimage,' (2013) Marketing Theory, 13(4), 429-430.

prevent an aggrieved former adherent from challenging the lawfulness of their gifts at a later date. The rationale, therefore, fails to examine the temporal nature of relationships and explain why a presumption of influence is always justified in such contexts. Accordingly, the strictness of fiduciary duties is overinclusive when applied to religious contexts.

The intended limits set by the 'proximity limitation' does not mitigate the rationales over-inclusive nature, as it is also inappropriate in religious contexts. Many religions involve some form of donations, for example, during religious sermons or tithe payments.[708] Further, donations may be made to achieve greater levels of knowledge.[709] Alternatively, adherents may donate the entirety of their assets to a religious institution by submitting to vows of poverty, as in *Allcard*. These sorts of donations are likely to be anticipated by most adherents of faiths that involve similar forms of donations. New converts may, however, not anticipate such donations, yet presumed undue influence would not be relevant to such scenarios. It is unlikely that a relationship of any kind exists between those individuals and the religious official. In other faiths, mandatory gift-giving or financial commerciality may be treated as an illegitimate exercise of religion by adherents of the opinion that "proper religions do not charge."[710] This distinction, although crude and broadly generalised, sheds some light on the internal activities of religions. Considering a donor's religious motivations for donations demonstrates that gifts are often an inherent part of religious experiences. Accordingly, the ability of claimants to bring undue influence claims on the basis of the rationale is very unlikely to be limited by the proximity limitation. It should be questioned whether courts could effectively determine whether inducements stem from the fiduciary (a religious figure), from religious texts, or from

[708] A practice common for Jehovah Witnesses, see generally, Leonard Bupanda, *The Tithing Dilemma and the Triumphs of Love*, (AuthorHouse 2013).
[709] A practice adopted in Scientology, see James R. Lewis, *Scientology*, (OUP 2009), 190-198.
[710] Edge (n 15), 387-388.

the donor's reflections on what their religion requires of them (as in *Hartigan*[711]). Consequently, the strict fiduciary-based approach is not diluted to an appropriate degree, as it may initially seem to be through the 'proximity limitation.'

Analysis of proximity is also likely to bleed into the rebuttal stage under the rationale, which is a troubling prospect for religious defendants. In practice, religious defendants would likely experience real difficulties in providing evidence to rebut a presumption of influence if they cannot firstly show a lack of proximity between gifts and the conflict of their fiduciary duties. The difficulty is compounded if independent advice has not been received by claimants, even if it was suggested by defendants before property was gifted. As mentioned above, it is unclear what impact independent advice would have on claims following this rationale. Accordingly, religious defendants are disadvantaged compared with scenarios where financial transactions to religious figures are not made because of the religious motivations of donors or promisors.

The potential for the rationale to produce unprincipled decisions on liability is made more likely by the lack of applicability of the 'incentive limitation'[712] in religious contexts. Fiduciary status imposed on religious figures in the way described is unlikely to offer a sufficient safeguard against unprincipled findings of undue influence where there has been no exploitation. Consider a fiduciary whose personal interests may be furthered by a gift that had not been directly caused by them, but not prevented by them. X, a religious official, may have heard from Y, an adherent, that Z, another adherent, informed them that they intend to give money to X to continue their religious ceremonies. The gift is later made to X. Here, the benefit experienced by X is only incidental to the benefit received by the religious institution X is a

[711] See page 64.
[712] Bigwood's conceives of the limitations as assessments that need not be determined jointly for the presumption to arise. Accordingly, in this 'either' 'or' analysis, it is more likely that the presumption will be raised against defendants.

part of. This benefit is received by X by acting out the religious duties owed to adherents. Duties could include advising adherents how they can live righteous lives and ensure a good afterlife, and voluntary donations may be required for these services. Accordingly, the benefit received by X has only been produced indirectly from X's fiduciary relationship with Z. If there is no disregard for the intended religious purposes motivating similar gifts, for instance, evidence exists that X uses gifts for private activities, it is unclear how the motive pursued by both parties is anything but religiously motivated. The conduct cannot justifiably be stretched to be defined as exploitative. The gifts are intended to benefit the religious institution more than X, but X nevertheless benefits, as it helps them to fund their religious practices.

Foreseeably, the rationale would capture this sort of conduct where there is a breach of fiduciary duty but no exploitative conduct in many informal religious settings where religious officials are directly gifted property by adherents. This analysis demonstrates how, in practice, decisions could give rise to judicial reasoning based on legal moralism. I agree that the law is morally illegitimate in prohibiting what is considered immoral conduct even where that conduct does not cause harm to the acting individual or another.[713] In Bigwood's rationale, relief in these sorts of cases could only be based on an implicit view of what constitutes an acceptable transaction between a religious fiduciary and adherents in scenarios like those mentioned. The presumption of influence, which is based on fiduciary duties is, therefore, unjustly overinclusive and the limitations set out by Bigwood do not offer any real safeguards against such a presumption arising.

Bigwood may argue that these scenarios are instances of passive exploitation where defendants commit some degree of wrongdoing that justifies intervention. However, for this conclusion to

[713] Feinberg (n 522), 12.

be correct, the definition of exploitation would be interpreted so broadly that it would essentially capture any conduct that could incidentally be motivated by a fiduciaries' personal interests. Bigwood seems to anticipate such criticism in his commentary on Lindley J's judgment in *Allcard*:

"For the smaller advantage received by the fiduciary, the less motivated he is likely to have been to use (hence abuse) his special position of influence over his beneficiary in order induce (actively) or receive (passively) the impugned gift. At some point, the incentive is reduced to such an extent as to destroy altogether the fiduciary's motive for using his influence over his beneficiary, hence rebutting the generalisation upon which the presumption of such abuse is founded..."[714]

There are problematic aspects of this analysis,[715] but only one is relevant to the present discussion. In situations of gift-giving motivated by religious faith, motives or incentives endorsed by fiduciaries in relationships with adherents are usually based on shared understandings of religious beliefs and practices. The motive for asking for, or accepting, gifts in religious contexts, as in *Allcard*, is unlikely to vary in degree, or reach a point in which is it so reduced that the defendant's incentive is destroyed in the way described by Bigwood. Accordingly, the rationale is unlikely to provide a clear distinction between exploitative and lawful behaviour in religious cases. Consequently, it is arguable that the concept of exploitation becomes redundant in assessing liability and the rationale is essentially based on strict fiduciary duties to determine when influence becomes undue.

[714] Bigwood (n 27), 448.

[715] For example, why are only large gifts considered to be susceptible to undue influence? This seems an unprincipled distinction that remains from *Allcard*. It is most easily highlighted by considering someone who influences people to give them small sums of money or property but reaches a very wide audience. That person could easily obtain the same money as that involved in *Allcard*. The conduct is the same in the case of small gifts, only the total amount is different. All donators could bring a joint claim to seek the proportion of the total they paid.

Ultimately, when applied to common religious scenarios, Bigwood's rationale greatly risks unprincipled and unjust outcomes for religious defendants. As demonstrated, the fiduciary grounding of the rationale may rely on moralistic reasoning to determine when influence becomes undue. This conclusion does not, however, mean that exploitation has no place in understanding undue influence. The main issue identified with this rationale is the imposition of fiduciary duties in contexts involving religious officials. The suitability of a more refined understanding of exploitation is explored in chapter 7.

6.1.3. Chen-Wishart on Perfectionism, relational autonomy and harm

Chen-Wishart's dualist rationale is the latest of the three accounts seeking to develop an appropriate framework to explain the operation of presumed undue influence. Consequently, it has the benefit of building on Birk's and Chin's claimant-sided account and Bigwood's defendant-sided account. The combination of claimant-sided and defendant-sided principles is explicitly contained in an account based on impaired will and wrongdoing. The two principles are set within a Perfectionist account of positive autonomy advanced by Joseph Raz.[716] The rationale is relational in nature and seeks to take account of the special nature of the relationships entered into and enjoyed by individuals.[717] It is a welcome addition to the rationale debate; Chen-Wishart's account is deeply rooted in normative literature and offers positive lessons for the monist accounts considered in this chapter.

[716] Based on the theory proposed in Raz (n 28).
[717] *Ibid*, 155.

In the hybrid account claimant autonomy is the fundamental concern,[718] which is defined as a value that trumps all others.[719] For Chen-Wishart, autonomy is not simply viewed as another value amongst others that should be respected in law and politics;[720] it should be actively enhanced and protected.[721] Chen-Wishart's analysis of autonomy concentrates on Raz's conception of positive autonomy advanced in *The Morality of Freedom*.[722] Autonomy is seen to flourish in relationships providing guidance and support because they help individuals to create their own identity.[723] The relational analysis of autonomy conducted by Chen-Wishart is a new and positive introduction to the rationale debate.

On this formulation of autonomy, legal states must create and monitor valuable options for individuals in their pursuit of the good life.[724] By adopting moral value pluralism, the range of potentially adequate options worthy of promotion is unspecified.[725] A broad margin of toleration is considered appropriate in order to determine which options and justifications for those options are adequate. The margin of appreciation is intended to protect social forms that help to ensure cultures are cultivated and can survive.[726] To distinguish between what options are valuable and which are repugnant, states must assess whether an option enhances or restricts autonomy to an unacceptable degree. For instance, a person who willingly agrees to be a slave (often discussed in moral jurisprudence) is an example of a repugnant option that should be prohibited by states under this conception of autonomy because it restricts autonomy

[718] Chen-Wishart (n 23), 240-242.
[719] Citing John Rawls, *A Theory of Justice*, (Harvard University Press 1971) at 239.
[720] *Ibid*.
[721] *Ibid*.
[722] Distinct from negative autonomy, which is typically defined as freedom from coercive interferences, Raz (n 28), 410.
[723] Chen-Wishart (n 23), 242.
[724] Raz (n 28), 412.
[725] See *ibid*, 381 & 425.
[726] Chen-Wishart (n 23), 248.

in an unacceptable way.[727] Despite agreeing to the commands of their master in whatever context, Raz believes that these individuals do not make autonomous choices since they do not act independently and have given away their ability to act autonomously again. On this reasoning, if an option hinders an individual's autonomy in a real and substantive way and causes them to act without independence, it is a repugnant option and states should eliminate it.[728]

The analysis of the willing slave example demonstrates why this understanding of autonomy is Perfectionist in nature. Raz conceives of the autonomy principle as an ultimate good in his account of legitimate political and legal action by appealing to normative reasons to justify this position. Raz does not allow room for alternative viewpoints on what other good(s) should set limits to that power. Raz's account is not, however, subject to the same criticisms I have already made of legal moralism to the same degree.[729] Despite clear overlaps between the two traditions, Raz's Perfectionist conception of autonomy is less susceptible to criticisms that it amounts to a strong form of moralism. Raz appeals to reasoned-based moral reasons to justify legal intervention, not moral beliefs or feelings of distaste of a given society.[730] Further, the account advanced by Raz endorses moral pluralism, which promotes that different moral views can be held by individuals. This includes the ability of individuals to make choices that others may view as poor ones. Accordingly, the threshold of what constitutes good reasons for legal intervention is much higher than the accounts of moralism referred to in this chapter.[731] Raz's

[727] See generally, Feinberg (n 29), 71-81 & John D. Hodson, 'Mill, Paternalism, and Slavery,' (1981) Analysis, 41(1), 60-62.
[728] Raz (n 28), 411.
[729] Feinberg has argued that legal perfectionism is a form of moralism (n 522), 219 & 277-279.
[730] John Stanton-Ife, "The Limits of Law", *The Stanford Encyclopedia of Philosophy* (2016) <https://plato.stanford.edu/archives/win2016/entries/law-limits/> section 4. Accessed May 2020.
[731] I discuss this position in more detail on pages 202-203.

Perfectionism allows for a greater range of acceptable conduct and reasons for what constitutes adequate justifications for that conduct.

Alongside this conception of autonomy, Chen-Wishart also endorses Raz's specific formulation of a Perfectionist harm principle. In the hybrid rationale, the harm warranting legal intervention falls into three categories: harm to autonomy enhancing social bonds; harm to legal institutions that support voluntary transfers of property, and; harm to an individual's future autonomy.[732] The existence of any of these harm justifies intervention in her rationale because it prevents defendants from continually exploiting their relationship with donors or promisors.[733] Chen-Wishart submits that instances of undue influence involve donors or promisors who "let their guard down" because of the nature of the relationship with defendants, which is then exploited by defendants, causing them to suffer one of the harms.[734] The harm principle aims to limit the restrictions on individual autonomy imposed by courts.

The limits of the doctrine are also set by the constitutive nature of relationships. Chen-Wishart believes that "Going beyond the boundaries [of the relationship] puts [he/she] him [defendants] 'off-side' and tips [he/she] him into the territory of worthless choices which cause harm to an autonomy enhancing social form and legal institution, and usually also to the claimant's future autonomy."[735] On this understanding, undue influence can be used by states as a justification for determining repugnant choices and prohibiting those choices because of the harm it causes to individuals.

[732] Chen-Wishart (n 23), 248-250.
[733] *Ibid*, 252.
[734] *Ibid*, 252-253.
[735] *Ibid*, 253.

Impaired will forms part of this rationale and is assessed in a more nuanced way than in Birks and Chin's account. Chen-Wishart discusses how hard it is to determine whether someone has truly consented to a transaction. By adopting Hart's analysis of consent in contractual agreements, a 'thick' account of consent is declared more appropriate in an undue influence rationale than the 'thin' kind set out by Birks and Chin.[736] On a thick account, individuals can expressly engage in consensual transactions, but can nevertheless be excused from their contingent responsibilities.[737] Consent is, therefore, relevant to the application of Chen-Wishart's rationale at times, but ultimately, not the "be all and end all of transactional liability."[738]

Chen-Wishart argues that a thick account of consent provides a better way of understanding consent in cases like *Allcard*. It is submitted the claimant must have exercised their autonomy when making gifts to the defendant. Chen-Wishart considers that to argue otherwise would be inaccurate.[739] Consequently, consent is a background factor in this rationale that need not be shown to be lacking when the transaction was made. Claims can still be successful where undue influence can somehow be *inferred* by courts based on the circumstances of the party's relationship.[740]

Wrongdoing also features in Chen-Wishart's rationale as a corollary of the harmful conduct specified. Accordingly, under the positive conception of autonomy considered, violating an individual's future autonomy is both wrongful and harmful. The violation of future autonomy subsequently hinders an individual's ability to pursue what options are valued by them to

[736] *Ibid*, 244-246.
[737] *Ibid*, 246.
[738] *Ibid*.
[739] *Ibid*, 243.
[740] *Ibid*, 253.

varying degrees, depending on the extent of the harm inflicted. Chen-Wishart views this as a wrong. At times, the violation will be minimal and at other times, as argued by Chen-Wishart, it will be particularly severe. In the rationale, wrongs vary in intensity and it seems that they need not be intentionally caused by defendants. The violation of an individual's autonomy has a tangible impact on the person and their interests, which is categorised as a harm. Therefore, in this Perfectionist account of autonomy, there is harm where there is a wrong and *vice versa*.

The principal aim of the rationale is to explain 'clean cases,' "where the Court found no diminished capacity by the claimant and no wrongdoing by the defendant, but still inferred undue influence from the relationship of influence between the parties, and the transaction which 'called for an explanation.'"[741] In essence, these are the hard cases I referred throughout part I. Following the rationale, defendants are not let "off the moral hook," even where claimants have consented to transactions and the defendant's conduct cannot be described as actively exploitative.[742] Chen-Wishart argues that *Allcard* is an example of this and is incapable of proper explanation by either of the monist accounts examined above.[743]

In attempting to achieve this aim, Chen-Wishart applies her account to the existing doctrinal test for presumed undue influence. The first stage of the test, where the transaction "calls for an explanation," is explained to arise because of the abnormality of transactions. The abnormality conceived of here occurs in two ways. Firstly, where transactions have a significant impact on the claimant's welfare. The gifts in *Allcard* are judged to be an example of this type of abnormality.[744] Chen-Wishart argues that the gifts were "objectively

[741] *Ibid*, 237.
[742] *Ibid*, 260.
[743] The battle between impaired will and wrongdoing is viewed as a war of "attrition." This is demonstrated by the identification of problems and how both approaches fit with precedents (some of which have been considered) and their defective use of language in theory and practice, see *ibid*, 236-239.
[744] *Ibid*.

inappropriate" because they failed to account for the possibility that the donor may later leave the sisterhood, at which point they would subsequently be without any assets.[745] The gifts are considered to have substantially undermined the claimant's future autonomy.[746] It is also argued, that even if the original gifts were not objectionable for this reason, the defendant's refusal to return whatever remained when the claimant left the sisterhood "subverts the relevant social norm."[747] Chen-Wishart labels this as objectionable because the defendant's obligation to the claimant was a continuing one that needed to take account of changes in the claimant's beliefs, as well as how this would impact on their relationship.[748]

Secondly, abnormality exists where the transaction is not normally made in the type of relationship between the parties.[749] The first stage of the presumed undue influence test requires claimants to establish that a transaction 'calls for an explanation' "if it entails a disadvantage that would 'have been obvious as such to any independent and reasonable person who considered the transaction at the time with knowledge of all the relevant facts.'"[750] *Allcard* did not feature in the discussion of this point. Instead, Chen-Wishart considers a nonreligious undue influence case to elaborate on what this conception of abnormality covers. In *Building Society v Dusangh* [2000][751] it was submitted, "…guarantees by parents to support loans to their children, while improvident for the parents, are regarded as unexceptional and 'capable of reasonable explanation on the basis of parental affection."[752] The focus of this second limb

[745] *Ibid*.
[746] *Ibid*.
[747] *Ibid*.
[748] *Ibid*. This analysis is extended to other cases to justify relief in cases where elderly claimants would not have the resources to meet the contingencies of living to an old age. For example, *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA) & *Hammond v Osborn* [2002] EWCA Civ 885; [2002] 6 WLUK, *ibid* ft 110.
[749] *Ibid*, 254.
[750] Quoting *Bank of Credit & Commerce International SA v Aboody* [1990] 1 Q.B. 923 (CA); [1989] 2 W.L.R. 759 [965] (Slade LJ), *ibid*, 255.
[751] 80 P. & C.R. D.20.
[752] Chen-Wishart (n 23), 256.

of the abnormality test is, therefore, on the type of relationship held between the parties and what is typical or expected conduct in that relationship.

Chen-Wishart explains that defendants can rebut presumptions of influence by showing an appropriate explanation for transactions through one of three ways: (I) claimants have an acceptable explanation for the transaction, and so defendants have not failed to protect the claimant's welfare. (II) it can be demonstrated that claimants have actively exercised their judgment when entering into the transaction and did not simply choose to trust the defendant. In this scenario, no relationship of influence is operative, and the defendant owes no obligation to claimants to start with. (III) claimants received adequate independent advice and defendants have successfully shifted their obligation to the independent adviser, leaving defendants free to deal at arm's-length and self-interestedly with claimants.[753] Each of these is considered to show that transactions are "the spontaneous act of the donor under circumstances which enabled him to exercise an independent will."[754]

Despite signs of real promise, the hybrid rationale is overinclusive and subject to similar concerns and criticisms aimed at the monist accounts examined earlier. Chen-Wishart has misconceived the nature of religious relationships in cases like *Allcard* at times, even though the account is based on an understanding of relational autonomy. I now demonstrate how the rationale does not appropriately explain or identify when religious influence becomes undue without making objectively lead inferences on defendant conduct. Consequently, Chen-Wishart does not fully deliver on the promise that this account legitimately explains why

[753] *Ibid*, 261.
[754] Quoting *Allcard* (n 6), 171 (Lindley J), *ibid*, 260.

defendants in hard cases, or to use her terminology 'clean cases,' like *Allcard*, unduly influenced the claimant's gifts.

One problem with the rationale is that the potential harms suffered by individuals seen to justify intervention are construed too broadly. In particular, harm to an individual's future autonomy is a problematic aspect of the harm principle endorsed. Gifts of property will inevitably impact on a donor's future autonomy to some degree. By relinquishing property rights altogether or the enjoyment of them, the diversity and amount of assets held by a donor is reduced, at least at the point transactions are completed. However, a reduction in assets should not by itself be construed as wrongful and harmful simply because it could later negatively affect a donor's interests when their circumstances have changed. Improvidence should not inevitably be seen as a wrong. Chen-Wishart's discussion of *Allcard* suggests that a reduction in assets is potentially a harm in all instances where it could affect the claimant's future autonomy if the reduction is significant. Since undue influence can be inferred and need not be proven in the rationale, this seems true even where though there are no signs of exploitation, coercion, or a lack of consent in a thick sense, as defined by Chen-Wishart. In *Allcard,* there was only a possibility that the transactions could later harm the donor's future autonomy because the claimant could have foreseeably lived at the sisterhood and obeyed rules of poverty until she died. Yet, this fact does not forcefully justify why donees are subject to a continuing obligation to set aside a proportion of the money received in case donors later change their religious beliefs. Neither should donees be required to return whatever is left of the gifts if the donor later decides to change their beliefs.[755] Realistically, it is impossible to determine with any

[755] The obligation raises additional questions that increase the risk of unjust outcomes. For example, how would the donee become aware of this obligation? Also, what proportion is considered suitable, and would this depend on how much was given? Could this affect the range of remedies available to claimants? Such questions were not considered by Chen-Wishart.

degree of precision whether someone will change their religious beliefs or their need for additional assets, where they have subsequently fallen on hard times.[756]

Additionally, donors, like the claimant in *Allcard*, make gifts to help further their religious and spiritual practices at the time, which they genuinely believed in before meeting the donees. Accordingly, this aspect of the harm principle fails to consider the temporal nature of undue influence and why harm should not be construed over such a long period. Autonomy is a much more complicated matter than this, even under this rationale. It is important to assess whether the donor's autonomy has varied over the course of the relationship with defendants given how much this can change over time, and how it can impact the motivations for gifts. This analysis is especially forceful if as Chen-Wishart argues, individuals must be allowed to pursue their conceptions of the good life through the options available to them.

Moreover, the consequences of extremely improvident financial transactions should not outweigh the donor's individual choices, where autonomy is viewed as the ultimate goal of the law. Positive autonomy advanced by Raz and adopted by Chen-Wishart endorses moral value pluralism. Consequently, individuals must have the ability to make poor choices, where they believe at the time of transactions it will enhance their autonomy in some way.[757] If that individual subsequently changes their mind on the legitimacy of the transaction or the

[756] Theories have been proposed on how to determine whether current thoughts will replicate future thinking, see Jennifer Morton, 'Deliberating for Our Far Future Selves,' (2013) Ethical Theory Moral Practice, 16(4), 809–828. However, this aspect of the temporal nature of decision making is unnecessary for the rationale developed in chapter 7.

[757] There is wider research on the legitimacy of protecting an individual's future options. Feinberg, for instance, submits that states are not generally justified in limiting an individual's autonomy because it is viewed as a bad choice, or to protect future options for individuals. This is argued to be an illegitimate violation of future autonomy at the time the action is being considered by the individual and not retrospectively, see Feinberg (n 29), 67-69. Decisions like these can only be prohibited through a soft form of moralistic reasoning where there is also exploitation, this is considered to apply to ticket scalping, blackmail and prostitution because of the nonexploitation, 81. Focus here is on the financial harm of undue influence and explaining why Chen-Wishart's rationale is not limited to contexts involving exploitation. This is a key distinction between Feinberg's analysis, which explains why moralistic reasoning should not apply equally here.

perceived benefits do not come to fruition, that is unfortunate and frustrating for the donor. However, the donor accepted this risk when they exercised their autonomy at the time of entering into the transaction. If that poor choice does not reach the level where it can be considered morally illegitimate and repugnant under the Razian conception of autonomy, their autonomy has not truly been wrongfully harmed by entering into the transaction. Repugnant options are extreme restrictions of autonomy. For instance, the 'willing slave' scenario considered above. It is classified as a repugnant option because it is a complete abdication of self-governance, rather than a choice that could potentially enhance or reduce autonomy.[758] The threshold of Raz's conception of autonomy is intentionally set so high to allow for moral value pluralism, which is especially important in religious contexts where beliefs and practices are often very different, some of which may seem ridiculous to nonbelievers. Extremely improvident financial transactions that are later regretted by donors do not reach this threshold.

Harm to one's future autonomy as explained in Chen-Wishart's rationale should be abandoned. Its inclusion makes it easy for aggrieved former adherents who have donated to religious organisations to show that they have wrongfully suffered this type of harm. This makes it highly likely that claims will be successful since there is no real practical limit to this type of harm, or at least none is specified by Chen-Wishart. As a result, it is unclear how remote or insignificant this harm needs to be for claims to fail. The rationale consequently creates an exceedingly generous returns policy for donors, which is only limited by the defence of laches considered in claims, not by the rationale's foundational principles.

[758] For succinct and cogent reasons why slavery agreements are not valid under Liberalist reasoning see Feinberg (n 29), 74-81.

Chen-Wishart's focus on positive autonomy should also address when a claimant's actions are understood as autonomous. There are hints of this on occasions, for example, in considering evidence that could be used to rebut the presumption, it is submitted "(II) the claimant did actively exercise [his/]her judgment in relation to the transaction, rather than simply choosing to trust the defendant, so that no relationship of influence was operative and the defendant owes her no obligation to start with."[759] Attempts to rebut the presumption of influence need to show the transaction was "the spontaneous act of the donor under circumstances which enabled him to exercise an independent will"[760] and, therefore, they accepted the consequences of future deprivation. However, it is difficult to determine when claimants have exercised their judgement before making transactions, rather than simply trusting the defendant's conduct. Using consent in the thick sense is overly inclusive. Accordingly, Chen-Wishart does not treat claims that gifts are autonomously made and claims that gifts are not autonomous evenly.

It could be argued this objection could be overcome where claimants receive advice, which is set out in (II) above. However, what is it about advice that ensures that donors act autonomously, even if it is actively sought? The influence could be so strong on donors, especially in religious scenarios, that any amount of sound advice would not mean that they actively exercise their own judgment. Further detail is needed to determine some form of a baseline for understanding autonomy to ensure (II) works effectively at the rebuttal stage.

The understanding of what should be raised in the rebuttal stage also raises other concerns about injustice. In practice, the rebuttal stage could become superfluous in some cases, such as *Allcard*. Firstly, it is uncertain how far (I) should be interpreted by courts. In *Allcard*, an

[759] Chen-Wishart (n 23), 261.
[760] *Ibid*, 259.

acceptable explanation of the gift could be advanced; the donor wanted to join the order of nuns, and to do so was required to agree to vows of poverty. These facts are unlikely to apply just to this specific order of nuns. Other religions have such vows, for example, Catholics are regulated by Codes of Canon Law. Those vows are part of the specific religious experiences that are legally recognised as religious. The only available basis to reject this as an acceptable explanation for the transaction is to argue from the standpoint of moralism that the motivations for the gifts are objectively inappropriate. However, this conclusion does not fit into Chen-Wishart's Perfectionist account of positive autonomy. The religious rules have to be treated as normal motivations for transactions that fit into the "large margin of tolerance" of acceptable options for the rationale to stay consistent with the understanding of autonomy and pluralism incorporated.[761]

Similarly, (II) does not apply to cases of religious undue influence since this type of relationship automatically raises the presumption and this is not questioned by Chen-Wishart. Additionally, (III) specifying the role of independent advice in cases is equally troublesome. It specifies that advice must be "adequate" so that defendants shift their obligation to another, but little is said about what this may extend to. Chen-Wishart considers that in *Allcard*, any legal advice received after that made by her brother would not have been listened to as it would be seen as anti-religious.[762] Consequently, it could have been impossible for the defendant to rebut the presumption of influence under this understanding of undue influence.[763] If advice is heard, but not listened to, then it must be true that the defendant still retains a continuing duty to care for the welfare of the claimant following the rationale. Accordingly, the defendant would not have been free to deal self-interestedly. It seems more likely that these sorts of

[761] *Ibid*, 254.
[762] Chen-Wishart (n 23), 238-239.
[763] *Ibid*, 260.

scenarios create a new phase in the relationship of the potential influence that would need to be subsequently rebutted. Where this takes place, and (I) is applied in the manner expressed by Chen-Wishart, it seems that defendants are unlikely to ever be able to rebut the presumption of influence, regardless of their actual conduct. Undue influence will simply be inferred from moralistic understandings of what constitutes reasonable reasons for gift-giving. In turn, this enhances the risks of unprincipled outcomes where there is no real loss of autonomy or finding of exploitation.

Chen-Wishart's rationale does not effectively engage with the nature of religious relationships and, therefore, cannot explain hard cases of undue influence, like *Allcard*. The rationale creates a real possibility that defendants will be unable to rebut presumptions of influence. If accepted in practice, this approach would prove to be a troubling development, as religious cases of undue influence have all largely been presumed undue influence cases since the latter half of the nineteenth century. Furthermore, the normative understanding of the harms advanced by the rationale are too broad and would likely lead to illegitimate decisions on defendant liability.

6.2. Conclusions

I have argued that the three leading, and most frequently discussed rationales for undue influence, are inadequate in explaining when religious influence becomes undue. As a result, the rationales cannot explain how English courts should regulate religious undue influence in a consistently principled way or offer a complete way to address the challenges considered in part I. The collective failings of the rationales can be grouped into categories.

The main criticism of the rationales relates to the general failure of the authors to consider how religious scenarios, which involve specific beliefs and practices, should alter how the test for presumed undue influence is applied by courts. This was an important task for each of the commentators who use *Allcard* to explain how the rationales operate in cases. The authors take a general approach and seek to justify the relief in *Allcard* but for the claimant's delay in bringing the claim as if it were a nonreligious undue influence case. Accordingly, both the religious nature of the cases and the party's religious relationships is largely ignored. The rationales treat intense religious feelings and instances of devotion as indications of undue influence when it motivates adherents to make gifts to religious institutions. Birks and Chin's account specifically fails to consider why dependence on religious figures, including advisors, may enhance an adherent's autonomy even if the dependence is significant. Bigwood's account premised on fiduciary duties and exploitation is arguably overly protective of a donor's interests. The wrongdoing rationale does not acknowledge that the duty to advise and duties of loyalty might be stronger in religious relationships in order to protect the short-term and long-term interests of adherents, or that religious figures will often receive some form of benefit in a wide range of scenarios. The limitations described by Bigwood are poorly designed and would allow aggrieved former adherents to bring undue influence claims for incidental benefits received by officials when a gift is later regretted. Unjustly, the success of that claim seems likely following Bigwood's account. Additionally, Chen-Wishart's account does not give weight to the different sorts of relationships that inevitably involve some form of influence, most relevantly religious ones, even though it is described as a relational account. Time is spent examining *Allcard* without determining when the rationale establishes that the gifts were unduly influenced by the defendant. Chen-Wishart clearly believed *Allcard* to involve undue influence and reached that conclusion by inferring that undue influence produced the transactions.

Another difficulty for the rationales in explaining hard cases is the incomplete or overly inclusive understandings of each rationale's fundamental principles. I argued that this created a real possibility of overregulation of gifts motivated by religious faith, despite the explicit limitations of the rationales. For example, Birks and Chin do not fully discuss what is meant by 'impaired will.' Instead, the four-limbed test set out to is conclusory rather than explanatory. The same is true for the inclusion of the term 'excessive dependence.' I discussed how this test could regularly produce unprincipled judgments in religious cases. Similarly, Chen-Wishart does not define what is meant by autonomy, and when the facts of cases are evidence of autonomous choice. Rather than appealing to broader philosophical and legal theory debates about autonomy, the analysis sticks to a Perfectionist conception and does not appeal to moral evaluations to determine the proscribed limits of autonomy. The rationale, therefore, incorporates a theoretical principle without defining fully how it should be applied in practice.

Moreover, I argued that Chen-Wishart's analysis of what harms should be prevented by the doctrine is too broadly construed. Inevitable harm generated by financial transactions, for instance, harm to one's future autonomy should not be treated as a leading reason justifying intervention. The harm described provides aggrieved adherents, or adherents that have fallen on hard times the opportunity, to claim back gifts without offering a strong justification.

I also established that each rationale endorses moralistic and paternalistic reasoning to help decide hard cases. I explained why both forms of reasoning are illegitimate considerations in an undue influence rationale. Such reasoning is needed to explain when influence becomes undue because of the vagueness of the accounts and the sorts of reasoning adopted by the authors. Birks and Chin's account allows subjective conceptions of impaired will and excessive dependence to influence judgments. In turn, this could give rise to both moralistic and

paternalistic reasoning. Additionally, Bigwood's account does not engage much with what exploitation consists of and how it applies in cases. The wrongdoing rationale relies more heavily on breaches of fiduciary duties. As demonstrated, breaches of those duties are often easily satisfied where exploitation cannot be found. The rationale, therefore, makes judgments based on moralistic reasoning and not on a clear understanding of exploitation. Lastly, Chen-Wishart implicitly seeks to guard against both variations of reasoning by allowing moral value pluralism in a Perfectionist account of autonomy. However, there are occasions, as highlighted, where this Perfectionist analysis is inconsistent with the rationale's fundamental aims. Findings of undue influence can be inferred on the basis of moralistic justifications on what is harmful to one's future autonomy.

A different problem identified with the rationales relates to the limits and justified boundaries of the rationales described by the authors. Each of the rationales generally offers an over-inclusive presumption of influence that would likely produce difficulties for religious defendants to rebut. At the conceptual level, Bigwood's limitations are sound, however, when applied to religious contexts, they do not impose any real safeguards for religious officials. Religious figures, who would be held to owe fiduciary duties in cases, would be found to breach their duty when they receive some form of benefit, even if it is not to be used for their personal interests. A presumption of influence inevitably arises in such scenarios. I also argued that the limitations, which bleed into the rebuttal stage of cases, have less applicability in religious cases. As a result, religious defendants would face great difficulties trying to rebut a presumption of influence compared to nonreligious cases where the presumption arises in social or professional settings. Chen-Wishart's rationale is subject to the same sort of criticism. I considered above that the three ways the presumption of influence can be rebutted are less available to religious defendants because they lack detail explanation and clear reasoning.

Lastly, each of the rationales fails to account for how influence changes over time, and why the relationships of parties may fluctuate in cases where gifts are made over the course of a long-term relationship. For instance, none of the rationales make a distinction between the range of gifts given to the defendant in *Allcard* and the alleged unduly influencing conduct. Each rationale freezes the presumption at the time of the first gift and applies it to all subsequent gifts. Accordingly, each gift is susceptible to a presumption of influence and none are severed from it because the rationales do not seek to question the legitimacy of automatic presumptions of influence.

Overall, the rationales have a number of failings that prevent principled determinations of when influence legitimately becomes undue in hard cases of religious influence. I have demonstrated throughout this chapter that this occurs at both a normative and practical level. Each account offers an inordinately generous returns policy allowing former adherents, who later regret their decisions to gift property to religious leaders and organisations, to seek relief years later. I consider that the financial harm caused by defendants needs some form of a causative link to reduce this concern. Further, the breadth of the rationales means that the only real way of limiting the success of claims is the defence of laches, which cannot have been the intention of the rationales, given the intended limits stated in each account. Consequently, none of the rationales offer a suitable option for reforming the understanding of presumed undue influence in English law. My conclusions on the ability of the three rationales to decide hard cases demonstrates that it is essential for an appropriate rationale to be detailed and normatively justified by reference to wider philosophical discussions. Chen-Wishart demonstrated the benefits of engaging more widely with such literature but failed to go far enough in describing and justifying the hybrid rationale.

A new rationale must be developed with a specific focus on religious claims and take account of how considerations of religious values and motivations benefit judicial decision making in hard cases. In doing so, a rationale could address both the challenges and questions that apply uniquely to religious cases, as well as the general doctrinal challenges created by the test for presumed undue influence. A new rationale based on this reasoning would benefit the English understanding of how the test for presumed undue influence should determine when religious influence becomes undue.

Chapter 7: The Integrative Rationale for Presumed Undue Influence and *s2 FA06*

7. Introduction

In this chapter, I set out my integrative rationale of autonomy and exploitation for presumed under influence and *s2 FA06*. Based on the insights and lessons outlined in chapter 6, I argue that this rationale promotes more principled regulation of both legal wrongs in religious contexts. Accordingly, I re-engage with how English courts should interpret *s2 FA06* in religious cases. Overall, I develop understandings of the existing tests and language associated with both legal wrongs to reduce the discretion afforded to judges which improves the reasoning of cases, and ultimately, enhances the legitimacy of decisions on defendant liability.

To satisfy this aim and promote a revisionist understanding of both legal wrongs, I do not seek to understand the relevant ways in which the wrongs may be understood generally. Accordingly, the following analysis is not based on conceptual analysis defined as, [764] "[a]n analysis of concepts is an analysis of the ways in which words function in our actual language games, which must be based on observation of linguistic practices and prevailing linguistic intuitions. Conceptual analysis cannot be revisionist."[765] Instead, I engage with applied jurisprudence to determine the correct boundaries of the foundationalist concepts that I argue are important to the rationales for both legal wrongs.[766] In essence, I demonstrate that certain facts in cases show a more foundational basis that undue influence and fraud by false

[764] For a general overview of its usage in legal philosophy see Natalie Stoljar, 'What Do We Want Law to Be? Philosophical Analysis and the Concept of Law,' in Wil Waluchow et al, *Philosophical Foundations of the Nature of Law* (OUP 2013).
[765] Andrei Marmor 'Farewell to Conceptual Analysis (in Jurisprudence)', in Wil Waluchow et al, *Philosophical Foundations of the Nature of Law*, (OUP 2013), 212.
[766] This type of reduction is metaphysical or constitutive and about the nature of things, rather than about concepts and how they are referred to, *ibid*, 216-217. For wider discussions on methodology in jurisprudence and legal theory scholarship see Halpin (n 614), 67-109 & Alex Langlinais and Brien Leiter, 'The Methodology of Legal Philosophy,' in Herman Cappelemen et al, *The Oxford Handbook of Philosophical Methodology*, (OUP 2016).

representation produce gifts motivated by religious faith. This type of methodology is typically used in jurisprudential discussions of "what is law?"[767] but there is no clear reason why it cannot be used to discuss specific legal doctrines.

The legal theory analysis conducted in this chapter is both descriptive and evaluative. I endorse an "indirectly evaluative approach,"[768] which is defined as what is valued as important for the practice of law, rather than a direct evaluation that upholds what the practice of law values as important.[769] In wider legal contexts, this approach "…seizes on the ability to provide authoritative determination of social relations without recourse to further moral argument as the key characteristic."[770] Such reasoning applies in part to the analysis of autonomy, namely, a Perfectionist understanding of what courts can legitimately determine are valuable options for individuals within a margin of appreciation.

The indirectly evaluative approach combined with a normative approach explains the other principles featuring in the rationale.[771] The normative approach advances reasons why the usage of particular conceptions of autonomy and exploitation are justified in religiously motivated gift-giving contexts. The normative approach "…seizes on the deployment of normative argument as a key characteristic of the practice."[772] My analysis is "directly evaluative"[773] because it explains appropriate reasons for justifying intervention in both areas

[767] The first real engagement with this question and specific methodology is found in H.L.A Hart, *The Concept of Law*, (OUP, 3rd Edition, 2012), 1-17. The focus is on "general and descriptive" jurisprudence, 239-244 described as "descriptive sociology," xlv. For analysis of this methodology see Julie Dickson, Methodology in Jurisprudence,' (2004) *Legal Theory* 10 (3), 117-156.
[768] A phrase coined in Julie Dickson, *Evaluation and Legal Theory*, (Bloomsbury 2001), 51-70. It is used to refer to the methodology of Raz's work considered below. Also see Dickson (n 767), 117–156.
[769] Halpin (n 614), 78.
[770] *Ibid*, 85.
[771] Associated with Ronald Dworkin's writing in *Law's Empire* (Hart Publishing 1988), see *ibid*, 78 & Dickson (n 767), 122.
[772] *Ibid*, 85.
[773] Dickson (n 768), 51-54.

of law. This methodology incorporates an interpretivist approach that examines the crucial differences between individuals and communities and explains why those differences are important for understanding the nature of religious influence, and when it becomes unlawful. On this combined basis, the rationale limits how far the essential aspects of the rationale can be interpreted by courts within a reason-based margin of appreciation.

I propose a new understanding of how a dualist account can address many of the difficulties of regulating hard cases of religious undue influence. My rationale illustrates the importance of examining the religious relationships between claimants and defendants, and the religious motivations for gifts made over time. My integrative rationale examines a claimant's impaired autonomy to see whether it was caused by the defendant's wrongdoing. The rationale is predominantly defendant-sided because it focuses on the causative role of the defendant's influence and wrongdoing. The rationale also includes claimant-sided considerations. The combination of normative principles determines whether defendants have exploited a claimant's impaired autonomy in order to make a financial gain. For the reasons specified, it is not enough that the claimant's autonomy was somehow impaired before they made a gift. Causation must be established by proving that a defendant caused that impairment and subsequently violated the claimant's autonomy through their exploitative conduct. The existence of the claimant's impaired autonomy and the defendant's exploitative conduct, which produces the gift, provides strong justifications for finding presumed undue influence in cases.

The chapter subsequently discusses how the rationale applies to *s2 FA06*. I consider how autonomy and exploitation can be applied in a similar way in the criminal context in a way that offers a better explanation of how the existing statutory language of the offence should be interpreted by courts in religious cases. My analysis takes into account the possibility that

testing the falsity of religious representations is likely to be banned by courts where there is no clear evidence that the defendant misrepresents the state of their mind. In such cases, where there is evidence of exploitative conduct and the defendants satisfies the other *mens rea* requirements for *s2 FA06*, defendants should be found guilty of the offence. I also explain how testing the sincerity of religious beliefs should be considered by courts and how it fits into my rationale.

Autonomy and exploitation are of equal importance to the functional operation of my rationale. The normative understandings advanced below explain how each principle helps to set appropriate limits to the rationale and justifies relief in both areas of law. Decisions on liability are not made because individuals make poor decisions that were highly improvident for their future interests. I consider that individuals often make decisions that do not align with their long-term goals or desires. Nevertheless, those decisions will frequently be autonomous choices at the time and should be respected by the law in both areas.

Temporality is an explicit consideration in my rationale alongside autonomy and exploitation. The influence of time on the law is part of a growing trend in the socio-legal analysis of specific areas of law.[774] Current scholarship argues that the general omission to consider how time affects law and legal institutions is significant.[775] This view extends to different areas of legal

[774] See generally, Sian Beynon-Jones and Emily Grabham, *Law and Time*, (Routledge 2018); Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law*, (University of Toronto Press 2016) & Sofia Ranchordás and Yaniv Roznai, *Time, Law, and Change: An Interdisciplinary Study*, (Hart Publishing 2020).
[775] Beynon-Jones and Grabham (n 774), 1-3.

study,[776] most relevantly, to criminal law[777] and aspects of private and public law relating to fraud regulation.[778]

Law and legal institutions generally conceive of time as transpiring in a linear way.[779] However, concerning conceptions of autonomy and exploitation, this perspective lacks nuance as it does not account for relevant temporal factors. I agree that autonomy fluctuates over time.[780] In presumed undue influence and *s2 FA06* cases, courts should be required to consider changes to the claimant's or victim's autonomy over time. My analysis looks at practical reasoning and how individuals internally reflect on their short-term and long-term preferences in order to determine their true motivations for action. Accordingly, my rationale contains an internal view of temporality, which has principally been missing in the rational debate discussed in chapter 6.

Before moving onto the substantive engagement with the key areas of focus of my rationale, it is necessary to briefly examine a potential criticism of this approach. A fair criticism anticipated at this stage is that the rationale builds upon the existing academic debate discussed in chapter 6 and legal theory, which disproportionately considers the appropriate limits of civil liability. The discussion of criminal liability for financial transactions in religious contexts is, it must be conceded, either absent or cursory in the sources discussed below. However, this is a necessary move. By firstly focusing on the more direct application of the rationale to undue

[776] In family law contexts see See Ellen Gordon-Bouvier, 'The Open Future: Analysing the Temporality of Autonomy in Family Law,' (2020) Child and Family Law Quarterly, 32(1). For discussions relating to medical law, see Emilie Cloatre, 'Traditional Medicines, Law, and the (Dis)ordering of Temporalities,' in Beynon-Jones and Grabham (n 774).
[777] See Sinéad Ring, 'On Delay and Duration: Laws' Temporal Order in Historical Child Sexual Abuse Cases,' chapter 4 in *ibid*.
[778] Philip Ashton, 'Time-Spaces of Adjudication in the U.S. Subprime Mortgage Crisis,' in *ibid*.
[779] Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) UC Irvine Law Review, 4(5), 71-80 & Ring (n 777), 61-65.
[780] Gordon-Bouvier (n 776).

influence, I clearly explain my intended understanding of the rationale's fundamental principles, which will more effectively show what I am trying to achieve in this chapter. The civil law analysis also has the benefit of building on the failures of the rationales discussed in chapter 6, and more detailed judgments discussed in chapters 2 and 4, that is lacking in the criminal context. Setting out my analysis in this way makes it clearer how the rationale can also theorise *s2 FA06* in a way that leads to more appropriate regulation of religious fraud.

7.1. The integrative rationale and presumed undue influence

I have argued that each of the three rationales discussed in chapter 6 failed to explain hard cases of religious undue influence. The main reason advanced for this was that the rationales failed to consider the party's religious relationships that typically involve different degrees of influence and dependence than other relationships of influence. As mentioned, these relationships may change in intensity greatly over time and can involve a shared distrust of external advice. Additionally, the rationales did not provide strong justifications for deciding cases in practice. Despite this conclusion, I noted that the grounding principles of each account have degrees of applicability in other cases of undue influence. I submitted that each of the rationales inherently captured some of the essence of why certain conduct should be co considered unlawful in gift-giving contexts.

In this section, I build on my analysis of the three rationales and narrow down understandings of impaired will, autonomy and wrongdoing by considering a wider range of legal and philosophical literature. I subsequently use this analysis to demonstrate why my rationale for presumed undue influence more suitably explains when relief in religious cases should be

granted. The rationale is better able to determine when the defendant's conduct wrongfully impairs the autonomy of donors, which causes gifts to be made in religious contexts. My rationale also reduces the potential burdens faced by religious defendants listed in part I that arise when they attempt to rebut presumptions of influence. Ultimately, I establish why my rationale is capable of combatting my criticisms of the three rationales evaluated in chapter 6.

7.1.1. Conceptions of personal autonomy

Autonomy is a highly regarded ideal in moral philosophy,[781] politics, social policies,[782] and law.[783] Despite the great importance of the principle in these fields and the frequent discussions in scholarly work, it is a concept that cannot be precisely defined in law;[784] autonomy can only be appropriately characterised.[785] Typically, it is argued that at its most basic characterisation, autonomy is an ability for self-rule or self-government.[786] Some scholars claim that when autonomy is used to set limits to the law, it remains vague at best.[787] However, these commentators fail to give adequate respect to the quality and volume of scholarship seeking to pin down the normative foundations of the principle.

[781] For an overview of the vast array of theories see Gerald Dworkin, *The Theory and Practice of Autonomy*, (CUP 1988),1-12; John Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy,' (1988) *Ethics,* 99(1), 109–124.
[782] Dworkin (n 781), 10.
[783] For example, in Chen-Wishart's account. Also, contractual liability is argued to be premised on autonomy, see Conrad D. Johnston, 'The Idea of Autonomy and The Foundations of Contractual Liability,' (1983) Law and Philosophy, 2(3), 280.
[784] *Ibid*.
[785] *Ibid*.
[786] This also covers autonomy as a capacity, a condition, an ideal, and a right see Feinberg (n 29), 27-51. This thesis will only focus on the general usage of the term, however.
[787] Thomas May, 'The Concept of Autonomy,' (1994), American Philosophy Quarterly, 31(2), 133.

There are four leading, and at times, overlapping categories of personal autonomy: I) coherentist;[788] II) reasons-responsive;[789] III) responsiveness-to-reasoning[790] and; IV) incompatibilists.[791] Autonomy theorists endorse this categorisation either explicitly or inexplicitly.[792] Generally, accounts of autonomy aim to stick to one category, which provides a helpful means of grouping accounts. I adopt this categorisation to ease understanding and help achieve conceptual clarity on what each category means by autonomous action.

It is a challenging task to decide what category offers an appropriate foundation for an understanding of autonomy in a rationale for presumed undue influence. A proper conception must take into account and be compatible with forms of authority and other external influences that are common and important parts of daily life.[793] In the context of this thesis, the most important aspect of an individual's daily lives are their religious beliefs[794] and what relationships they form as a result of those beliefs.[795] I also take account of other areas of influence that give rise to individual preferences, including family life and well-being. Giving specific focus to these considerations narrows down which account of autonomy enhances the

[788] See Laura Waddell Ekstrom, 'A Coherence Theory of Autonomy,' (1993) Philosophy and Phenomenological Research, 53(3), 599-616 & Dworkin (n 781).
[789] See generally Tomis Kapitan, 'Autonomy and Manipulated Freedom,' (2000) *Philosophical Perspectives, 34(*14), 81-104 & Marina A.L. Oshana, 'The Misguided Marriage of Responsibility and Autonomy, (2002) The Journal of Ethics, 6(2), 261-280.
[790] John Christman, 'Autonomy and Personal History,' (1991) Canadian Journal of Philosophy, 21, 1–24.
[791] Peter Van Inwagen, 'The Incompatibility of Free Will and Determinism,' (1975) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition, 27(3), 185-199. For general commentary see Alfred R. Mele, *Autonomous Agents: From Self-control to Autonomy*, (OUP 2001), 211-237.
[792] Sarah Buss and Andrea Westlund, 'Personal Autonomy,' *The Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/> Accessed August 2019, ss 2.
[793] May (n 787), 133.
[794] Religious beliefs are highly influential on what choices are valued by adherents, for example, venture capital investments (see Justin Chircorp et al, 'Does religiosity influence venture capital investment decisions?' (2020) Journal of Corporate Finance, 62, 1-14); and election voting (see Aileen McColgan 'Undue Spiritual Influence: A Historical Analysis' (2017) King's Law Journal, 28(2), 279-308).
[795] Religiosity affects the motivations and constraints on social affiliation, Patty Van Cappellen et al, 'Religiosity and the Motivation for Social Affiliation,' (2017) Personality and Individual Differences, 113, 24-31. Religious test groups were found to change their beliefs on a numeric estimation task to be more in line with their religious peers than a control group who were not, see Patty Van Cappellen, 'Beyond Mere Compliance to Authoritative Figures: Religious Priming Increases Conformity to Informational Influence Among Submissive People,' (2011) International Journal for the Psychology of Religion, 21(2), 97–105.

ability of my rationale to distinguish between lawful and unlawful religiously motivated gifts in hard cases.

Coherentist accounts of autonomy

A coherentist understanding of autonomy is the most appropriate of the accounts for developing what counts as autonomous action in presumed undue influence cases.[796] Such accounts offer a suitable way of taking account of the nature of religious relationships and how religious beliefs alter the motivations for a donor's actions. Individuals are described as acting autonomously when the motivation for action coheres with some mental state that accurately represents their point of view on that action at the time.[797] Individuals do not act autonomously, if when acting, they occupy a point of view from which they repudiate that same action.[798] Coherence-based theories focus on the mental state of individuals as decision-makers and practical reasoners. Varying coherentist theories examine the individual's views on their long-term and short-term goals,[799] their character traits,[800] and how higher-order desires move individuals to act.[801] A wider range of other means of identifying an individual's specific state of mind and reasons for action also exists.[802]

[796] Coherentist based accounts such as Frankfurt's that apply autonomy to moral philosophy have received criticism, however, see John Fischer, 'Responsibility and Autonomy: The Problem of Mission Creep,' (2012) Philosophical Issues, 22(1), 167-179.
[797] Buss and Westlund (n 792), ss 2.
[798] *Ibid*
[799] Michael Bratman, *Structures of Agency: Essays* (OUP 2007).
[800] Dworkin (n 781).
[801] Harry Frankfurt, *The Importance of What We Care About*, (CUP 1988), 11-25. These specific theories are listed in Buss and Westlund (2018), ss 2.
[802] Buss and Westlund (n 792), ss 2.

I focus on Dworkin's coherentist theory of autonomy.[803] His account is arguably the leading coherentist conception of autonomy and more broadly, has been described as a seminal account of autonomy.[804] Dworkin's understanding of autonomy combines each of the means of identifying an individual's mental state and their reasons for actions just mentioned. Dworkin's theory of autonomy provides the opportunity for a rationale of undue influence to specifically take account of the nature of religious relationships, religious enthusiasm, and spontaneous gift-giving.

After setting out what this account means in detail below, I argue that this account of autonomy more accurately reflects how individuals think about entering into financial transactions, which extends to religiously motivated reasons for gifts.[805] I then build on Chen-Wishart's existing work on positive autonomy and consider what options the law should not prohibit in this context.[806] I submit that this joint analysis of autonomy creates a more detailed framework to assess cases and offers additional reason-based justifications for intervention. I consequently demonstrate how Dworkin's account can meet the challenge set by other autonomy theorists, more generally, that an appropriate conception of autonomy needs to take account of some external influences that provide, through stability, predictability, resources that enhance autonomy, but yet still retains an ability to accurately identify an individual's own behaviour.[807]

[803] Gerald Dworkin, 'Autonomy and Behavior Control,' (1976) The Hastings Center Report, 6(1), 23-28 & Dworkin (n 781).
[804] Christman (n 781), 112. It has been subject to much criticism as a conception of autonomy in moral philosophy. For example, Christman asserts that this account fails to offer an effective means of identifying a person's higher and lower-order desires are, 113-114.
[805] I argue this at a conceptual level and do not seek to empirically establish this is how individuals enter into transactions. Given the legal and philosophical nature of this thesis, I believe this is a justified response to determining an appropriate account of autonomy for an undue influence rationale.
[806] See pages 242 & 243-245.
[807] May (n 787), 134.

To reinforce why I have chosen a coherentist account for my rationale, I now explain why the other three categories of autonomy fail to offer a more suitable understanding of autonomy.

Reasons-responsive accounts of autonomy

In a reasons-responsive account of autonomy, individuals act autonomously if their mental processes creating their motives consider a wide range of reasons to engage or not engage in some action.[808] Individuals are required to examine the reasons that do not form part of their perspectives or views on choices before acting. The considerations made are, therefore, independent of the individual, making this an externalist understanding of autonomy.[809] Accordingly, individuals are not autonomous when they are unresponsive to reasons that justify some motives but not others. The individual's lack of consideration for the reasons to act or not subsequently fails to confer legitimacy on their action.[810] An inability to be moved by reasons may stem from a cognitive disability or a refusal to be moved by reasons.[811]

I reject a reasons-responsive account for my rationale because it offers an incomplete explanation of autonomous action. This category of autonomy requires individuals to act in accordance with the reasons for conduct when they are aware of them, and if they act

[808] Buss and Westlund (n 792), ss 2. For example, one account within this category is described as "taking responsibility" for actions, see John Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, (CUP 2000), 211-217. Two possible objections to this conception of autonomy, unrelated to this context are raised: the account seems to offer incentives for agents not to take responsibility for actions, 217-220; secondly, there may be instances of moral responsibility where the individual has failed to take responsibility, 220-222. It is argued briefly that the account prevents this from occurring, however, 217. For other criticisms of the account see Ishtiyaque Haji, 'On Responsibility, History and Taking Responsibility (Comments on John Martin Fischer's Presentation),' (2000) The Journal of Ethics, 4(4), 392-400.
[809] Externalist accounts of autonomy receive much criticism, see Stefaan E. Cuypers, 'The Trouble with Externalist Compatibilist Autonomy,' (2006) Philosophical Studies, 129(2), 171-196.
[810] *Ibid*.
[811] *Ibid*.

incompatibly, they do not act autonomously.[812] Accordingly, the approach cannot take account of the reasons why individuals may act incompatibly with the reasons they may have for action or inaction. Consider a parent who thinks about leaving all of their wealth to their children in their will, even though they are estranged. The parent would rather leave the property to a charity of their choosing to benefit more people. After reading about the Supreme Court decision in *Ilot v Mitson* [2017][813] (where, after twenty years of a mother and daughter being estranged, the daughter was found to be a reasonable dependent and able to claim a large percentage of their mother's estate) in a newspaper, the parent concludes that there is no point in leaving their assets to anyone but their children. The parent thinks that regardless of their intention to distribute their property as they wish to after death, their children could claim reasonable maintenance if found to be their 'dependents' under the relevant legislation.[814] The parent considers that this is likely. Accordingly, the parent decides to leave their assets to their children. In this scenario, the parent's action is incompatible with their genuine reasons for giving. On this understanding of autonomy, the parent is not acting autonomously.

However, this conclusion seems intuitively odd. Parents often act in ways that put the interests of others, mainly their children, before their interests and preferences when they do not wish to. Parents who act incompatibly with their reasons for acting when giving priority to their children's interests can only be interpreted as lacking autonomy through the paternalistic reasoning that the parent does not make a real choice for themselves; they are not moved by their real reasons for action. Accordingly, the reason-responsive account misses an additional factor that justifiably explains why the parent's action should not be described as autonomous to avoid being charged with the claim that it gives rise to paternalistic reasoning.

[812] *Ibid*.
[813] [2017] UKSC 17; [2018] A.C. 545
[814] Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(c).

There are also specific reasons for rejecting this category of autonomy in the context of undue influence. Firstly, consider a claimant who receives legal advice before making a gift. The advisor may inform the claimant that the gift is very improvident, and they should not comply with their religious motivations for the gift. If that reason not to act is ignored by the claimant because the reason does not align with their religious motivations, the claimant's choice to enter into the transaction would not be a true or a valid choice under this understanding of autonomy. However, as argued in a similar way concerning Birk's and Chin's discussion of impaired will, this conclusion is insulting and an inaccurate description of the claimant's conduct. Consequently, this account of autonomy fails to consider the relevance of incompatible reasons for action that are part of decision-making processes, which are highly relevant to religious contexts.

Secondly, the account gives rise to paternalistic reasons for intervention in another way. Individuals are offered incentives not to take responsibility for their actions,[815] which means the doctrine could be used as a returns policy for unprincipled decisions to make gifts. Accordingly, my analysis provides compelling reasons why this conception of autonomy is unable to guard against the sorts of concerns discussed in chapters 4 and 6. Consequently, such accounts provide unhelpful explanations of autonomy for the purposes of developing a legitimate rationale for presumed undue influence.

[815] See Fischer and Ravizza (n 808), 217-220.

Responsiveness-to-reasoning accounts of autonomy

A responsiveness-to-reasoning account of autonomy[816] considers that autonomy is exercised when individuals evaluate their possible motives for actions based on their own beliefs and desires, and this subsequently provides them with an opportunity to adjust their behaviour, as a result of that evaluation.[817] The most important part of an individual's reasoning process is deemed to be the evaluation of their own beliefs and desires. This account of autonomy requires individuals to distance themselves from their beliefs and desires and to see themselves as objective arbitrators of their reasons before deciding whether to act.[818] Evaluations enable individuals to decide what conduct should follow this reasoning, where that individual holds particular beliefs and desires. It is not important that individuals make accurate judgments about what action should follow.[819] Autonomy is still exercised where individuals hold false beliefs on why they should act in particular ways.[820]

On the face of it, this account looks quite similar to coherentist understandings of autonomy briefly mentioned and discussed further below. However, one key distinction between responsiveness-to-reasoning and coherentist accounts is that the former involves an additional externalist focus.[821] The former account accepts that individuals can be mistaken about whether they are truly reasoning;[822] individuals may not be aware that reflections that cause them to act have been influenced, and so those actions are not determined by their reasoning.[823] A

[816] A leading account is advanced in Christman (n 790).
[817] Buss and Westlund (n 792), ss 2.
[818] *Ibid*.
[819] *Ibid*.
[820] *Ibid*.
[821] *Ibid*.
[822] *Ibid*.
[823] *Ibid*.

responsiveness-to-reasoning account includes an added degree of objectivity needed to determine whether individuals have been influenced by another to act.

I do not accept a responsiveness-to-reasoning understanding of autonomy in my rationale for presumed undue influence for practical adjudication reasons.[824] Applied in practice, this account would most likely require individuals to hear advice before gifts are determined as independently motivated and lawful. Such action would provide a guarantee that donors have sufficiently distanced themselves from their beliefs and desires to an appropriate degree, which is indicated by the added degree of objectivity of the account. This account looks a lot like view (II) on the role of independent advice in presumed undue influence cases discussed in chapters 2[825] and 4.[826] However, the standard set by the account is too strict and relegates respect for independent will for moralistic understandings of appropriate transactions. Such reasoning is illegitimate in the context of this thesis as stated in chapter 6,[827] as it imposes an objective conception of appropriate gift-giving that often will not match up with the religious conceptions of obdurate believers.

Moreover, a rationale based on this conception of autonomy fails to consider the importance of the actual beliefs held by individuals. Religious beliefs, in particular, will often prevent individuals from evaluating other beliefs and desires held in a real way. As stated previously, the claimant in *Allcard* would most likely have treated independent advice as a temptation from the devil or not adequately taking account of the religious nature of the gifts.[828] Subsequently,

[824] There are general criticisms for why such an account should be rejected. This includes Christman's leading account. In Mele (n 791), 271-280 it is argued that it inappropriately focuses on the personal history of individuals. In Andrea C. Westlund, 'Rethinking Relational Autonomy,' (2009) Hypatia, 24(4), 26-49, it is submitted that Christman fails to consider the importance of relational autonomy.
[825] See page 79.
[826] See pages 145-146.
[827] See pages 187 & 199.
[828] See pages 145-146.

any advice heard is unlikely to have been accepted by the claimant as helpful, and less likely to be followed. Consequently, donors motivated by religious faith may not think it necessary to take a step back and evaluate their choices because of how forcefully their beliefs impact their motivations for action. Accordingly, this conception of autonomy is unable to address the specific religious regulatory challenges posed by the test for presumed undue influence examined in part I.

Autonomy understood in this way also contains a degree of circularity when applied to contexts of undue influence. Taking a step back to evaluate one's possible choices in light of one's motives and desires based on advice does not guarantee that an individual subsequently acts autonomously. The undue influence could have occurred before this point or be so strong that no advice could make the claimant act autonomously. Therefore, regardless of reflecting on advice, it is not guaranteed that the advice would show a gift has been independently reasoned.

Additionally, the advice itself could also amount to instance of illegitimate influence under this view of autonomy, which prevents donors from effective independent reasoning. Individuals do not live in complete isolation from interpersonal or institutional influences. An infinite range of sources could influence an individual's conduct, including legal advisors. It is a weak argument to submit that regardless of the content of the advice, a legal advisor is nevertheless capable of unduly influencing financial transactions. Intuitively, something more seems required. This consideration helps to demonstrate that for an account of autonomy to be legitimate in the context of undue influence, it must adopt a temporally nuanced analysis of facts, by focusing on wrongdoing to demonstrate the independence of reasons for the actions.

This analysis also links to a general criticism of responsiveness-to-reasoning accounts of autonomy. It is argued that such accounts of autonomy are incomplete in determining what influences have, or have not, prevented an individual from reasoning independently before acting.[829] On this basis, accounts fail to distinguish between acceptable influences and influences that violate autonomy.[830] Similar criticism was against Birks and Chin's rationale above.[831] The account of autonomy advanced in the rationale did this by giving great weight to the dependency of claimants on defendants. As established in my critique of that rationale, greater clarity is needed to distinguish religious influence from undue influence.

Ultimately, a responsiveness-to-reasoning account of autonomy does not create greater clarity on what the scope of undue influence should be in a way that reduces the risks of unprincipled decisions in religious cases. The account fails to provide an adequate framework for developing a rationale for presumed undue influence that can take account of the nature of religious beliefs and motivations for gift-giving.

Incompatibilist accounts of autonomy

Incompatibilist accounts of autonomy consider that autonomy is not exercised where an individual's actions can be explained by reasons independent of them.[832] For these accounts,

[829] *Ibid*.
[830] Select responsiveness-to-reasoning accounts of autonomy attempt to address this difficulty, see Paul Benson, 'Free Agency and Self-Worth,' (1994) The Journal of Philosophy, 91(12), on pages 651-668.
[831] See pages 185-189.
[832] For example, Kant's account of autonomy which requires "a kind of causality belonging to living beings insofar as they are rational… that… can be efficient independently of foreign causes determining it," cited in Robert Kane, *The Significance of Free Will*, (OUP 1998), 82. Also, see van Inwagen (n 791), 148. For broader discussions on the differences between such accounts see Buss and Westlund (n 792), ss 2.

autonomous action requires complete independence of reasons for actions.[833] Therefore, even if the individual's beliefs and desires are among the reasons for acting, there is no self-governance of actions.[834] The threshold of autonomy is set so high that any influence from another undermines the ability of individuals to act on their own will.[835] One theorist goes so far as to say that free will is, in reality, a very uncommon phenomenon.[836]

Incompatibilist accounts do not offer a suitable basis to develop a rationale for presumed undue influence.[837] The standard set by incompatibilists for autonomous action is simply too high to allow for any real distinction between religious influence and religious undue influence. This conception would create conceptual clarity as to what constitutes impaired will and thus would overcome the main challenge facing Birk's and Chin's account.[838] However, this clarity is achieved at such a great cost that it cannot be construed as a justified conception of autonomy for the purposes of this thesis, since any instance of religious influence motivating gifts would be deemed unlawful.

A rationale based on this account would also be susceptible to the threshold criticisms of Bigwood's wrongdoing rationale.[839] Any indication that a claimant *may* have been taken advantage of, or acting without autonomy, even if it is minimal, would be unlawful.

---

[833] Incompatibilist theorists consistently attempt to show that compatibilist theories (the three other categories of autonomy considered in this section), fall short on what is required to autonomous action, *ibid*, 80. For the significance of ultimate responsibility and incompatibilists conception of autonomy see *ibid*, 81-102. Kane proposes the notion of complete 'sole authorship' which is necessary for his own Incompatibilist account, 80.
[834] Buss and Westlund (n 792), ss 2.
[835] *Ibid*.
[836] van Inwagen (n 791), 78. In this account, there are two occasions on which individuals act on their own will: "cases of an actual struggle between perceived mora duty or long-term self-interest, on the one hand, and immediate desire, on the other; and cases of a conflict of incommensurable values" 77.
[837] For more general, deeply philosophical reasons why such an account should not be accepted as a legitimate conception see Tomas Kapitan, 'A Master Argument for Incompatibilism?' in Robert Kane, *The Oxford Handbook of Free Will*, (OUP 2001) 127-157. It is submitted that the "Consequence Argument" made against compatibilist conceptions of autonomy, can be reduced in force to the point that the argument does not prove incompatibilism, 127-128.
[838] See pages 185-190.
[839] See pages 196-200.

Accordingly, incompatibilists lack the nuance to engage with the relationships held between the parties in any more detail to determine whether a decision is of the claimant's free will. More specifically, incompatibilist accounts would be completely irreconcilable with religious relationships. Adherents of many faiths often devote themselves to one moral authority for all decisions made,[840] including supreme deities or religious figures, for example, Imams.[841] The account would thus fail to appreciate and give adequate respect to the special nature of religious relationships. Instead of treating such beliefs and relationships as a legitimate part of religious experiences, the religious dimension of an individual's life would be seen to undermine their self-governance and ability to act on their own free will based on moralistic reasoning.

Incompatibilist conceptions of autonomy fail to appreciate the relational dimension of autonomy, which many autonomy theorists engage with.[842] Brown argues that most conceptions of autonomy consider a liberal subject to move freely in society unencumbered with conflicting responsibilities and not dependent on others for survival or protection,[843] and this ignores conflicting commitments and the reasons why people are dependent on others. Consequently, incompatibilists do not capture the real essence of how individuals form and maintain relationships with others.

On a similar note, if taken seriously, this conception of autonomy would treat any legal advice received before transactions as capable of undermining the ability of a donor's self-governance. The advisor would foreseeably become a source of influence, clouding or taking over the

[840] James Rachels, 'God and Human Attitudes,' (1971) Religious Studies, 7(4), 334.
[841] As in *Khan* (n 151) discussed on page 80.
[842] See n 662.
[843] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*, (Princeton University Press 1996), 156-157. These comments are made with a particular focus on distinctions between male and female autonomy, but they are also applicable to religious adherents. This is especially pertinent where there is intersectional consideration of female adherent's autonomy.

judgement of advisees. Although independent legal advice does not ensure autonomous decision-making, it may help donors to consider their own motivations for completing transactions more clearly. An incompatibilist conception disregards the relevance of advice heard in undue influence cases. This would be an inappropriate development to the doctrine, as independent advice should have the potential to play some sort of role in cases, even if it is not a determining factor. Where it is relevant to the rebuttal stage of presumed undue influence cases, a more nuanced assessment of the facts can be made. In turn, this is more likely to provide greater justification for decisions.

There is a final, more general reason which supports the rejection of categories of autonomy that focus on external considerations. The adoption of an incompatibilist account of autonomy in a rationale for presumed undue influence would create confusion on what motivates a claimant's actions. Cases will generally involve two sorts of motivations that feature in the claimant's decision-making process before gifts are made: the claimant's own motives are present (internal reasons for action), as well as the religious beliefs instilled or manifested by defendants (external reasons for action). In practice, it is hard for judges to determine the real motivation(s) for gifts. How would a judge seek to separate independently acquired motivations from externally imposed motivations? In a rationale for presumed undue influence, a greater degree of precision should be aimed for to prevent every case from being successfully argued, a possibility which is very likely under this understanding of autonomy. The incompatibilist view of autonomy is, therefore, an illegitimate conception of autonomy in this context for multiple forceful reasons.

In this section I have explained why three conceptions of autonomy should be rejected in a rationale for presumed undue influence. Common themes are identified throughout my analysis

to justify this position, including the inappropriateness of externalist accounts of autonomy, and why accounts fail to consider why certain sources of influence may enhance an individual's capabilities for self-governance. The most common theme identified was each category's inability to incorporate the potential importance of religious beliefs and relationships for adherents in cases. The following section addresses these challenges and reinforces my decision to include Dworkin's coherentist account of autonomy as a fundamental principle in the integrative rationale.

7.1.2. Gerald Dworkin on autonomy

Dworkin's account of personal autonomy has proven highly influential to discussions of free will and self-governance. His work on autonomy is the focus of several private law theorists aiming to set limits to areas of law[844] because of the explicit and precisely defined basis of Dworkin's account.[845] This account of autonomy has also become popular because it was developed with paternalism in mind, and therefore, seeks to guard against strong forms of paternalistic reasoning.[846] My consideration of Dworkin's account is consequently in line with existing private law discussions and consistent with my objections to paternalistic reasoning in gift-giving contexts.

[844] For example, Michael J. Trebilcock, *The Limits of Freedom of Contract,* (Harvard University Press 1993), 150 & Horatio Spector, 'A Contractarian Approach to Unconscionability,' (2006) Chicago-Kent Law Review, 81(1), 95-118.
[845] Fabrizio Esposito, 'Conceptual Foundations for a European Consumer Law and Behavioural Sciences Scholarship,' in Hans-W. Micklitz et al, *Research Methods in Consumer Law: A Handbook*, (Edward Elgar Publishing 2018), 90.
[846] *Ibid*, 89. The commentary focuses specifically on Dworkin (n 781) & Dworkin (n 647), 64-84.

In this section, I outline a slightly different version of Dworkin's conception of autonomy featured in the private law analysis referred to. My analysis of Dworkin's views on autonomy incorporates his original conception of autonomy, as well as his second effort at setting down a justified understanding of autonomy. I first outline the aspects shared by the two conceptions of autonomy before setting out the differences between the two accounts, and the reasons why Dworkin felt it necessary to amend his original conception. The two-limbed account is a novel way of applying Dworkin's account in private law theory. I argue that this account provides a more suitable understanding of autonomy in my integrative rationale.

Dworkin's more recent conception of autonomy[847] is not completely new. It was developed from an earlier attempt[848] that was subject to much criticism.[849] The two accounts of autonomy advanced by Dworkin share some similarities. Firstly, both accounts are premised on first-order and second-order preferences. First-order preferences "have as their object other, second-order preferences: a desire to desire to do X or Y"[850] and consist of wants that reference an action.[851] For example, a wish to follow a certain religion that results in someone following that religion. Second-order preferences "have as their object actual actions of the agent: a desire to do X or Y"[852] and are references to higher-order preferences.[853] For instance, an adherent who changes their mind on their religious beliefs and does not want to follow that faith subsequently. Second-order preferences provide a means of reflecting on and disciplining first-order preferences.[854]

[847] Dworkin (n 781).
[848] Dworkin (803), 23-28.
[849] This mainly related to its inability to define what identification meant in the account. For an overview of this commentary see Christman (n 781), 113-114.
[850] *Ibid*, 112.
[851] This categorisation is taken from Harry F. Frankfurt, 'Freedom of the Will and the Concept of a Person,' (1971) The Journal of Philosophy, 38(1), 8.
[852] *Ibid*.
[853] *Ibid*, 8-9.
[854] Eposito (n 845), 91.

Secondly, both of Dworkin's accounts accept that procedural independence is an important aspect of autonomy and reject substantive independence. Dworkin submits that autonomy is achieved through procedural independence, possessed by individuals whose motivations for action are not the result of "manipulation, deception, [and] the withholding of relevant information..."[855] Dworkin states that such conduct violates the norm of autonomy by infringing upon the voluntary character of an individuals' actions.[856] The links between action and the individual's character are broken because the action of the individual is involuntary.[857] Where procedural independence is infringed by another, the actions of individuals become the combined product of themselves and another.[858] For Dworkin, this combination excuses individuals completely, or at least partially, from the responsibility of their actions.[859]

However, not every interference with the voluntariness of an individual's actions interferes with their ability to pursue their conception of a good life;[860] interferences are a matter of degree. Individuals have preferences about their preferences, such as a desire not to have, or act upon the particular desires they hold.[861] Dworkin considers that the story of Odysseus is an example of this reasoning, "In limiting his liberty, in accordance with his wishes, we promote, not hinder, his efforts to define the contours of his life."[862] Accordingly, where autonomy is limited by another in a way desired by individuals because they conceive it as good for them and their values, the interference with their autonomy is justifiable.

---

[855] Dworkin (n 803), 25.
[856] Dworkin (n 781), 14.
[857] *Ibid*.
[858] *Ibid*.
[859] *Ibid*. By focusing on specific types of behaviour that violates procedural independence, Dworkin limits the coverage of his account. Accordingly, unlike the accounts of autonomy considered in section 1.2, it is not subject to relational autonomy critique.
[860] *Ibid*.
[861] *Ibid*, 15.
[862] *Ibid*.

Dworkin rejects the need for substantive independence, [863] characterised as accepting the commands of others as final and deferring independent judgment,[864] because "…it makes autonomy inconsistent with other important values."[865] An individual's conduct lacks substantive independence if they "renounce his[\her] independence of thought or action" before completing an action.[866] Dworkin proposes that individuals are autonomous even if they are guided by particular causes, obligations, or commitments if, and only if, it has been chosen or consistently approved of.[867] Dworkin cites individuals disciplined by monasteries as an example of autonomous conduct[868] and rightfully observes, "There is no possible world in which one could remain both substantively independent and commit oneself to a cause or a person."[869] Understood in this way, autonomy overcomes the potential criticisms of incompatibilist theorists that no one acts autonomously by following the moral orders of religious institutions or deities. Moreover, an account of autonomy rejecting substantive independence has the potential to incorporate moral value pluralism in a broad manner depending on additional criteria for self-governance, which I explore below.

In *Autonomy and Behavior Control*,[870] Dworkin describes his first account of autonomy, which requires that an individual's second-order identifications are congruent with their first-order motivations.[871] The process outlined was termed "authenticity," a necessary, but not sufficient condition for autonomous action.[872] Authenticity requires an individual who smokes to desire

[863] *Ibid*. 25.
[864] *Ibid*, 22.
[865] *Ibid*, 23.
[866] Dworkin (n 803), 25.
[867] *Ibid*.
[868] Dworkin (n 781), 18
[869] *Ibid*, 25.
[870] Dworkin (n 803).
[871] Dworkin (n 781), 25.
[872] *Ibid*.

to smoke and if they did not desire to smoke, but then smoked, the individual would not act autonomously when smoking.

In Dworkin's second account of autonomy advanced in *The Theory and Practice of Autonomy*,[873] authenticity was considered a mistaken addition of the first account. The inclusion of authenticity was seen to "…ignore[s] a crucial feature of persons, their ability to reflect upon and adopt attitudes toward their first-order desires, wishes, intentions."[874] Dworkin reconfigured his conception of autonomy by defining it as:

"… a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are."[875]

To put this definition another way, "The idea of autonomy is not merely an evaluative or reflective notion, but includes as well some ability both to alter one's preferences and to make them effective in one's actions and, indeed, to make them effective because one has reflected upon them and adopted them as one's own."[876] For Dworkin, the critical part of autonomous action is, therefore, the ability of individuals to question whether they align with their reasons for action.[877] If an individual is unable to think in this way before acting, or during their actions, either because they lack the capacity, or someone prevents them from doing so, they do not subsequently act autonomously.

[873] *Ibid*. For a more detailed overview of this account in wider moral philosophy see Lawrence Haworth, 'Dworkin on Autonomy,' (1991) Ethics, 102(1), 129-139.
[874] *Ibid*. Dworkin lists multiple views that corroborate this view at 15- 20.
[875] Dworkin (n 781), 20.
[876] *Ibid*, 17.
[877] *Ibid*.

Even though Dworkin disputes the appropriateness of his first account, I consider it is an appropriate conception of autonomy for my rationale. The criticisms of scholars made against 'identification,' now examined, have less applicability in this context than in an account of moral autonomy. A leading objection to Dworkin's first account is that it is subject to an infinite regress of considerations when determining whether someone acts autonomously. The criticism is considered most applicable to individuals living completely subservient lives who identify with their first-order preferences living in this way and approve of the lower-order preferences of fulfilling the tasks making them subservient.[878] It is argued that where this is the product of the individual's education and social experiences throughout their life, they have been manipulated, and the values and ideals of that individual are not truly their own. Accordingly, it is claimed they do not have authenticity.[879] The argument follows:

"Since the acts of identification must themselves be autonomous, this requires that another act of identification takes place at a higher level. And since this act must also be carried out in a way that reflects procedural independence, then a fourth level must be postulated there. Hence the regress."[880]

However, if the first account was situated in a Perfectionist framework, as I do below, a limit can be set for what higher-order preferences individuals can hold, which helps to overcome objections that individuals can legitimately subject themselves to a completely subservient life. When authenticity is applied in a Perfectionist framework, like that adopted by Chen-Wishart, the limits of autonomy specified do not allow that choice to be made because it can be characterised as a repugnant option. The threshold of the framework is set at a particularly high standard and would also cover the complete surrendering of autonomy, as in the willing slave

[878] Christman (n 781), 113-114.
[879] *Ibid*.
[880] Christman quotes Irving Thalberg, 'Hierarchical Analyses of Unfree Action,' (1978) Canadian Journal of Philosophy, 8(2), 219-220 at *ibid*, 113-114.

example discussed in chapter 6.[881] Further, this understanding of autonomy would not cover similar situations in *Allcard*, where vows of poverty and obedience were accepted by the claimant. Such choices would not be excluded as repugnant options because the nuns, on a conventional understanding, were free to leave the convent if they wanted to or later changed their religious beliefs.

Furthermore, the force of the infinite regress argument is not always as applicable to all undue influence cases. For instance, modern reported cases in England and Australia mainly consist of newcomers to religious organisations and communities (notably, *Allcard, Azaz,* and *Hartigan*). In those cases, the impact of the infinite regress is felt less strongly. The claimants were not initially influenced by the defendants to attend the relevant religious place of worship. Instead, the claimants visited or joined the religious and spiritual institutions of their own free will, an aspect of the cases which is not disputed. Consequently, the regress is less present in such cases since there is a baseline of the typical conduct of those claimants by which to assess their later actions and motivations to help determine if they were acting autonomously before gifting property.

I still include both accounts of autonomy in my rationale, despite demonstrating how the first account can still help to produced principled determinations of when a donor acts autonomously. My approach helps to more accurately characterise autonomous choices. This is necessary to ensure that the rationale provides a detailed account of how autonomy is infringed. Autonomy understood in this context is a substantive and evidential concept that can be examined by courts to better establish when religious influence becomes undue. A claimant's preferences may seem to have been congruent at the time of a gift, but this may only

[881] See pages 201-202.

have occurred because they were prevented from reflecting on their preferences by another party. Accordingly, the two limbs considered together in this way adds greater evidence that an individual's decisions are based on their own beliefs and preferences.

7.1.3. Autonomy and presumed undue influence

My combination of Dworkin's accounts of autonomy provides the first step in my rationale to determine when gifts have been unduly influenced. This part of the rationale identifies when a donor's autonomy has been impaired (the claimant-sided aspect of the rationale). Impairments of autonomy are subsequently violated by a donee's wrongdoing, which breaches the donor's procedural independence (the defendant-sided aspect). I elaborate on what I mean by the defendant's wrongdoing in the following section. I consider that autonomy is impaired when donors make gifts but do not agree with their reasons motivating the gifts. Here, the donor's second-order preferences do not match up with their first-order preferences. I define this as an 'incongruence between reasons,' which follows Dworkin's original account of autonomy. Secondly, a donor's autonomy is infringed when they are unable to question and reflect on the reasons for gifts made to donees. I call this second limb 'reflection thwarting,' which follows Dworkin's second account of autonomy. If claimants are unable to demonstrate either one of the two limbs, their autonomy has not been impaired, and a presumption of influence does not arise. (I consider the procedural operation of my rationale claims in more detail below.)

I now explain how my account of autonomy applies to decided hard cases of religious influence. I argue that courts have wrongly decided leading religious cases. By applying the theory of autonomy in the way described, I demonstrate why this account of autonomy brings

greater conceptual clarity to the terms impaired will and autonomy in these settings. Additionally, I describe how both limbs of autonomy impose the first set of limits on my rationale. Autonomy understood in this way is consequently not subject to the same objections made in Chapter 6 about Birks and Chin's and Chen-Wishart's understanding of autonomy.[882]

Allcard v Skinner (1887)

Following the understandings of autonomy contained in my rationale, the claimant in *Allcard* was not unduly influenced at all stages when the gifts were made during their relationship with the defendant. This is a considerable departure from the orthodox understandings of the judgment. In the rationales that focused on impaired will discussed in chapter 6, *Allcard* is viewed as a classic example of undue influence.[883] I consider that my opposing conclusion is justified under the autonomy framework advanced here because it ensures greater respect for the religious relationships held between parties and how this can change over time.

Two facts are significant to this discussion, firstly, during the first six-years of the party's relationship the claimant regularly received written advice about her financial affairs from her brother, a barrister. After receiving the letters, the claimant continued to practice the beliefs of the order, live with the sisterhood, and make several gifts to the defendant which were used for charitable causes. The claimant renounced her beliefs and left the sisterhood in 1879 to join the Church of Rome. Additionally, the judgments of the Chancery Court only briefly mention changes in the claimant's religious enthusiasm during these years. When the claimant was a

[882] For a summary of my criticisms Birks and Chin see page 190 and for Chen-Wishart see page 213.
[883] A detail overview of the facts was given on pages 131-132.

novice in 1886, she expressed a wish to leave the sisterhood but did not, as ultimately, she felt bound to it.[884] After agreeing to the vows when she became a sister in 1871, the claimant once again wanted to leave the sisterhood but was told by the defendant she could not since she was still bound to it.[885] Another similar effort happened on a later occasion.[886]

Even if the defendant had not spent all the money and such a long period had not passed before the claim was brought, I consider that the gifts had not been unduly influenced. At no point in the chain of causation between the claimant's relationship with the defendant and the gifts made is there evidence that the claimant's autonomy was truly infringed. The claimant's reflections were not thwarted. It appears that the claimant's first-order preferences (their religious beliefs) were in line with their second-order preferences (being willingly committed to the religious order and practising the sisterhood's beliefs) when making each of the gifts; the claimant wanted to become an integrated part of the sisterhood and made the gifts to the defendant to further her spiritual development. Additionally, the claimant had written correspondence with her brother between 1870 about her life at the sisterhood and the amount of property she owned. The first instance judgment mentions that just after the claimant agreed to the vows of poverty her brother received a letter that made him think she was well-informed.[887] All of the letters received by the brother were positive, written by someone well-educated, and aware of what they had done.[888] There is no suspicion that these letters were written by the defendant, nor did the claimant dispute that they had not written the letters. After corresponding with her brother, the claimant proceeded to make the subsequent gifts. Both judgments of the Chancery Court held that there was no undue pressure on the claimant[889] and

[884] *Ibid*, 176.
[885] *Ibid*.
[886] *Ibid*.
[887] *Ibid*, 166 (Kekewich J.).
[888] *Ibid*, 167.
[889] *Ibid*, 179 (Lindley L.J.).

the gifts were not given because of impropriety.[890] The claimant had the opportunity to critically reflect on her first-order preferences and see how they could be achieved through her second-order preferences on occasions throughout the party's relationship, and the claimant did so on multiple occasions. Consequently, the claimant's reflections were not thwarted by the defendant at any point at which the gifts were made.

Secondly, there does not appear to have been an incongruence between the claimant's reasons for the gifts. There is no indication in the facts, or the separate judgments of the first instance or Court of Appeal Chancery judges, that the claimant's actions were incompatible with her motives or desires for action at each point the gifts were made. Additionally, there is no mention of whether the claimant's expression to leave the sisterhood correlated to the times the gifts were made. A temporal point, which the judges in *Allcard* and other commentators focusing on the claimant's impaired will, fail to consider. It is correct to say that when the claimant reflects on her first-order preferences and thinks about leaving leave the order, that her second-order presences were incompatible. At this point, there was an incongruence between the claimant's reasons for the gifts. Accordingly, the claimant's autonomy was not complete here. However, the impairment does not appear operative at the time the gifts were made to the defendant. The claimant's impaired autonomy was not caused by the defendant and therefore, not wrongfully caused. Instead, the impairment was generated by the victim when they considered their short-term and long-term preferences, and how they had changed since joining the sisterhood. Accordingly, the link between the claimant's character traits and their voluntary behaviour was not broken by the defendant. A change of mind on first-order preferences is simply not sufficient to justify relief. For these reasons, causation is essential for

[890] *Ibid*, (Kekewich J.).

determining when autonomy is impaired and whether that violation has been produced by defendants.[891]

My analysis also explains the positive role that independent advice *received* by claimants has in my rationale. Advice is most likely to be given by solicitors, as in *Azaz*,[892] or some other professional body. But it can extend to religious officials, like in *Khan*, where the advisor to the contractual agreement was an Imam.[893] Claimants are safeguarded against abuses of position by religious officials acting as advisors in my rationale, particularly by how the conception of exploitation explained below applies to third parties.[894] Advice received by claimants may help them to reflect upon their preferences, values and create congruence between their reasons for gifts, depending on the content of the advice. This stands even if the advice is dismissed by claimants because it is considered incompatible with their first-order and second-order preferences. In my rationale, advice received by claimants does not establish that defendants did not unduly influence claimants. The influence may on occasions be so strong that no amount of advice enables donors to create congruence between their reasons, for example. Courts must be satisfied that defendants have violated a claimant's autonomy through their exploitative conduct in the way described. I discuss the other part of the role of independent advice where it is actively discouraged by defendants below.[895]

[891] It was noted in chapter 6 how causation is only considered relevant by Bigwood, see page 191. In Birks and Chin's account, it was not treated as a relevant aspect of claims, see page 186. Chen-Wishart does not explicitly advance it the hybrid rationale and seems to relegate it to the role of a background factor.
[892] See page 157.
[893] See page 80.
[894] See pages 263-264.
[895] See page 261-262.

Hartigan v International Society for Krishna Consciousness Inc [2002]

Autonomy interpreted in the way I have described also explains my skepticism about the judgment in *Hartigan*.[896] Here, the claimant sought to claim back her property worth $87,000 gifted to a Hare Krishna community after being informed by the defendants that the claimant's understanding of giving, developed from independently interpreting religious scriptures, was misplaced and did not require the amount offered. Weeks later the claimant made transferred her property to the defendants.

The claimant must have reflected upon the necessity of the gift for some weeks and considered whether it matched up to her religious and familial preferences. Before gifting the property, the claimant phoned her partner numerous times across a period of weeks to ask whether he supported the potential gift and how it would impact their family life. Therefore, the claimant's ability to reflect upon her beliefs and motives for action was not thwarted. The gift was motivated by the claimant's reflections on her first-order preferences (what she believed the religion required of her and why it was important to her) and her second-order desires (whether she should invest the money for religious causes or use it for another cause).

Furthermore, the facts do not indicate an incongruence between the claimants' reasons for the gift. When it was made the claimant's first-order preferences and second-order preferences seem compatible. Even if there was not complete compatibility, the facts do not demonstrate that there was a complete incompatibility between her preferences. Rather, the claimant regrets the transaction at a later point because of the severe consequences it has on her life. The claimant's family would lose their home if undue influence was not found. Although it would

[896] See pages 72-73, 76-66 & 82-83.

have been upsetting and regrettable for the family if undue influence was not established, the claimant's autonomy was not impaired when the gift was made. The gift was simply an improvident choice motivated by the claimant's religious wishes that later impacted her ability to live her life as she wished to. Consequently, the court was wrong to order rescission.

This section has applied the two-limbed account of autonomy in my rationale to decided cases of undue influence to shed light on how the cases should have been assessed. Impaired autonomy and causation are the first considerations in my rationale. Additionally, I have explained how advice should be considered by courts in my rationale where it has been *received* by claimants. The next section assesses when hard cases of religious influence become undue by determining whether defendants have wrongfully caused the impairment that results in a gift being made.

7.1.4. Autonomy, exploitation and presumed undue influence

Exploitation is not an unfamiliar concept to understandings of undue influence. English courts have described the doctrine as a defence by which "to protect vulnerable members of society from oppression or exploitation."[897] I also considered how the concept features in the rationale debate, namely by discussing Bigwood's rationale in chapter 6.[898] I now explain how autonomy and wrongdoing are combined in my rationale and subsequently, describe how I define exploitation in undue influence settings.

[897] *Etridge (No 2)* (n 22) [98] (Lord Hobhouse). Lord Nicholls also describes undue influence to includes "cases where a vulnerable person has been exploited" at [11].
[898] See pages 191-200.

The combination of autonomy and wrongdoing is critical to my rationale for presumed undue influence. Autonomy may be impaired for the reasons just explained, but for intervention to be justified, the donor's autonomy must have been *violated* by the defendant's wrongdoing. Focusing solely on the donor's autonomy fails to generate the clarity necessary for a principled rationale for undue influence, which I argued was lacking in Birks and Chin's rationale.[899] Further, by not including a wrongdoing limb, my rationale would be subject to similar paternalistic criticisms noted to apply to Birks and Chin's[900] and Chen-Wishart's rationales.[901]

Defendant wrongdoing is relevant to the examination of the congruence between reasons motivating a donor's gifts. In many cases, it is foreseeable that two or more first-order preferences valued by claimants will feature alongside several second-order preferences. For example, religious commitments, as well as the value they attach to family and community life (first-order preferences), and their belief that gifts to each of those help both groups to maintain current practices (second-order preferences). Donors may gift money to specific religious institutions without truly wanting to do so. A donor, similar to the widow in 'The Widow's Mite,'[902] may not want to gift the little money they have in hope of salvation, as they would rather leave the money to help their young children but nevertheless gifts what they have, fearful of the consequences of not doing so. In such circumstances, there is not a strict congruence between the donor's reasons for the gift. Whereas, in the same scenario, where a wealthy donor gifts a large amount of their property for the same reasons and still is able to provide for their children at a later stage, their reasons for the gift are congruent.

[899] See pages 185-190.
[900] See page 189.
[901] See pages 209-210.
[902] A biblical story where a poor widow gives two mites, which is more costly to her than the rich who had made gifts found in Luke 21:1-4.

The various reasons a donor may have for making and not making gifts demonstrate that there will not always be a strict congruence between their reasons. However, the incongruence has not necessarily been caused by another party. Instead, in the example similar to The Widow's Mite, the incongruence between reasons is the product of the individual's competing life-choices, which creates doubts about their motivations for action and gift-giving. The importance of wrongdoing is strongest at this stage in the analysis of undue influence. Where the incongruence has been caused by a defendant's wrongdoing, the donor's autonomy has been violated. Here the procedural independence of the donor's decision-making was infringed by the wrongdoing. On this basis, the rationale more accurately reflects the reality of decision-making in gift-giving contexts and explains why the justification for intervention is reason-based. The inclusion of wrongdoing indicates that my understanding of autonomy is not an intellectualised one that overestimates the reasoning capabilities and convictions of donors making emotionally charged choices.

Defendant wrongdoing is also important to reflection thwarting. If the analysis of the defendant's potential wrongdoing does not follow the determination of whether an individual was able to reflect upon their preferences, undue influence would be established where claimants omit to do so, which is unjustifiable. Assessing autonomy and wrongdoing together helps to guard against the possibility that judgments can give rise to strong forms of moralistic and paternalistic reasoning. Accordingly, rash and spontaneous gifts motivated by the claimant's religious enthusiasm are lawful, unless the gifts were induced by another party's wrongdoing. If claimants had the opportunity to assess and reflect on the potential risks of the gifts and considered how those gifts may not truly match up with their high-order preferences but failed to do so, the claimant has acted autonomously. The claimant's autonomy is only

violated when the wrongful acts of another party break the voluntariness of their actions, as this conduct infringes on the donor's procedural independence to act.

I define wrongdoing by reference to normative understandings of interpersonal exploitation examined in legal theory literature. The account of interpersonal financial exploitation I adopt is inspired by Feinberg's analysis of exploitation and the principled limits of the criminal law.[903] Feinberg's analysis of exploitation is, however, equally applicable to both civil and criminal law. Feinberg argues that exploitation is experienced differently by individuals depending on the circumstances of the relationships between exploiters and exploitees. The potential range of these experiences is limited in undue influence settings. Exploitation need only cover exploitation that causes direct harm to exploitee, since undue influence allows for relief only after a financial transaction has been completed. Consequently, claimants will always suffer some form of financial harm, even if the claim is brought by third parties.[904]

Feinberg states that harmful exploitation should be considered alongside coercion,[905] "Some proposals by A are coercive in their effect on B in that they close or narrow B's options, and they are also instances of A exploiting B's vulnerability for A's own advantage."[906] In many conceivable religious scenarios, Feinberg's view on exploitation and coercion applies.[907]

[903] It is commonly endorsed in a variety of contexts for setting limits to the law. For example, theorising s4 FA06 see Collins (n 521), 167-184. Additionally, it has been considered in relation to determining the moral wrongfulness of white-collar crimes, see Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, (OUP 2007), 93-97.
[904] My account need not consider the 'free-floating' type of exploitation considered by Feinberg, which exists where exploitation occurs in some way without harming the exploitee's interests, which has also been consented to by the exploitee. Feinberg considers the prohibition of this type of exploitation can only be justified by strict moralism, *ibid*, 176. Chapter 36 terms this the 'exploitation principle' and assesses whether in all instances this is not a justifiable limit on liberty, see Feinberg (n 29), chapter 31 'Exploitation with and without harm.'
[905] The understanding of exploitation advanced does not cover actions that are nonexploitative or noncoercive, for example "in an ordinary commercial exchange from which both vendor and purchaser expect to gain (but not at one another's expense)," *ibid*, 178.
[906] *Ibid*, 177.
[907] *Ibid*, 178.

Firstly, "A's act can be exploitative and coercive, as when his[/her] proposal effectively forces B to act in a way that benefits A."[908] In undue influence contexts, this could apply, for example, where a religious figure insincerely submits to an adherent that if they do not give them money they will not pray for their sins, which will cause them to suffer in the afterlife. Here, exploitation is active and has a clear and direct impact on the adherent's decision-making process. The type of coercion described by Feinberg is not the same as someone who threatens or forces another to do so something in a strong sense. The exploitee is not subject to conduct that gives them no other plausible choice. In this context, coercion and threats are not the equivalents of coercion and threats in situations where an individual is forced to commit a crime as in criminal contexts criminal,[909] or to enter into a contract.[910]

Highly coercive instances of exploitation are more relevant to claims of actual undue influence. I now explain how this conception of exploitation could operate in such claims. My analysis demonstrates that my use of exploitation in my rationale has demarcated boundaries on how exploitation should operate in both categories of influence, even though my focus is on presumed undue influence. Certain factors provide evidence of more active and direct exploitation that apply solely to actual undue influence cases. A factor indicating such conduct is an intentional abuse of a position of trust caused by lying.[911] Lying extends to intentionally withholding information pertinent to the reasons for gifts. Additionally, lying applies to scenarios where defendants knowingly fail to correct misunderstandings of facts and religious

[908] *Ibid*.
[909] The criminal understanding of duress includes duress by threats and duress of circumstances, meaning an individual commits a crime to avoid bad consequences, for example, driving while intoxicated to get an injured person to a hospital, see Nathan Tamblyn, *The Law of Duress and Necessity: Crime, Tort, Contract*, (Routledge 2017), 166.
[910] *Ibid*, chapter 3. Contractual understandings of duress include economic duress, see *Universe Tankships v International Transport Workers Federation, The Universe Sentinel* [1983] 1AC 366.
[911] For broader commentary on what is wrongful about lying see Neil MacCormick, 'What Is Wrong with Deceit?' (1982) Sydney Law Review, 10(1), 14-19. Lies and misrepresentations were discussed concerning understandings of actual undue influence see *Etridge (No2)* (n 22) [32]-[33] & [42] (Lord Nicholls).

doctrines or beliefs motivating gifts, or where the money is used for purposes not agreed to by both parties. These considerations are all wrongs by themselves and do not require the donor's autonomy to be infringed for intervention to be justified.

A donor's autonomy is, however, impaired where the lies create incongruence between a donor's reasons for gifts. This would occur when a gift would not have been made to a party but for the defendant's lies. Additionally, defendants thwart a donor's reflections if donors knew what was withheld by defendants and would not have chosen to make the gift as a result of complete knowledge. In these circumstances, there is an aggravated wrong caused by exploitation.

Manipulative techniques used by defendants to influence donors' decisions can also constitute strong forms of coercive exploitation.[912] Manipulation has been described as "directly influencing someone's beliefs, desires, or emotions such that she falls short of ideals for belief, desire, or emotion in ways typically not in her self-interest *or likely not in her self-interest in the present context*."[913] This definition has a clear overlap with the internalist conception of autonomy advanced in my rationale. Manipulation includes deceptive practices, already discussed, and threats of *severe* punishment.[914] Accordingly, a defendant who threatens that a donor will experience terrible consequences if they defy their orders to gift them property manipulates the donor's preferences and exploits them. Such techniques are wrongs by themselves without the donor's autonomy being infringed. However, this conduct will also typically reveal an incongruence between the donor's reasons for the gift. The donor's second-

[912] For general commentary on how to define manipulative practices and why they are wrong, see Anne Barnhill, 'What is Manipulation?' in Christian Coons and Michael Weber, *Manipulation: Theory and Practice*, (OUP 2014), 51-72.
[913] *Ibid*, 72.
[914] *Ibid*, 61 ft 15 citing Ruth Faden and Tom Beauchamp, *History and Theory of Informed Consent,* (OUP, 1st Edition, 1986), 358-364.

order preferences will not match their first-order preferences where they make gifts because of threats. Where this occurs, there is also an aggravated wrong.

Feinberg describes exploitation in a second way where, "A's act can be exploitative and noncoercive, as when he takes advantage of B's traits or circumstances to make a profit for himself either with B's consent or without the mediation of B's choice at all."[915] This type of exploitation is characterised by more passive instances of exploitative conduct. Applied to undue influence contexts, exploitation is noncoercive in this sense where the conduct alters the donor's decision-making process in a way that causes them to make a gift, rather than completely closing the options available to donors. The noncoercive conception of exploitation considered here is more likely to feature in hard cases of religious undue influence. Further, this understanding of exploitation has a clear link with my analysis of autonomy, as it takes account of the donor's consent and explains why certain choices should not be recognised as lawful.

I make two additions to this conception of exploitation. Firstly, I consider that it extends to any property-based profit gained by another as a result of a defendant's exploitative conduct in the way described; A, therefore, exploits B even where a profit is made by C. Secondly, I focus on religious reasons for conduct that may, depending on the defendant's actions, excuse the defendant's conduct. I argue that religious reasons can provide legitimate reasons for certain actions that help defendants to rebut presumptions of influence.

Before illustrating what factors indicate noncoercive exploitation in presumed undue influence cases, it is important to consider a general limit of my understanding of exploitation here. In

[915] Feinberg (n 29), 178.

claims, there is a key distinction that makes certain examples of exploitation of character traits objectionable and wrongful, and others as unobjectionable and lawful. Consider an example given by Feinberg where A has given something to B, "A may say afterward to B: "You are what you are (generous, loving, insecure, gullible, or fearful, as the case may be). I don't change that, or infringe on it, or exert pressure on it. Rather, I use it to my profit. You have no complaint. At most you might be envious of my gain. But I didn't force anything on you; I simply used you as you are."[916] Here the conduct is not objectionable because the passive nature of means it is not exploitative. For it to reach a threshold that should be prohibited some other kind of behaviour is required from defendants, namely, evidence of impaired autonomy. I do not claim that a defendant exploits a claimant's if they simply rely on their generosity to gain financially. By requiring courts to find this sort of exploitative conduct and an infringement of autonomy, my rationale offers principled reasons that justify why gifts made in these circumstances are both wrongful and unlawful.[917]

Defendants need not target and abuse special disabling characteristics of donors. On this basis, greater conceptual clarity exists between understandings of undue influence and the doctrine of unconscionable dealing.[918] However, as is the position in the undue influence case law examined in part I, the donor's general health can make them potentially more vulnerable to influence. Accordingly, this factor remains an overarching consideration in my rationale, which helps to indicate the claimant's susceptibility to exploitation. Defendants may not intend to exploit the donor but may do so through one of the ways now outlined.

[916] *Ibid*, 179.
[917] It is important to emphasise this point, as in both legal theory and criminal law literature there are considerable debates concerning what makes exploitation both unfair and unlawful, see See generally, Robert Mayer, 'What's Wrong with Exploitation?' (2007) Journal of Applied Psychology, 24(2), 137-150. For comments on both topics in contractual settings see, Bigwood (n 447), 125-162.
[918] For an outline of unconscionable dealing see Mark Pawlowski, 'Undue Influence: towards a Unifying Concept of Unconscionability,' (2018) Denning Law Journal, 30(1), 117-122.

Less severe manipulative techniques used by defendants can influence a donors' decisions in a less coercive and obtrusive way. Such techniques include threats designed to influence the donor's decision-making process that cannot be described as coercive in a strong sense. In scenarios involving these sorts of threats, donors may still think that they have a choice in how they can respond to the threats. For example, threats of shunning and shaming disobedient adherents are often used as means of influencing adherents.[919] Here, a donor's social standing amongst congregation members may be used by donees to influence a donor's motivations, which does not always strictly coerce donors. In *Allcard*, the vows of poverty and obedience agreed to by the claimant did not require her to gift her property to the defendant. The appeal judgment of the Court of Chancery submitted that the donor would, nevertheless, have felt pressure to give all of her property to the defendant,[920] even though the defendant did not exert any pressure on the claimant to do so.[921] However, a different conclusion can be reached on slightly different facts. The exploitative conduct conceived of here would be found where the claimant felt pressured to make the gifts to the sisterhood because of the defendant's threats to shun, shame, or denounce the claimant if she failed to do so, which changed the claimant's motivations for the gifts because they were fearful of the threats being acted out. As a result of such feelings, there is the real possibility that the defendant creates incongruence between the donor's reasons for the gift.

Evidence that defendants have taken steps to isolate donors from the outside world and their network of friends and family can also count as exploitation where it violates the donor's autonomy. In religious and spiritual relationships this includes efforts taken by defendants to single out adherents from others and subsequently prevent them from contacting family and

[919] For general discussions of the possible consequences of defying religious beliefs and duties, see Greenawalt n 32), 60 & Witte et al (n 441), 219-233.
[920] *Allcard* (n 6), 177, (Lindley L.J.).
[921] *Ibid*, 179.

friends in a way that is not expected or typical of that religion. The conduct described could create incongruence between a donor's reasons for gifts. In *Allcard*, all members of the sisterhood were required to take vows of obedience and poverty to become a professed member. The sisterhood's religious beliefs required all adherents to consent to those conditions to reach that position. The defendant did not target the claimant or other adherents to exploit their religious feelings and obtain property. The vows were an inherent part of professed member's religious experiences and had a significant impact on the claimant's motivations for the gifts. Accordingly, the claimant's reasons for the gifts were congruent at this stage. Through making the gifts, the donor was able to reach the position they desired.

A defendant's attempts to deter donors from seeking independent advice, whether it is legal or not, can also constitute exploitation. If advice is actively discouraged by defendants or defendants withhold information that would almost inevitably be revealed by advisors because of the adverse nature of the gifts, defendants exploit donors. In religious contexts, this could occur where defendants prevent donors from accessing independent advice and use their position of trust as a substitute for advice, which may or may not be based on religious reasons. Similarly, a religious official may also exploit a donor by preventing them from seeking advice from other religious figures by undermining their reputation. Courts should consider the nature of the religious beliefs motivating those attempts to prevent advice being heard to determine if the defendant's conduct is exploitative and whether it has thwarted their ability to accurately reflect upon their preferences. Religious beliefs requiring complete isolation from the outside world or rules of obedience to follow the orders of the leader, such as in *Allcard*, that do not count as repugnant options under Raz's Perfectionist framework, should not by themselves amount to instances of exploitation. Only if those beliefs are not a shared practice of a religion are the attempts to prevent the donor from receiving advice likely to be exploitative. This would

likely occur where defendants think that legal advice will change a donor's intention to make a gift because of the reasons for the gift or the financial value of it, and so acts in a way uncommon for the religious circumstances in order to tarnish the donor's view of the potential benefits of advice.

Another factor establishing that defendants have exploited donors is where donors are rushed into making gifts and there is no consistency between the donor's motives for the gifts. For example, in *Whitmire*, a US case considered in chapter 2,[922] the court assessed the donor's original intention to make the gift before having contact with the defendant. The court found that this evidence helped to show that the initial gift made to the defendant with prior intention had not been unduly influenced. However, where there is no prior existing intention to make a gift, and the donor's reflections are thwarted by defendants because they believe the donor will change their mind upon reflection, possibly by preventing them from seeking advice, defendants may exploit the donor. Evidence of previous intent to make gifts is a relevant factor to the rebuttal stage in cases, although, it should not be a determining one. Intention can change over time due to the temporal nature of relationships, as demonstrated throughout this thesis. Accordingly, this factor is more relevant to gifts made in short-term relationships or in claims where only one gift is made to defendants, which feature less regularly in hard cases of religious undue influence. Consequently, this is a weaker justification for intervention and should be supplemented with additional factors indicating defendant wrongdoing.

Finally, intentional efforts by defendants to use other individuals to influence the donor's motives can amount to exploitation. This factor is significant to religious relationships where adherents or religious officials may be told of certain information or proposed gifts that cause

[922] See pages 68.

them to influence donors. The conduct of congregation members, for example, would not necessarily be defined as exploitative or subject to an undue influence claim. In *Khan*, an Australian case discussed in chapter 2,[923] the claimant argued that the defendant knew of the impact the Imam's presence would have on the claimant, which was used to buy the house at a lower price. The undue influence claim was denied, and no contract was found to have been made between the parties.

However, in different circumstances, the influence of third parties to a gift suggested by defendants can amount to exploitation by defendants, not third parties. It would occur where there is evidence of a defendant's knowledge of the impact the third party woule have on the donor and their motivations for gifts to inspire the execution of gifts. In religious and spiritual contexts, this factor is similar to an instance of exploitation where defendants threaten to shun or shame donors if they do not follow their requests for gifts. Third parties who are particularly enthusiastic adherents may be used by defendants to impress upon donors the potential social consequences of not making gifts, which could take place where donors question defendants on the purpose of gifts, or why the gifts need to be of such a high value, for example. The third-party will not, however, necessarily be found to have unduly influenced any gifts made as a result of their involvement. Although they may create incongruence between the donor's reasons for gifts or thwart their ability to reflect upon their preferences, the third party will only have unduly influenced the gift if they have also exploited the donor when doing so through one of the other factors listed.

Each of the factors discussed here establishes when a defendant exploits a donor. Except for the prior intention factor, one factor needs to be satisfied alongside a finding that it wrongfully

[923] See page 80.

violated the donor's autonomy resulting in a gift. Evidence of additional factors strengthen claims that gifts have been unduly influenced and make the analysis of the defendant's wrongdoing conducted by courts easier.

7.1.5. The rationale's procedural operation

My rationale works within the existing doctrinal framework for presumed undue influence with slight amendments. I reject the use of automatic presumptions of influence and argue that they are not always justified in practice. Automatic presumptions of influence fail to account for changes in relationship and influence in long-term relationships, which are typically a common aspect of religious undue influence cases.[924] Courts do not consider at the presumption stage what gifts should be susceptible to a presumption of influence and whether some should be severed from it. Consequently, defendants face the difficult task of rebutting the presumption as it applies to all gifts, which as discussed in this thesis, has generally proven an insurmountable task in hard cases of religious undue influence.

The same conclusion does not apply where presumptions of influence must be proven by claimants, which have resulted in gifts being severed from presumptions of influence in judgments.[925] Where automatic presumptions of influence do not apply, the temporal nature of relationships is taken into account by the current approach of English law where relationships of sufficient trust and confidence must be established between the parties at the time of each

[924] This consideration would also foreseeably apply in relationships between long-term care givers and those receiving care. For a general commentary on the concerns of undue influence claims in these settings see Brian Sloan 'Due rewards or undue influence? – Property Transfers Benefitting Informal Carers,' (2011) Restitution Law Review, Volume 19, 37-48.
[925] See *Re Craig, Dec'd* [1971] Ch 95. C.

gift.[926] This arises where the party's relationship is of the nature that it could give rise to influence, for instance, where there is a heightened degree of trust and engagement between the parties.[927]

Courts should still assess whether gifts call for an explanation where they cannot be explained by ordinary motives. I consider that gifts call for an explanation where there is evidence of reflection thwarting and incongruence between the donor's reasons for the gifts at the time each gift is made. I consider that the size of gifts does not indicate that it calls for an explanation, which is the current approach of the test.[928] The size of the gift is an unhelpful approach for deciding when presumptions of influence should arise.[929] Gifting large sums of money is far from incompatible with religious and charitable motives, as discussed in chapter 2.[930] Deciding that gifts are too large does not account for the donor's motives and imposes an objective view of legitimate gift-giving that will often be incompatible with the conceptions of obdurate believers.[931] Accordingly, my rationale extends the coverage of undue influence to gifts of any value if evidence was produced of an autonomy impairment. If the gifts do subsequently call for an explanation, a presumption of influence arises. This two-stage understanding of presumptions of influence applies to each gift made by donors to defendants.

Defendants can rebut presumptions by showing that none of the exploitation factors listed were present at the time of the gifts. The defendant exploits the donor's when one of the factors are established. Where this conduct produces a gift, the defendant has unduly influenced the donor.

---

[926] *Ibid*.
[927] John McGhee, *Snell's Equity*, (Sweet & Maxwell, 33rd Edition, 2016), para 8-031.
[928] *Allcard* (n 6) 185 (Lindley L.J.) adopted by the House of Lords in *Etridge (No 2)* (n 22) [29] (Lord Bingham). See pages 130 for the test for presumed undue influence.
[929] In *Evans* (n 422) Judge Keysler QC suggested that this reasoning was unprincipled at [63].
[930] See pages 76-78.
[931] See pages 149-150.

If, however, the defendant shows that there is no evidence of the factors, then even though the donor's autonomy was impaired at the time of the gifts, the impairment was not caused by the defendant's wrongdoing. In these circumstances, the defendant can subsequently rebut the presumption of influence, and the claim is unsuccessful, regardless of how improvident the gift is for the donor's interests.

7.1.6. Conclusions

In this section I have described how autonomy and exploitation are understood in my rationale and what sort of conduct should be captured in religiously grounded presumed undue influence cases. Some may argue that my rationale is underinclusive and fails to offer sufficient protection to those who make gifts to religious institutions motivated by religious faith.[932] Admittedly, the threshold of what constitutes undue influence in the rationale is high. However, I believe this is justified for three key reasons. Firstly, the threshold is set so high since it is fundamentally difficult to determine when religious influence becomes undue. If the benchmark of acceptable behaviour was lowered, then cases like *Allcard* could become more common and the doctrine would operate like a generous returns policy.[933] Improvident decisions should not be treated as a justified basis for legal intervention if positive autonomy is truly valued by the law. Secondly, my theory avoids endorsing strong accounts of paternalism and moralism that would produce bias judgments against specific religious

[932] For example, in contractual contexts, criticisms have made against the understanding of undue influence in Hong Kong. It is argued that courts there have set the threshold of proving undue influence too high, which reduces the doctrine's ability to serve its protective function, see Puja Kapai, 'Undue Influence and Unconscionability in Comparative Common Law: Delivering Contextualized Justice for Minority Sureties,' (2019) Transnational Law and Contemporary Problems, 28(2), 427.
[933] A similar concern is expressed about civil laws regulating mediumship in Edge (n 15).

traditions.[934] The doctrine should be neutral to the backgrounds of the parties in cases and should endorse a pluralistic conception of acceptable motives for gifts. Thirdly, on a more practical note, undue influence is not the only claim that can be brought by those seeking to reclaim gifted property. Claims of unconscionable dealing, duress, lack of knowledge, and misrepresentation can also be pleaded to challenge the legality of gifts.

7.2. The integrative rationale and *s2 FA06*

The chapter has so far focused on the civil context of how conceptions of autonomy and exploitation can more appropriately rationalize the presumed category of undue influence. I briefly mentioned the rationale's criminal overlap when discussing Feinberg's account of exploitation. The former sections sought to address how hard cases of religious undue influence should be decided by English courts. This section does not engage in an exactly similar exercise. Religious fraud cases litigated under *s2 FA06* are not in the same way hard cases to decide; they are cases where certain issues have not yet been addressed in the context of religious fraud because such cases have proven extremely rare. Accordingly, there are no conflicting perspectives of judges in domestic reported cases on how these cases should be decided in the same way there is for religious undue influence. The challenges facing the regulation of religious fraud through the offence have not been directly engaged with yet in domestic law. My rationale offers a principled means of theorising the offence and engaging with some of the challenges faced by English courts that were identified in part I. In theorising *s2 FA06*, I am part of a recent trend in criminal theory scholarship. Duff has recently advanced a normative theory of criminalization that seeks to offer a 'master principle' on what counts as

[934] Specific attitudes of prejudice faced by religious defendants in claims was considered on pages 99-112.

good reasons in principle to criminalise certain actions.[935] Further, Collins has put forward a considered account of what conduct *s4 FA06*, fraud by abuse of position, should prohibit.[936]

In the rest of the chapter, I demonstrate how the integrative rationale can explain how *s2 FA06* should be interpreted in interpersonal cases. In doing so, I establish why the rationale justifiably applies to both the civil and criminal wrongs in religious contexts. No attempts have been made by commentators to theorise *s2 FA06*, and so this analysis is a novel contribution to understandings of the offence. I argue that this development in the understanding of *s2 FA06* will greatly help to prevent the overcriminalisation of religious representations resulting in gains of financial capital.

The possibility of overcriminalisation of religious representations ties into much broader concerns raised consistently by criminal law theorists. In recent years, English criminal law has been criticised for creating too many criminal offences,[937] causing the current state of the criminal law to be described as "unprincipled" and "chaotic."[938] The concern about overly criminalising conduct is a real and pressing one for many criminal theorists for two leading reasons:[939] firstly, there are so many offences that individuals are put are risk of being convicted and punished for conduct that does not justify that response.[940] Additionally, and more relevant to the subsequent discussion of *s2 FA06*, it is alleged that it is impossible to offer precise definitions for every criminal offence.[941] A lack of definitions of offences provides police and prosecutors with an unjustly broad discretion to investigate and convict a wide range of

[935] R. A. Duff, *The Realm of Criminal Law*, (OUP 2018), 3. The master principle is considered to be 'thin' and leaves a lot of substantive work to be finished at a later date, at 3.
[936] Collins (n 521), 169-186 & Collins (n 600), 354-363.
[937] Duff (2018), 1.
[938] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) Law Quarterly Review, 116, 253. For contrary views see Duff (n 935), 1.
[939] Duff (n 935), 1-2.
[940] *Ibid*, 2.
[941] *Ibid*.

conduct.[942] As such, overcriminalisation risks unprincipled enforcement of law at a practical and normative level.[943]

Although the integrative rationale is an important development for setting the principled boundaries of how *s2 FA06* should apply in interpersonal religious contexts, it does not address all of the challenges of regulating religious fraud examined in chapter 3. The rationale is unable to address the human rights-based considerations generated by *Article 9 ECHR*, relating mainly to testing the falsity of a defendant's religious representations where there is no clear evidence that a defendant believes their representations are false.

In the following sections, I consider how autonomy and exploitation is understood generally in criminal law theory before discussing how my rationale applies to *s2 FA06*. I justify why my rationale establishes a more principled understanding of the offence's statutory language and illustrate how it applies to decided cases. US religious cases and domestic nonreligious cases are also considered here due to the unavailability of domestic decisions on religious fraud prosecuted for *s2 FA06*.

7.2.1. Autonomy and criminal law

Autonomy is seen as one of the most fundamental concepts in criminal law.[944] It is argued to have an important normative aspect, namely, that individuals should be treated with respect

[942] *Ibid*.
[943] *Ibid*.
[944] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, (OUP 2013), 23. For a broader understanding of how it is considered in criminal law see 23-28.

and capable of making their own choices.[945] Autonomy is considered in a wide range of substantive topics in criminal law[946] and criminal justice.[947] Most commonly, autonomy is seen as a normative principle that sets limits to criminal laws.[948] But criminal laws can also enhance the autonomy of individuals by preventing others from unlawfully violating their autonomy. Individuals have a greater ability to control their actions and make their choices based on correct understandings of reasons. On the other hand, criminal laws inevitably impose severe restrictions on an individual's ability to exercise their autonomy. Laws prohibit particular acts by making them criminal offences which are subject to invasive punishments. Punishments include imprisonment, which generally amounts to one of the most severe examples of limiting autonomy that can be justified by the law.[949]

Autonomy is frequently discussed in relation to harm principles and exploitation in criminal law. Feinberg's immense volume of work is arguably the most detailed theoretical elaboration on how criminal law can legitimately limit a person's autonomy. Feinberg defines his descriptive sense of autonomy in reference to the harm and exploitation principles.[950] However, it is not appropriate for determining the rationale of *s2 FA06*, as it is a descriptive account. Consequently, it is subject to the same sorts of criticisms of Birks and Chin's and Chen-

[945] *Ibid*, 24-25.
[946] For example, the boundaries of consent see Tom L. Beauchamp, 'Autonomy and Consent,' in Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice*, (OUP 2009). It has been considered in regard to sexual autonomy see Kiran Grewal, 'The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape,' (2012) *Journal of International Criminal Justice,* 10(2), 373–396.
[947] See Paul Roberts, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries,' in Peter Alldridge and Chrisje Brants, *Personal Autonomy, the Private Sphere and Criminal Law A Comparative Study*, (Hart Publishing 2001) & Alan Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law,' (1996) The Modern Law Review, 59(4), 540-556.
[948] Feinberg's four-volume collection on the moral limits of the criminal law, some of which have been discussed throughout this chapter are principled on a Liberalist conception of autonomy, see Feinberg (n 29); Feinberg (n 521); Also, for discussions on Dworkin's account of autonomy in this context see Lawrence C. Becker, 'Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality,' (1999) William & Mary Law Review, 40(3), 959-973.
[949] Raz describes them as "a global and indiscriminate invasion of autonomy," Raz (n 28), 418.
[950] Four conceptions of self-governance are submitted, Feinberg (n 29), 28-51.

Wishart's accounts of autonomy.[951] Below I explain why my interpretation of Dworkinian autonomy better explains what conduct should be characterised as lacking autonomy and what should be criminalised under *s2 FA06* by focusing largely on religious fraud contexts.

Dworkin's latter conception of autonomy has been adopted in commentary arguing for more principled limits to criminal offences.[952] However, neither of Dworkin's accounts has been considered in relation to English criminal fraud laws. The most relevant scholarship to fraud laws is Eggert's analysis of regulating financial elder abuse under US consumer law.[953] Dworkin's latter contribution is employed by Eggert to demonstrate when elderly consumers do not autonomously agree to predatory loan arrangements. Eggert suggests how laws should be reformed to better protect elders.[954] However, Eggert uses autonomy in this context to justify why elders should relinquish control over their financial matters to safeguard their overall autonomy.[955] This is not the aim of my rationale and so my usage of Dworkinian autonomy is different. My use of autonomy is limited to how civil and criminal laws can justifiably regulate violations of an individual's autonomy in religious undue influence and religious fraud litigation. Regardless of this difference, the account of autonomy included in my rationale is compatible with a range of topics in law and it is, therefore, not out of place in contexts involving deceit and misrepresentation.

[951] For a summary of these arguments see 191 & 213.
[952] Dworkin has applied it to discuss bans on physician-assisted suicide, see Gerald Dworkin, 'Should Physician-Assisted Suicide Be Legalized?' in Dieter Birnbacher and Edgar Dahl, *Giving Death a Helping Hand: Physician-Assisted Suicide and Public Policy. An International Perspective*, (Springer 2008), 3-9.
[953] Kurt Eggert, 'Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending,' (2003) Loyola of Los Angeles Law Review, 36(2), 693-775.
[954] Eggert would introduce Elder Home Equity Loan Instruments, which "…allow the senior homeowners to reform any loan documents that contain interest rates or fees above a certain benchmark, or that contain other potentially confusing or harsh terms." *Ibid*, 696. A detailed explanation of the instruments is given at 758-770.
[955] *Ibid*, 696.

7.2.2. Autonomy and *s2 FA06*

s2 FA06 prohibits dishonest representations known to be false, misleading, or might be either by defendants that are intended to make a gain for themselves or cause a loss to another party.[956] The offence seeks to prevent conduct that would cause individuals to act upon false information, which would make them unable to make truly informed choices on their own accord. The fraud offences listed in *s1 FA06* do not require deception to cause the loss or gain because the offences are inchoate in nature.[957] Despite this fact, *s2 FA06* can be characterised as prohibiting individuals from deceiving others or lying to them in order to gain some form of property or where they intended to do so.

Autonomy, as I define it above, is highly relevant in fraud offences like fraud by false representation, where the fraud is committed on persons.[958] The rationale does not seek to explain instances of fraud operating on systems or application schemes,[959] such as entitlement to housing benefits or incorrect submissions of income tax. I consider that a victim of *s2 FA06* experiences autonomy impairment when the *actus reus* of the offence is satisfied.[960] Cases of religious fraud involve false inducements made by defendants, which impact the victim's ability to adopt certain reasons for their actions. In religious cases, when falsity can be proven because the defendant misrepresents the state of their mind, the actions of the victim are not truly the product of their own decision-making process. Instead, victims are influenced by the defendant's false or misleading representations, which can, and will often result in reflection thwarting. In these scenarios, victims do not reflect upon their preferences and reasons for

[956] s2(1)(a)-(b).
[957] Ormerod (n 12), 196.
[958] Dworkin submits that deception infringes upon the voluntary nature of the individual's actions, Dworkin (n 781), 14. Although deception is not required under the offence, it helps to show evidence of impaired autonomy.
[959] This conduct is captured by s2(5) FA06.
[960] See pages 272-278.

actions in a strict sense because the reflection process is void of procedural independence. The representation makes this process a product of both the victim's and the defendant's desires. Therefore, victims are unable to reflect upon their first-order preferences and second-order preferences organically. Consequently, victims cannot effectively align their different preferences with their reasons for action.

This conception of autonomy does not extend to representations that are neither potentially false nor misleading.[961] Individuals should not be able to claim that they did not appreciate the risks of what they were doing where representations are clear and truthful when the defendant genuinely believes in the representation and cannot be shown to have misrepresented the state of their mind. Additionally, this applies to scenarios when victims are confused by a representation at the time it is communicated but fail to seek clarification about it from defendants. Therefore, in cases where falsity can be proven because there is evidence of the defendant's state of mind, there is no need to reform the *actus reus* for my rationale to operate in practice until the specific falsity testing challenge is determined by the courts or Parliament.

7.2.3. Autonomy in religious *2 FA06* cases

In religious cases where it is not possible to prove that the defendant knew their representations were false, prosecutions will be prohibited from establishing the falsity of the representation under the current law, and so cannot determine whether the victim's autonomy was impaired. Representations will most likely be shielded from falsity testing by the decision in *ex parte*

[961] s2(2)(a) FA06 requires an objective determination of whether a representation is untrue or misleading. It must then be shown that the defendant believes the representation was false, misleading or might be either, under s2(2)(b).

Williamson and other relevant *Article 9 ECHR* jurisprudence that was considered by the House of Lords in that judgment.[962] If the courts or Parliament rules that religious *s2 FA06* cases do not need to satisfy the falsity element of the *actus reus* where it is not possible, the subsequent analysis of defendant conduct will depend on assessments of their dishonesty. Assessing dishonesty will likely include whether defendants sincerely believed in their religious beliefs surrounding the representations based on *ex parte Williamson* and *Ivey*. Exploitation, therefore, plays an even more significant role in these cases because it provides the basis to determine defendant liability. I discuss the different applications of my rationale in such cases below.

To date, *Phillips* is the only case of religious fraud litigated under *s2 FA06* in England.[963] As mentioned in chapter 3, the case was unreported, and the coverage of the case fails to set out the facts in any real detail. Moreover, in dismissing the case, Judge Riddle did not engage with the statutory wording of *s2 FA06* and how it applies to religious representations because the case was held nonjusticiable.[964] It is, therefore, unhelpful to the current analysis of how my two-limbed conception of autonomy applies to religious fraud cases prosecuted for *s2 FA06*.

I now assess how the conceptions of autonomy operate based on the facts of *Ballard* to establish why intervention is justified in similar cases using the language of *s2 FA06*, where defendants know that their religious representations are untrue or misleading, and this can be evidentially proven by prosecutions. In *Ballard*, the defendant made representations via mail that they had miraculous powers to cure ailments and help adherents overcome illnesses. The defendant also claimed that they were a descendant of Saint-Germain. A number of defendants paid for the healing services performed by the defendant as a result of the representations.[965]

[962] See page 88
[963] See page 85.
[964] *Ibid*.
[965] For a more detailed of the facts of *Ballard* see page 39.

If the truthfulness of the representations could be tested for falsity because there is clear evidence that the defendant does not believe in the representations, the autonomy of victims was impaired where their motivations for action were based on the defendant's false or misleading representations. The representations caused reflection thwarting because the victim's higher-order desires (their religious beliefs) and second-order desires (to overcome ailments or be healed of a condition completely) cannot have been reflected upon in a real way. Reliance on false representations meant that the victim's reflection process was based on incomplete knowledge and lacked procedural independence. Therefore, victims did not make a completely autonomous choice to act and pay the defendant.

Secondly, the representations could have also created incongruence between a victim's reasons for acting. The victim's first-order and second-order preferences would not have strictly aligned where they unknowingly relied on false information, in the hope that it cured their ailments. Victims may have placed this reason above other reasons that are important to them. Typically, an individual's health is one of their more important interests. Good health helps them pursue other options valuable to their interests and relationships. This is not entirely true for all long-term interests. Many individuals engage in risky and unhealthy activities and jobs, for example, smoking, tree felling and free climbing. However, these options do not reach a level where they become repugnant options. In an autonomy framework built on moral value pluralism, options like these, and the possibility of being healed by miraculous powers, should be tolerated within a state's margin of appreciation on what constitutes valuable options where there is no real evidence of falsity. Considering false representations of miraculous powers, victims may have determined that their health and religious beliefs are their most important and valuable options (first-order preferences), and thus reluctantly sacrificed other wishes (second-order preferences) to pay for the religious services they genuinely believed would

benefit them. If their decision to act was motivated by false information, the victim's decision to make that payment was based on incongruence between their reasons. Accordingly, their decision to act was not autonomous.

7.2.4. Autonomy in nonreligious *s2 FA06* cases

I now consider reported *s2 FA06* cases to make it clear how my conception of autonomy applies in practice. Finding reported cases of *s2 FA06* that show how autonomy is impaired in the way described is difficult. Most reported cases relate to fraud on systems or companies, for example, in respect of insurance claims resulting from road traffic accidents.[966] Accordingly, most judgments look at how an institution has been subject to false representations and not how false representations affect a victim's autonomy.

False or misleading statements will often cause reflection thwarting, as occurred in *R v Stokes* [2019].[967] Here the defendant falsely represented that puppies for sale were from a domesticated setting and in good health but knew that they were, in fact, from a puppy farm and were suffering horrible illnesses that typically resulted in death. Several people suffered the fraud. For one victim, their puppy fell critically ill the day after purchasing it from the defendant. In treating the illness, the victim's incurred vet bills of £4,900. In this scenario, the victim's first-order preference was the desire for a dog and their second-order preference was to desire a dog that was not farmed or have a high risk of illness. The false representation, that the puppies were from a domestic setting, prevented the victim from truly reflecting and

[966] For example, *R v Wright* [2013] EWCA Crim 820; [2013] 4 WLUK 72.
[967] EWCA Crim 1433 (CA).

deciding whether they wanted a farmed dog. The victims were not aware of the high possibility that the dog could become critically ill due to the poor conditions the puppies inhabited, or that this breading process may lead to physically weaker dogs. The victims, therefore, did not make a voluntary choice to accept those risks because they were unaware of them at the time of buying a puppy.

False or misleading representations can also create incongruence between the reasons for actions adopted by victims. When acting on these sorts of representations, victims accept the representations as valid reasons that help them to match up their first-order and second-order preferences. Even though victims agree to the reasons that match up to their preferences, they are relying on inaccurate or false information provided by a defendant's false or misleading representation, which could be proven. The victim's autonomy is consequently impaired because their decision-making capabilities are tainted by the influence of another. Their decision consequently lacks procedural independence. Accordingly, although the victim chooses their own reasons to act, that choice is influenced by the defendant's representation and is subsequently not a voluntary one.

An example of this is found in *R v McDevitt* [2012],[968] which involved multiple false and misleading representations, including the representation made by the defendant that they would hold £75,000 of the victim's money and return it to them within six months. The money was needed for a highly profitable investment that would produce a windfall for the victim. The representation was a complete fabrication and the defendant spent all of the money within five months of receiving it. At the time the transaction was entered into, there was an incongruence between the victim's reasons for action. If the victim had known that the representation was

[968] NICC 16. The case was decided in Northern Ireland, but the judgment examined the *FA06*.

false, they would not have entered into the transaction and given their money to the defendant. Accordingly, the representation operated to provide false reasons to create a potential congruence between the victim's reasons for action. Here the victim considered that the representation did create congruence between their first order preferences, to make a profit and their second-order preferences, to want to use savings to make a profit. As a result, the victim's autonomy was impaired by the defendant's false representation.

False or misleading representations will inevitably impair a victim's autonomy in the ways described. A victim's autonomy is only violated if the impairment is wrongfully induced by defendants. Accordingly, the other elements of the offence must also be satisfied for intervention to be justified; liability for *s2 FA06* can only be justified at that this second stage. I now elaborate on how wronging understood as exploitation applies to *s2 FA06*.

7.2.5. Exploitation and *s2 FA06*

Exploitation has a significant role in my rationale. It helps to explain when religious fraud is proven beyond a reasonable doubt in *s2 FA06* cases, which applies both where religious representations can and cannot be tested by courts. As mentioned above, when religious representations cannot be tested for falsity, exploitation becomes the leading principle for determining how *s2 FA06* should be interpreted by courts. Therefore, in these cases, the defendant's wrongdoing determines their liability and the victim's autonomy should not be assessed by juries. This is a justified change of position to my approach, despite the fact that I argued in the civil context that the defendant's wrongdoing should not, by itself, determine a defendant's liability for undue influence. The distinction in how the rationale applies in cases

where falsity cannot be proven is more justified at this time in *Article 9 ECHR* jurisprudence than testing miraculous religious claims for falsity, and finding a nonjusticiable area of law, justiciable.

Feinberg's first account of exploitation that "Some proposals by A are coercive in their effect on B in that they close or narrow B's options, and they are also instances of A exploiting B's vulnerability for A's own advantage"[969] is inexplicitly prohibited by the statutory language of the offence. The *mens rea* requires that defendants dishonestly intend to cause a loss to the victim or make a gain for themselves or another, through their false or misleading representations. The language of false representations offers a textual foothold to admit this account of exploitation because of the clear links to lying, which amounts to active exploitation in Feinberg's account.

Exploitation is, therefore, experienced by victims in *s2 FA06* cases where defendants know their representation is false even if they do not pressure the victim into conceding to the representation. Defendants use victims as a means to an end to make a gain or cause a loss for themselves or another. An example of this occurring in religious contexts is where a defendant represents to victims that they will be punished in the afterlife for not donating to a particular religious cause without truly believing that this could happen. Here the defendant insincerely relies on the religious beliefs of the victim to hide their fraudulent intentions. The victim, unaware of the falsity of the representation and the defendant's insincerity, does not want to make the donation, but nevertheless makes it because of the fear of the punishment. In this scenario, the defendant's exploitative conduct creates incongruence between the reasons for

[969] Feinberg (n 29), 178.

the victim's actions. Consequently, liability for *s2 FA06* would be justified where dishonesty and insincerity are also found by juries.

Using *Ballard* as a case study once more shows how this conception of wrongdoing applies to religious *s2 FA06* cases that are likely to be litigated in a more concrete way. More active exploitation would have been present in *Ballard* if the representations were slightly more forceful and there were clearer signs of insincerity motivating the representations. For instance, if the defendant had stated that their powers were the only way the victim's ailment could be healed. If the victims genuinely believed the representation, and the defendant did not and this could be proven by prosecutions, the defendant coerced the victims into paying for the healing services. The defendant acted insincerely and took advantage of the victim's religious beliefs and trust. In turn, the victims were actively exploited by the defendant who prevented them from accurately reflecting on their preferences in order to make a gain based on the false representation.

The same conclusion on liability would also apply to the representation that the defendant was a descendant of Saint-Germain, which does not relate to unworldly claims, if it could not be confirmed as true by the defendant. The defendant made a false representation or one that is at least misleading to gain financially if they did not inform those paying for the services that the representation could not be proven. By not correcting that impression, the defendant exploited victims paying for services based on the perceived prestige of their alleged ancestry, which prevented victims from accurately reflecting on their preferences and reasons for the donations.

Similarly, the defendant exploits victims if at a later point they became aware that they did not actually have miraculous powers to heal people and did not subsequently inform the victims of

this realisation. Here the defendant mispresents the state of their mind about the representation communicated at an earlier date. If this occurs, and the victim continues to pay for healing treatments, the defendant exploits the victim by not correcting their understanding of the truth of the representation. The defendant takes advantage of the victim's lack of knowledge of the representation's truthfulness and subsequent inability to reflect on the change of facts. The defendant in this scenario would also, it seems, likely to be found dishonest by juries.

If courts hold that it is not possible to test the falsity of religious representations in cases because there is no clear evidence that the defendant misrepresents the state of their mind, exploitation becomes the principal way of determining defendant liability. The prohibition against testing the falsity of religious beliefs will mean that the autonomy and active exploitation analysis described does not apply. In cases of this nature, unless a religious exemption is granted to religious defendants, defendants should still be found guilty if they have insincerely coerced victims into gifting property based on a representation by acting dishonestly and intentionally, in order to make a gain or cause a loss.

A dishonest and insincere defendant still exploits the victim's faith and trust by making the victim act for the defendant's own advantage. Facts indicating more passive means of exploitation considered above[970] are significant to determinations of dishonesty by juries. Accordingly, juries should be left to determine whether the defendant's efforts, for example, to isolate victims for other adherents or preventing them from seeking the advice of other religious ministers are evidence of dishonesty and insincerity on a case-by-case basis. The other factors that indicate more passive forms of exploitation considered in the civil law analysis are

[970] See pages 260-264.

also relevant to dishonesty assessments but should not be mandated by courts because of the concerns expressed about list-based dishonesty directions.[971]

Exploitation would not be found in circumstances where a victim was not originally convinced that the defendant's representation was true. If a victim holds this sort of view and does not seek to explore or question the truthfulness of a representation, but willingly pays for the services, the defendant does not exploit the victim in any real way. The defendant has not taken advantage of the victim. Instead, the victim knowingly and voluntarily makes the gifts based on the representations that may not turn out as promised. Consequently, the victim accepted this risk for their own reasons based on autonomous decision making.

7.3. Conclusions

In this chapter, I have explained and justified the application of the integrative rationale in two specific areas of law. In doing so, I have fulfilled my revisionist aim of developing a more legitimate rationale to explain how both legal wrongs should be interpreted and applied by English courts. In relation to undue influence, I have also addressed the challenges facing the rationales discussed in chapter 6. I have demonstrated how my rationale better explains when influence arises in hard cases of religious influence under the doctrinal test for presumed undue influence. I showed how the two limbs of autonomy advanced by Dworkin explains when a presumption of influence arises alongside evidence that there is a suitable relationship of trust and confidence, and the transactions calls for an explanation. I also demonstrated how

[971] See pages 110-111.

defendants can effectively rebut the presumption of influence by showing that they did not exploit a claimant's impaired autonomy that caused them to make a gift.

I followed this analysis by examining how the two-limbed theory of autonomy applied to reported religious undue influence cases. I argued that that the cases examined contained judicial reasoning that was based on unprincipled reasoning and was subsequently wrongly decided according to the integrative rationale. In doing so, I submitted that courts generally fail to consider the nature and influence that religious relationships have on a donor's motivations for gifts and their generosity, and how it changes over time. Religious relationships that involve gifts are not inevitably exploitative ones. Not all cases of religious influence should be categorised as undue where decisions to make gifts are later regretted by donors. My rationale reduces the risk of such findings by limiting how aggrieved former adherents can seek equitable relief after making substantial gifts to religious officials. I have set stricter limitations on how presumed undue influence should be interpreted in relationships held between religious officials and adherents by considering normative principles. Limits are also set by the procedural application of the principles, which adds further safeguards against unprincipled decisions. Accordingly, I have argued that it is possible to develop a more complete normative account of undue influence by not arguing for, or inexplicitly including, strong forms of moralistic and paternalistic reasons to justify intervention. Consequently, my rationale better explains when religious influence becomes undue in hard cases of presumed undue influence.

I also established how the integrative rationale applies to my criminal focus on *s2 FA06*. I outlined how the rationale establishes the justified normative boundaries of the offence by applying the autonomy and exploitation principles to religious fraud cases such as *Ballard*, and to nonreligious cases of *s2 FA06*. As a result, I have formulated a rationale that explains how

s2 FA06 should be interpreted and have described how it should be used by English courts to regulate fraudulent religious representations.

The integrative rationale is unable to address all of the problems posed by regulating religious fraud under *s2 FA06*. There is one challenge that the rationale cannot appropriately address; whether courts should be allowed to test the falsity of certain kinds of religious beliefs. This challenge is concerned more specifically with the boundaries of *Article 9 ECHR* and the jurisprudence of the ECtHR. Despite stopping my analysis short of suggesting the possible means of addressing the challenge, I have nonetheless expanded upon the complexity of the challenge and more broadly, demonstrated the doctrinal, procedural, and human rights law challenges that will face English courts in religious *s2 FA06* cases. Consequently, I have provided explanations to corroborate my view that regulation of religious representations under the current understanding of *s2 FA06* warrants the attention of the courts and Parliament.

Chapter 8: Conclusions

8. Introduction

In this concluding chapter, I begin by summarising the issues presented by regulating religious fraud and religious undue influence that have been identified in this thesis and briefly reassert my suggestions for addressing those challenges through the integrative rationale. I subsequently identify the prevalent themes of this thesis and summarise the potential policy implications that my analysis could have on the regulation of both legal wrongs in England. The chapter then suggests what interrelated issues could subsequently be assessed by other researchers interested in the two areas of law that I was unable to engage with in this thesis. I explain how research would likely produce even more principled regulation of abuses of religious capital resulting in gains of financial capital. Extended analysis of this kind would also benefit understandings of a number of other areas within criminal law, private law and law and religion, as mentioned.

8.1. Outline of thesis

Chapter 2 outlined how religious fraud and religious undue influence is regulated in US and Australian legal states. This comparative analysis established that the regulatory approaches relating to both areas of law shared common challenges, despite the differences in approaches and treatment of religion and religious beliefs. The US was an invaluable source for understanding the complex challenges of regulating religious fraud. *Ballard*, in particular, was considered as the basis of any discussion on religious fraud regulation. Subsequent cases in the

US have established a consistent approach for regulating religious fraud by requiring that the religious beliefs motivating religious representations should not be tested by courts, but that the sincerity of the defendant's religious beliefs should be assessed to determine criminal liability. I reviewed a number of views on this approach and considered suggestions on alternative ways to regulate alleged fraudulent religious conduct.

My analysis of the primary and secondary Australian sources enriched understandings of how religious undue influence is understood in contemporary settings. The Australian experience provided a number of cases that contained detailed reasoning on how the test for presumed undue influence applies to religious cases. Ridge's analysis of much of this reasoning was significant to understanding the subtle differences between the Australian and English understandings of undue influence. More specifically, Ridge's work examined the main challenges experienced by Australian courts that have decided religious undue influence cases more frequently. However, I noted that Ridge's work did not make any real substantive suggestions on how to address the challenges identified.

Similarly, the US jurisprudence on undue influence contributed a great deal to understandings of undue influence considered in religious cases. The analysis of the US cases signified that even when a jurisdiction has affirmed the doctrine's rationale for a long time, similar challenges to those later identified in Australian law, and English law later mentioned in chapter 4, were similarly experienced by many US states. Furthermore, this analysis generated further questions about the doctrine's functional operation that have not generally been considered in English law. The most notable of these questions concerned what is the explicit role of active and passive exploitation?[972] Are automatic presumptions of influence justifiable

[972] See page 67-68.

in long-term religious relationships of gift-giving?[973] This temporal question opened up far-reaching discussions on understandings of temporality in relationships of influence that featured regularly in my analysis in chapters 6 and 7.

Chapter 3 examined the most pressing challenges of regulating religious fraud using *s2 FA06*. I opened my analysis by discussing *Phillips* and argued that the decision would potentially prove more problematic for victims and fraud prevention,[974] than if cases of this nature were held to be justiciable. I demonstrated why issues of this nature, restated below, should not automatically be deemed nonjusticiable by courts without considering the specific facts of cases first.[975] I moved on to address the doctrinal and rights-based challenges of religious fraud regulation under *s2 FA06* and argued that English courts can engage with these issues to varying degrees without investigating religious practices in ways that are legally prohibited by human rights jurisprudence. Two challenges stood out more than the others mentioned: whether religious representations can and should be tested for falsity (the falsity testing challenge);[976] and, whether the sincerity of the defendant's religious beliefs, alongside dishonesty, should be the leading means of determining their liability (the sincerity testing challenge).[977] Both challenges were labelled as unique to religious contexts because they arise solely in transactions motivated by religious and spiritual beliefs relating to matters of the unworldly.

I also examined challenges arising in religious contexts posed by the *mens rea* of *s2 FA06*. I considered how the change to criminal understandings of dishonesty may detrimentally impact

[973] See pages 74-76.
[974] See pages 84-85.
[975] *Ibid* & 88-89.
[976] See pages 87-91.
[977] See pages 111-117.

dishonest assessments of the defendant's religiously motivated conduct.[978] Additionally, I examined how knowledge is understood in *s2 FA06* settings. I discussed how the traditional approach adopted by courts in determining whether a defendant knew something to be untrue, misleading, or might be either, would prove problematic to whether defendant satisfy this part of the *mens rea*, where representations relate to religious and supernatural occurrences.[979] I identified how courts will face significant problems in doing so where the alleged religious fact is not capable of being proven false or true by conventional methods used in criminal procedure, and it cannot be proven that the defendant misrepresented the state of their mind. I explained that the *mens rea* challenges mix unique religious challenges with general procedural challenges arising under the *FA06* that are compounded when assessed in religious contexts.

The *mens rea* challenges are significant to another more practical challenge considered; how can laws effectively determine who has committed *s2 FA06* in religious structures?[980] I considered the role of group sincerity in dishonesty assessments.[981] This applied most directly to religions involving beliefs requiring donations to be made for religious officials to carry out the religious wishes of adherents, for example, where religious officials pray for adherents to be blessed in the afterlife. If these beliefs are held and communicated by all officials of a religious institution, which is likely given their shared beliefs, it will be important for courts to be able to effectively determine which officials act fraudulently.

Despite the consistency and pragmatism offered by the US approach to religious fraud regulation, I concluded that this approach would prove highly problematic if transplanted directly into English fraud laws. Inevitably, human rights constraints imposed by the ECtHR

[978] See pages 98-111.
[979] See pages 94-97.
[980] See pages 118-123.
[981] *Ibid*.

on testing the falsity of religious beliefs would conflict with the wording of *s2 FA06*. As a result, Parliament would be required to make statutory amendments to the provision as it cannot be interpreted in a way that is compliant with *Article 9 ECHR* in all cases.[982] I argued that a rationale must be developed before statutory reform took place so that justified boundaries to the offence could be set in religious contexts.

Chapter 4 outlined the most concerning challenges of regulating religious influence through the English understanding of presumed undue influence in equitable settings. I defined these cases as hard cases of undue influence. The overarching challenge identified was the extent of discretion afforded to judges by the doctrinal test for determining when influence becomes undue.[983] I considered that this challenge was largely explained by the lack of a precise definition of the term impaired will and no strict agreement on the doctrine's rationale.[984] I argued that even though the doctrine is considered to be based on free will in contemporary cases, this understanding of the doctrine's rationale did not always fit with findings of religious influence in both historical and contemporary cases. Certain cases discussed took into account the defendant's wrongdoing to determine whether the defendant could rebut a presumption of influence.[985] Accordingly, it was established that wrongdoing was sometimes a theme in presumed undue influence judgments. However, its exact role was not confirmed with any degree of specificity in either religious or general cases.

The specific doctrinal challenges considered in chapter 4 intensified my concern stated at the start of this thesis that judicial reasoning found in presumed undue influence cases of religious and general nature have largely been unprincipled. In addition to the rationale question, several

[982] Required in domestic law under Human Rights Act 1998, s 3.
[983] See pages 134-143.
[984] See pages 136-137.
[985] See 134-142.

other questions were identified, that if less unanswered, could negatively impact decisions in cases of any nature. I asked: what was the role of independent advice?[986] Must defendants benefit from unduly influencing conduct?[987] Do courts consistently find a suitable relationship that should give rise to a presumption of influence?[988] Although these questions were discussed previously in relation to the Australian and US understandings of undue influence in chapter 2, the challenges posed by these questions has received less attention in England. As a result of this analysis, this thesis has singled out additional doctrinal complexities of the presumed test for undue influence that have not been examined in an extended way before by civil law scholars.

I concluded the chapter by submitting that the Australian and the US approach to regulating religious undue influence exposed similar concerns about over-regulating and under-regulating varying religious financing practices discussed in chapter 2.[989] Additionally, I considered that neither jurisdiction offered an approach that was doctrinally and normatively complete enough to principally determine when religious influence becomes undue without further clarification of the rationale and doctrinal test for presumed undue influence. Consequently, I argued that it was important to develop a rationale specifically aimed at dealing with abuses of religious capital resulting in financial gains to explain how presumed undue influence should operate in domestic settings. The suggestions made in chapters 6 and 7 were, therefore, a natural next step in the equitable and restitution literature on this area of law.

Chapter 5 engaged with the hybrid challenges of regulating religious fraud under *s2 FA06* and religious influence through the presumed category of undue influence. I considered how the

[986] See pages 143-145.
[987] See pages 149-151.
[988] See pages 154-162.
[989] See pages 162-163.

grounding principle problem applies to both legal wrongs,[990] as well as how courts and juries can correctly identify defendants involved in religiously influencing conduct,[991] and whether courts consistently take account of changes in religious influence and relationships that alter how defendant conduct should be examined by courts and juries.[992]

More broadly, this cross-fertilizing analysis of criminal fraud laws and civil undue influence is a novel contribution to the regulation of religious influence and relational influence surrounding financial transactions. The combination of the two different legal wrongs, which are based in very different areas of law, has offered this thesis a great deal. Most notably, it has enabled me to generate an appropriate response to the regulation of both legal wrongs in religious contexts involving gift-giving. The criminal and civil law analysis revealed several fundamental and interlinked questions concerning effective regulation, namely, what is the appropriate rationale for both wrongs? When should defendant conduct be considered unlawful? Should both legal wrongs capture direct and indirect instances of exploitative conduct? Should exploitative conduct require a gain of some form, even if it is not made by defendants? How should courts assess claims of either nature, when donors have left a religion for another and seek to have gifts returned to them? How can courts appropriately identify who are victims and who are defendants in religious structures?

In part II, chapter 6 engaged with the leading rationales seeking to theorise the doctrine of undue influence. At this stage in the thesis, I put the examination of religious fraud on hold. Discussions on the appropriate rationale for undue influence have been debated for as long as the doctrine has existed for. The same discussions were noted to be most commonly made by

[990] See pages 165-168.
[991] See pages 168-171.
[992] See pages 172-175.

scholars advancing a rationale for presumed undue influence, which for the main purposes of this thesis, was highly beneficial. My critique of the three leading rationales contributes to the general understanding of undue influence. I highlighted how the interaction of general doctrinal challenges posed by presumed undue influence cases listed in chapters 2 and 4 could not be addressed appropriately by the rationales mentioned. Additionally, I established that the authors of each rationale had not recognised some of the general challenges found in the judgments mentioned in their analysis. For example, what the role of independent advice is where it has been received but not followed, the nature of fiduciary duties owed to donors and temporal considerations of how influence alters over time in long-term relationships. Furthermore, by evaluating the rationales, I discussed the legitimacy of wider discussions on the doctrine's fundamental principles that have been mentioned in other author's rationales that could not be discussed further in this thesis.

Most significantly, my criticisms of the three rationales explained why each rationale could not legitimately and consistently establish when religious influence becomes undue. I nevertheless submitted that each of the principles featured in the rationales was essential to understandings of presumed undue influence. I concluded that normative understandings of free will, exploitation and relational autonomy captured much of the inherent meaning of undue influence experienced in religious contexts and relationships.

Lastly, the rationales examined were invaluable in creating greater clarity on how my rationale, advanced in chapter 7, provided a means of theorising *s2 FA06.* I have mentioned throughout this thesis that criminal law scholars have generally not sought to develop a rationale for the *FA06* offences. The one main exception to this gap in knowledge is the work of Collins on *s4*

FA06. Collins' work was, however, unable to make the same contribution to my rationale in the same way as the civil law scholars assessed in chapter 6.

Chapter 7 set out my principled approach for addressing many of the issues of regulating religious fraud and undue influence listed in part I. I termed this the 'integrative rationale of autonomy and exploitation.' My rationale requires courts to establish that the defendant's conduct satisfies the doctrinal elements of both legal wrongs, as well as the factors indicating that the donor's autonomy has been violated by the defendant's exploitative conduct in the ways described. My rationale is applied to the current wording of *s2 FA06* and the test for presumed undue influence with slight amendments, and it relies on particular conceptions of autonomy and exploitation set within a Perfectionist framework. I argued that the rationale is better able to produce principled decisions in cases in both areas of law. In such a principled approach, the religious circumstances of cases are given adequate respect and the doctrinal tests for both legal wrongs are considered in a more nuanced way. On this foundation, my concerns that strong forms of paternalistic and moralistic reasons can easily permeate existing doctrinal tests are heavily reduced.

The civil law analysis conducted in chapters 2, 4 and 6 provided multiple cases to demonstrate how my rationale applied in practical contexts in chapter 7.[993] In doing so, I offered a justification for why I believe some determinations of religious undue influence by English and Australian courts were incorrect. The cases reviewed, most notably *Allcard*[994] and *Hartigan*,[995] contain reasoning that frequently touches on conceptions of free will, exploitation and relational influence. Going against the orthodox views of these case, I argued that courts

[993] See pages 246-251.
[994] See pages 246-249.
[995] See pages 250-251.

do not typically examine these factors in a nuanced way, or in a way that appeals to reasons justifying the usage of particular factors when determining the defendant's liability. In these judgments, the courts did not describe their understandings of these factors in a principled way.

In relation to the rationale of *s2 FA06*, discussions on what constitutes exploitative conduct, in particular, is much less common in the case law. Consequently, the civil law focus offered valuable insights into the sorts of reasoning that could be considered by courts in religious fraud claims under *s2 FA06*. Accordingly, this affirms another reason why my analysis of both criminal and civil law provides a valuable lesson in helping to develop a rationale for the fraud offence that addresses the challenges identified in chapters 2 and 5.

I explained that if falsity testing is prevented for certain religious representations where there is no clear evidence that the defendant misrepresents the state of their mind, the analysis of autonomy impairment will not be possible.[996] In these scenarios, the exploitation limb will determine a defendant's liability, alongside the other *mens rea* requirements of *s2 FA06*, that includes an assessment of whether the defendant sincerely believes in their representations.[997] The alteration to my rationale's operation in these sorts of cases means liability can still be established and juries can be directed not to make decisions on nonjusticiable matters when deciding a defendant's liability.

[996] See pages 272-273.
[997] See pages 99-100.

8.2. Contributions to knowledge

Theory and practice

In this thesis I have exposed a range of challenges in both areas of law, some of these were identified in religious contexts for the first time, and other challenges had been highlighted in other jurisdictions that have not yet been experienced by English courts. To address the main aim of the thesis, I developed a rationale that I argued better explains how both legal wrongs should be understood specifically in religious contexts, which helps to produce more principled regulation. Consequently, the thesis can also have a beneficial impact on the regulation of other challenging cases of fraud and undue influence that do not occur in religious circumstances. The integrative rationale addresses many of the civil law challenges, and some of the criminal law challenges are discussed in a principled manner by appealing to normative principles. My rationale does not simply offer a rationale that seeks to achieve conceptual completeness. It is of practical significance to understandings of undue influence, most directly to presumed undue influence cases and *s2 FA06* cases

My emphasis on the cross-fertilisation between criminal and civil regulation opens up the opportunity for an extended study on the differences and potential lessons that could be produced from assessing understandings of fraud in both areas. Further analysis would benefit the regulation of how individuals and institutions finance their operations. One key focus area where more detailed comparisons would be beneficial is between actual undue influence and other *FA06* offences. This analysis could help develop understandings of what is meant legally by abuse of position;[998] explain the universality of fiduciary duties in relationships that involve

[998] A criminal fraud offence under s4 FA06.

expectations of donations and gift and; how fraudulent conduct, that is not exclusively built on false representations, should be assessed in long-term relationships of gift-giving.

More broadly, my rationale has the potential to create wider implications for other vitiating factors in private law. The rationale can help to make more effective doctrinal distinctions between actual undue influence, unconscionability, misrepresentation and duress. This applies most particularly to actual undue influence, as well as unconscionability, which is often conflated with undue influence in claims.[999] A similar exercise to that conducted in this thesis could be attempted to produce legitimate rationales for each of these vitiating doctrines. In turn, this study could produce similar consequences to that produced here by providing a more principle means of addressing the doctrinal challenges experienced by other vitiating doctrines.

Regulation of religious capital resulting in gains of financial capital

A study combining the analysis of criminal and civil laws was ambitious but essential for developing a principled response to how English courts should regulate religious fraud and undue influence. The combined understanding of regulation offered the potential for cutting cross-fertilising legal analysis. Analysis of this kind proved important in producing an effective approach to regulate abuses of religious capital resulting in financial gains. The thesis demonstrated that both areas of law contain common themes and share some hybrid challenges.[1000]

[999] See generally Katy Barnett, 'Thorne v Kennedy: A Thorn in the Side of 'Binding Financial Agreements'?' (2018) Australian Journal of Family Law, 31, 183-193.
[1000] See chapter 5.

My use of exploitation in my rationale is the main reason why I can suggest appropriate responses to how to address the challenges of regulating religious influence resulting in financial gains. I have identified that prosecutors and courts will face considerable evidential difficulties in attempting to prove a defendant's knowledge of unworldly matters that feature in religiously grounded *s2 FA06* cases. As a result of this analysis, I questioned whether this aspect of the *mens rea* could ever be satisfied.[1001] This is a very difficult challenge because, without contrary evidence of the defendant's state of mind, it is hard to prove what a person is or was thinking at a given time. I suggested that the factors considered to indicate wrongful exploitation in my rationale help to verify that a defendant knew a belief to be untrue, misleading, or might be either. This includes making inferences based on a defendant's exploitative conduct. Inferences based on these considerations seem to be the only way to prove knowledge even under my rationale where evidence of the defendant's knowledge at the time of the representation or after it, cannot be produced. For example, where religious officials single out one adherent and make representations to them that are not made to other adherents and then threatens them not to tell their peers to make a gain or cause a loss, it seems that a defendant knows that their representation is untrue, misleading, or might be either. The applicability of this sort of reasoning will, however, depend on the facts of each case.

I also considered the potential bias that could be experienced by religious defendants caused by the change in how dishonesty is now assessed in the criminal law after the Supreme Court decision in *Ivey.*[1002] I believe the understanding of exploitation advanced in this thesis can combat the impact of bias that might be experienced by religious defendants in *s2 FA06* cases to some extent.[1003] The exploitation limb of my rationale explains what sort of conduct should

[1001] See pages 94-97.
[1002] See pages 101-111.
[1003] See pages 280-281.

be captured by the offence. In turn, it helps juries to understand what type of conduct is indicative of exploitation and dishonesty. A defendant who actively isolates victims from their family and friends but does not isolate other adherents, or that actively prevents victims from receiving advice before making a gift, is acting in an exploitative and dishonest way.[1004]

Moreover, although I raised concerns about the usage of sincerity in religious fraud litigation,[1005] sincerity testing fits within the dishonest test set by *Ivey*.[1006] Accordingly, when juries are asked to determine whether the defendant's conduct surrounding an untrue or misleading representation is dishonest, juries should be able to question whether they believe that the defendant sincerely believes in the religious beliefs motivating representations.[1007]

By addressing some of the *mens rea* challenges highlighted, my rationale helps to reduce the concern that it can be difficult to correctly identify which religious officials of an institution have acted fraudulently under *s2 FA06*.[1008] Alongside the wording of *s2 FA06,* the requirement that a victim's autonomy (where it can be tested) must be violated by the defendant's exploitative conduct helps to reduce the likelihood that all religious officials, sharing the beliefs alleged to be fraudulent, will be found guilty of committing the offence.

However, I have not been able to address all challenges listed in chapters 2 and 3 because of their complex theological nature. I am referring here to the falsity testing challenges, which is largely left unaddressed. Despite stopping my analysis short of suggesting the possible means of addressing the challenge, I have nonetheless expanded upon the complexity of the challenge

[1004] See pages 260-263.
[1005] See pages 48-51 & 111-118.
[1006] See pages 99-100.
[1007] See pages 111-117.
[1008] See pages 118-123.

and demonstrated the doctrinal, procedural and human rights law challenges that English courts will face in religious *s2 FA06* cases. Consequently, I have provided detailed explanations to corroborate my view that regulation of religious representations under the current understanding of *s2 FA06* will not produce legitimate outcomes in this context. Additionally, I have also highlighted an area of law that is fertile ground for future analysis in this context and general human rights jurisprudence, as well as alternative approaches to regulation.[1009]

In the civil context, the efforts of courts and scholars seeking to resolve specific doctrinal challenges found in both England and Australian legal states, have not confirmed what are appropriate responses to the unique religious challenges or the challenges compounded in religious contexts. I examined the nature of specific factors present in case law since *Allcard* and justified my choice of factors that form the basis of my rationale. I consequently argued that the rationale is better able to effectively distinguish religious influence from undue influence in presumed undue influence cases.

Further analysis of the hybrid kind adopted in this thesis would confirm that there are other common issues of regulating religious influence resulting in financial gains through both areas of law that have not been described in this thesis. For instance, analysis of fraudulent conduct under the existing understanding of actual undue influence would foreseeably give rise to the complexities of the falsity and sincerity problems relating to the regulation of religious representations discussed in chapter 2. Furthermore, the same problems would be found by investigating the understandings of the civil doctrine of fraudulent calumny in religious contexts.

[1009] See pages 48-51.

The universality of strict fiduciary duties is a topic in numerous areas of private law that should also be investigated further. My analysis of the undue influence rationales led me to question more broadly how other aspects of civil law operate in religious contexts. One such area identified was the appropriateness of strict duties of fiduciary duties in religious contexts that involve gift-giving motivated by religious faith.[1010] I argued that breaches of duties of loyalty owed by a fiduciary, who is a religious figure, may only be incidental and expected by both parties in advance.[1011] This was noted to be a crucial difference between ordinary breaches of fiduciary duties and those theoretically examined in religious relationships. This research would help develop responses on the foundations of fiduciary duties.[1012] Moreover, extending the theoretical analysis found in this thesis to this area of law would overlap with existing descriptions of fiduciary duties based on Raz's Perfectionist principles.[1013]

Equitable understandings of presumed undue influence

By developing my rationale, I have contributed to the literature debating the doctrine's rationale. Most specifically, I have added to the range of criticisms made against monist accounts and explained why a multifactor account, like mine, produces more principled decisions on defendant liability and the remedies awarded to claimants. The integrative rationale is also better placed to explain when relational influence of any nature becomes undue.

[1010] See pages 194-199.
[1011] *Ibid*.
[1012] See generally Paul B. Miller, 'The Fiduciary Relationship,' in Andrew S. Gold and Paul B. Miller, *Philosophical Foundations of Fiduciary Law*, (OUP 2014) & Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations,' in the same edited collection.
[1013] Raz's service conception of authority has been applied to interpersonal fiduciaries by Evan Fox-Decent, 'Fiduciary Authority and the Service Conception,' in Andrew S. Gold & Paul B. Miller, *Philosophical Foundations of Fiduciary Law*, (OUP 2014).

I anticipate that criticisms will be made against the role of the fundamental principles featured in my rationale, and for the reasons why I have dismissed other factors and the approaches of the other civil scholars mentioned. Foreseeably, some may argue that a Perfectionist justification for limiting why some choices are not valuable to personal autonomy gives rise to strong forms of moralistic reasoning. Additionally, it could be said that my rationale sets the threshold of influence in religious contexts so high that claims will rarely be successful. However, I believe I have adequately defended my rationale by describing the fundamental principles of my rationale and their limits by applying the rationale to decided cases. I have also explained in detail why alternative civil rationales do not result in more principled outcomes by strictly focusing on hard cases of presumed religious influence.

As a consequence of the normative analysis produced in chapter 7, I have also provided some responses to the challenges and questions identified in chapters 3 and 5. I have explained that independent advice received by donors can help them to act autonomously and not be exploited by defendants, but that it does not automatically rebut presumptions of influence.[1014] Additionally, I have submitted that defendants need not benefit from their conduct directly[1015] because unduly influencing conduct produces a wrongful violation of a donor's autonomy that results in financial harm to the donor's interests, and this justifies legal intervention.[1016]

Moreover, my rationale establishes that improvident transactions do not *ipso facto* create a suspicion of undue influence, nor does it count as a weighty factor in determining whether a presumption of influence has been rebutted. I have shown two things by thinking in this way, firstly, if personal autonomy is a significant value in the context of gift-giving improvidence

[1014] See pages 260-261.
[1015] See page 257.
[1016] See pages 251-253.

must be tolerated, even if donors later deeply regret certain transactions. The doctrine of undue influence should not be capable of creating a generous returns policy. Secondly, gifts of any value should be susceptible to undue influence claims. A distinction between small and large gifts is generally unprincipled for the reasons discussed.[1017]

I have also sought to clarify what the nature of presumptions found in presumed undue influence cases is. Relationships between religious figures and adherents have traditionally given rise to presumptions of influence. However, in cases like *Azaz*, it is unclear why a sufficient relationship existed between the parties at all times. I examined understandings of automatic presumptions of influence arising in relationships between religious advisors and adherents and touched on other specific relationships considered in law to involve heightened levels of trust.[1018] I argued that religious relationships do not necessarily reach the level of trust that other relationships susceptible to automatic presumptions of influence do at all times gifts are made. Further, I stated that automatic presumptions of influence fail to take into account the temporal nature of relationships and influence.[1019] Consequently, changes in both factors are not considered at this stage in cases. Therefore, courts are unlikely to sever gifts from presumptions of influence unless a gift does not call for an explanation, but this is usually easily proven because of the size of gifts made. On this reasoning, I have suggested that automatic presumptions be abandoned, at least in religious contexts, and replaced by presumptions of trust and confidence that must be proven by claimants. This examination already occurs in cases where automatic presumptions do not apply. Accordingly, this recommendation does not require a complete rehaul of the understanding of presumptions of influence in English law.

[1017] See page 264.
[1018] See pages 154-162.
[1019] *Ibid*.

Finally, I have sought to reduce the burdens faced by religious defendants rebutting presumptions of influence.[1020] I argued that this was achieved by describing what factors indicate that presumptions of influence have been rebutted.[1021] The integrative rationale also provides courts with a limited amount of discretion to examine autonomy and exploitation considerations to determine whether additional factors can also operate in similar ways. The discretion afforded by the rationale appeals to reasons that provide strong justifications for decisions on whether defendants can rebut a presumption of influence. Accordingly, the same concerns expressed about how religious defendants can rebut presumptions of influence that arose out of my discussion of reasoning of decided cases and the rationales surveyed in chapter 6, are not as applicable to my rationale.

More generally, I hope that private law scholars will engage more directly with themes of temporality and how it is considered in understandings of other vitiating doctrines. I believe that this sort of reasoning would produce considerable benefits for the legitimate operation of such doctrines. Studying how time can be understood in private law would touch on a considerable number of topics and potentially identify common challenges. A suitable topic of study that naturally follows from the conclusions of this thesis is how independent advice can absolve liability in long-term relationships involving financial transactions. Advice may not apply to all transactions equally due to the nature of the specific transactions. Alternatively, the advice may be received before changes to a donee's or donor's circumstances, which causes the advice to be less applicable because of the nature of transactions.

[1020] See page 264-265.
[1021] See pages 259-266.

Furthermore, commentators could examine the defence of laches considered in long-term relationships of influence when individuals end their relationship with another party and do not change their minds on the beliefs that initially grounded the party's mutual connection. Religious and spiritual relationships would provide a good starting point for this analysis. Foreseeably, this research could also extend to other relationships involving heightened degrees of trust based on mutually held ideologies. This sort of temporal analysis could extend to the regulation of gifts, testamentary dispositions, and contracts to help ascertain whether transactions have been entered into lawfully on each occasion.

English criminal fraud laws

In a more limited way this thesis is an important step towards developing rationales for the other *FA06* offences.[1022] Efforts have already been made to theorise *s4 FA06*, fraud by abuse of position by Collins, as mentioned. Accordingly, a natural step in criminal fraud scholarship would be to theorise *s3 FA06,* fraud by failing to disclose information. This offence prohibits dishonest failures to disclose to another person information which they are under a legal duty to disclose[1023] to intentionally make a gain or cause a loss to another.[1024] This research would involve extensive assessments of fiduciary duties, exploitation and autonomy. Accordingly, my rationale may also have some application to that fraud offence.

[1022] s1 FA06 offences also included s 3, fraud by failing to disclose information and s4, fraud by abuse of position.
[1023] s3(a).
[1024] S3(b)(i)-(ii).

Further, the understanding of exploitation and autonomy contained in my rationale contributes to criminal law understandings of interpersonal exploitation aimed at gaining some form of property from another individual.

8.3. Implications for policy and practice

I have mentioned that this thesis could have a practical impact on how courts regulate both legal wrongs. In this way, I have consistently pursued the main aim of this thesis, how should English courts regulate religious fraud and religious undue influence? I now outline the specific contributions to legal policy and practices. My main contribution to policy relates to how courts should read the test for presumed undue influence and interpret *s2 FA06*. My rationale sets out how courts should read the tests for both legal wrongs and describes what conduct should be prohibited in religious contexts.

In the civil context, I have now produced a means of deciding hard cases of presumed undue influence, which are frequently religiously grounded. The rationale principally establishes when relational influence becomes undue in any form of context. It mandates that the specific reasons for the gifts and community values should be taken into account in judicial reasoning as an explanation of what constitutes ordinary motives at the presumption stage, and whether it indicates exploitation at the rebuttal stage, where the conduct is not connected to those reasons and values. As a result of my focus on hard cases of presumed undue influence, I have also demonstrated how the challenges that arise in easier cases should be addressed by courts. I have thus contributed to the understanding of how all types of presumed undue influence

claims should be understood and how courts can principally engage with challenges described to determine when influence becomes undue.

In the criminal context of *s2 FA06*, I have established how courts should understand the rationale of the offence and its justified boundaries. I also outlined how my rationale could incorporate additional considerations such as sincerity, depending on how the falsity problem is addressed either by courts or Parliament. Further, I have made some suggestions on how courts could seek to address certain categories of beliefs and why this may result in discrimination between religions in cases where beliefs are more capable of falsification.

More importantly, I have developed a perspective on religious fraud regulation that will hopefully create debate about whether religious exemptions should be granted to *s2 FA06* or whether legislative reform is necessary to give greater focus to defendant sincerity. Courts and Parliament will eventually be required to determine whether certain kinds of religious beliefs can be tested for falsity in prosecutions for *s2 FA06* where there is no clear evidence that the defendant holds false beliefs.[1025] As discussed in chapter 3, it seems unlikely that this will be answered positively because of the reading of the ECHR jurisprudence in *ex parte Williamson*, which prohibits such testing in favour of sincerity testing. If this decision is followed in the criminal context of fraud laws, a religious exception must be created, or legislative reform is necessary so that falsity testing is not required of religious beliefs. This debate is crucial to how religious fraud can be regulated by criminal laws. Such a debate could discuss the analysis of the US approach to religious fraud regulation and the alternative approaches suggested by US commentators that are claimed to more effectively protect the defendant's religious liberty.[1026]

[1025] See pages 86-93.
[1026] See pages 48-51.

This thesis has also touched on the negative aspects of sincerity testing of religious beliefs in religious fraud claims and those seeking exemptions from generally applicable laws. Determining an individual's sincerity is often a highly complicated matter where there is no clear indication of insincerity. In the English cases discussed where exemptions are sought,[1027] the risk of finding someone sincere when they are in reality insincere about their religious beliefs is low. Decisions typically relate to religious dress that cannot cause direct harm to others. However, the risk is different in religious fraud contexts. A finding of sincerity when a person is insincere allows defendants to use religion as a cloak to mask fraudulent conduct. Financial harms are caused to those who are subjected to this conduct. Religious institutions also suffer because religious categorisation may be abused by racketeers. This is likely to lead to reduced confidence in religions and such religions facing stigma, which may result in negative treatment by other institutions or by adherents and disbelievers.

However, courts must be realistic about how religious beliefs influence an individual's conduct over time. One way of doing so would be to consider the sincerity of the religious beliefs motivating the particular representations deemed fraudulent. Causation should be an essential factor to determinations of sincerity, rather than the fact that a religious official believes in some beliefs wholeheartedly but not all beliefs manifested. A determination based on the latter ground is too marginal and fails to consider the reality that faith in religion can alter over time, but this does not make someone insincere at the moment a gift was received.

I believe that sincerity testing as a means of determining religious exemptions to generally applicable laws should be evaluated. I do not suggest that it should not be considered in cases of this nature. Sincerity plays a significant role in litigation by giving weight to the individual's

[1027] See n 310.

subjective viewpoint, which I believe is highly important to religious freedom claims. Instead, I argued, like Su,[1028] that courts should give greater focus to the risks and consequences of determinations in particular cases to reduce the possibility that religious categorisation is abused by fraudsters or those seeking to unlawfully profit from their beliefs. Such a task is, however, one for future scholarship.

Practically, these policy implications should be of concern for religious organisations funded by donations and gifts made by adherents. In particular, the possibility of abuses of religious categorisation in fraud contexts, depending on how statutory test for *s2 FA06* is applied by courts. If courts ban falsity testing in this setting and adopt a sincerity-based approach as the US does, religious institutions should think carefully about the ways they raise money through religious practices and how they oversee how officials conducting fundraising events. If a *s2 FA06* case were tried and deemed justiciable, I foresee that a significant number of cases would be brought against religious institutions in the future.

Religious institutions should be aware of the potential that aggrieved former adherents and adherents who have realised the improvidence of their gifts will subsequently want to claim back gifted property. As mentioned throughout this thesis, religious influence and beliefs often fluctuate greatly over time as a result of social trends and influences, changes in health and wealth, and more generally, by growing older and reflecting upon individual preferences. Consequently, religious experiences are not consistently rooted in one denomination or even one faith.[1029] In the US, for instance, adherents commonly switch congregations at least once

[1028] Su (n 432), 48.
[1029] See Ben Clements, *Religion and Public Opinion in Britain: Continuity and Change*, (Palgrave MacMillan 2015), 12-24 and Office for National Statistics, 'How Religion has Changed in England and Wales,' (2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/howreligionhaschangedinenglandandwales/2015-06-04> Accessed September 2020.

in their lifetime.[1030] I have explained how claims of this nature are conceivable, especially through presumed undue influence if changes are not made to the test. To some extent, this also applies to *s2 FA06,* where adherents argue that a religious official could not possibly believe in their representations because they have not come true on multiple occasions.

Religious influence is an inevitable part of the practice of religion and often involves gift-giving. Legal attention must be directed to take account of this in regulating gifts motivated by religious faith. The question of how religious influence becomes unlawful in fraud and undue influence contexts needs to be tackled head-on. English law needs to revaluate the two legal wrongs examined in this thesis to ensure the law protects adherents against dishonest adherents and religious racketeers exploiting religious faith. English law must look to the legislative past to realise that regulation of religious influence requires specific focus because of the crucial differences between religious and nonreligious cases in this context. This thesis instructs English courts and Parliament on how they should go about completing this imperative task.

[1030] David Sikkink and Michael Emerson, 'Congregational Switching in an Age of Great Expectations,' (2020) Review of Religious Research, 62, 219–247.

BIBLIOGRAPHY

BOOKS

Ashworth A and Horder J, *Principles of Criminal Law*, (Oxford University Press 2013)

Barker K et al, *Private Law and Power*, (Hart Publishing 2017)

Beatson J and Friedmane D, *Good Faith and Fault in Contract Law*, (Clarendon Press 1997)

Beck L, *Religious Freedom and the Australian Constitution: Origins and Future,* (Routledge 2018)

Beynon-Jones S and Grabham E, *Law and Time*, (Routledge 2018)

Bigwood R, *Exploitative Contracts*, (Oxford University Press 2003)

Birks P, *An Introduction to the Law of Restitution,* (Clarendon Press 1985)

Bratman M, *Structures of Agency: Essays* (Oxford University Press 2007)

Brown W, *States of Injury: Power and Freedom in Late Modernity*, (Princeton University Press 1996)

Brownsword R et al, Good Faith in Contrac*t: Concept and Context*, (Dartmouth 1999)

Bryan M et al, *Equity and Trusts in Australia*, (Cambridge University Press, 2nd Edition, 2017)

Bupanda L, *The Tithing Dilemma and the Triumphs of Love*, (AuthorHouse 2013)

Burrows A et al, *Mapping the Law Essays in Memory of Peter Birk*s, (2006 Oxford University Press)

Carrette J and King R, *Selling spirituality: The Silent Takeover of Religion*, (Routledge 2004)

Child J and Ormerod D, *Smith and Hogan's Essentials of Criminal Law*, (Oxford University Press, 1st Edition, 2015)

Clark B.B., *New York Law of Contracts: Volume 1*, (Edward Thompson Company 1922)

Clements B, *Religion and Public Opinion in Britain: Continuity and Change*, (Palgrave MacMillan 2015)

Coleman E et al, *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society*, (Australian National University Press 2006)

Cooke E, *Modern Studies in Property Law: Volume 3*, (2005 Hart)

Clough B and Herring J, *Ageing, Gender and Family Law*, (Routledge 2017)

Davie G, *The Sociology of Religion: A Critical Agenda*, (Sage, 1st Edition, 2007)

Dickson J, *Evaluation and Legal Theory*, (Bloomsbury 2001)

Duff R.A., *The Realm of Criminal Law*, (Oxford University Press 2018)

Doehring C, *The Practice of Pastoral Care: A Postmodern Approach*, (Westminster John Knox Press 2015)

Dworkin G, *The Theory and Practice of Autonomy*, (Cambridge University Press 1988)

Dworkin R, *Law's Empire* (Hart Publishing 1988)

Elliot C and Quinn F, *Criminal Law*, (Pearson, 9th Edition, 2011)

Enonchong N, *Duress, Undue Influence and Unconscionable Dealing*, (Sweet & Maxwell 2012)

Faden R and Beauchamp T, *History and Theory of Informed Consent,* (Oxford University Press. 1st Edition, 1986)

Feinberg J,
- — *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, (Oxford University Press 1987)
- — *The Moral Limits of the Criminal Law Volume 3: Harm to* Self, (Oxford University Press 1989)
- — *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing*, (Oxford University Press 1988)

Finucane R.C., *Miracles, Pilgrims: Popular Beliefs in Medieval England*, (Palgrave 1977)

Fischer J and Ravizza M, *Responsibility and Control: A Theory of Moral Responsibility*, (Cambridge University Press 2000)

Frankfurt H, *The Importance of What We Care About*, (Cambridge University Press 1988)

Grabham E, *Brewing Legal Times: Things, Form, and the Enactment of Law*, (University of Toronto Press 2016)

Green S.P., *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, (Oxford University Press 2007)

Greenawalt K, *Religion and The Constitution: Volume 1: Free Exercise and Fairness*, (Princeton University Press 2006)
- — *Religion and The Constitution: Volume 1: Free Exercise and Fairness*, (Princeton University Press 2009)

Green S.P., *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*, (Oxford University Press 2007)

Hackler B and Mitchell C, *Current Issues in Succession Law*, (Oxford University Press 2016)

Hart H.L.A., *Responsibility and Punishment,* (Oxford University Press 1968)

Herring J, *Criminal Law: Text, Cases and Materials,* (Oxford University Press, 7th Edition, 2016)

— *Criminal Law: Text, Cases, and Materials*, (Oxford University Press, 18th Edition, 2018)

Herring J and Wallbank J, *Vulnerabilities, Care and Family Law,* (Routledge 2014)

Hoarder J, *Ashworth's Principles of Criminal Law,* (Oxford University Press, 9th Edition, 2018)

Humphrey C, *Both Sides of the Circle: The Autobiography of Christmas Humphreys*, (Allen & Unwin 1978)

Joyce J.A., *Edgar Allan Poe*, (F.T. Neely Company 1901)

Kane R, *The Significance of Free Will*, (Oxford University Press 1998)

Kerr W, *Fraud and Mistake: Including the Law Relating to Misrepresentation Generally, Undue Influence, Fiduciary Relations, Constructive Notice, Specific Performance*, (Sweet & Maxwell 1920)

Lewis J.R., *Scientology*, (Oxford University Press 2009)

Lincoln, C.Z. *Civil Law and the Church*, (The Abingdon Press 1916)

McGhee J, *Snell's Equity* (Sweet & Maxwell, 33rd edition, 2015)

— *Snell's Equity*, (Sweet & Maxwell, 33rd Edition, 2016)

Mackenzie C and Stoljar N, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, (Oxford University Press 2000)

Meagher R et al, *Equity: Doctrines and Remedies*, (LexisNexis Australia, 4th edition, 2002)

Mele A.R., *Autonomous Agents: From Self-control to Autonomy*, (Oxford University Press 2001)

Mitchell C & Swadling W, *The Restatement Third: Restitution and Unjust Enrichment:* Critical and Comparative Essays, (Oxford University Press 2013)

Morgan R, *The Supreme Court and Religion,* (Macmillan Publishing 1972)

Nedelsky J, *Law's Relationships*, (Oxford University Press 2012)

Ormerod D, *Blackstone's Criminal Practice,* (Oxford University Press 2017)

Ormerod D and Laird K, *Smith, Hogan, & Ormerod's Criminal Law*, (Oxford University Press, 15th Edition, 2018)

Oliver P et al, *Faith in Law: Essays in Legal Theory*, (Bloomsbury 2000)

Pearce R and Barr W, *Peace & Stevens' Trust and Equitable Obligations*, (Oxford University Press, 7th Edition 2018)

Phillips E et al, *The Law Relating to* Theft, (Cavendish 2001)

Ranchordás S and Roznai Y, *Time, Law, and Change: An Interdisciplinary Study*, (Hart Publishing 2020)

Raz J, *The Morality of Freedom* (Oxford University 1986)

Rawls J, *A Theory of Justice*, (Harvard University Press 1971)

Richardson J, *Archbold 2018: Criminal Pleading, Evidence and Practice*, (Sweet & Maxwell 2018)

Richardson J & Bellanger F, *Legal Cases, New Religious Movements and Minority Faiths*, (Routledge 2016)

Ridge R, 'Negotiating the sacred in law: Regulation of gifts motivated by religious faith,' in Coleman E et al, *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society*, (Australian National University Press 2006)

Robertson A and Tilbury M, *Divergences in Private Law*, (Routledge 2016)

Robilliard St. J.A., *Religion and Law: Religious Liberty in Modern English Law*, (Manchester University Press 1984)

Saliba JA and Melton G, *Understanding New Religious Movements*, (Rowman Altamira 2003)

Saprai P, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law*, (Oxford University Press 2019)

Scheb J.M., *An Introduction to the American Legal System*, (Cengage Learning 2002)

Shute S, 'Knowledge and Belief in the Criminal Law,' in Shute S and Simester A.P., *Criminal Law Theory: Doctrine of the General part*, (Oxford University Press 2002)

Sitkoff R.H. & Dukeminier J, *Wills, Trusts, And Estates*, (Wolters Kluwer Law & Business, 10th Edition, 2005)

Steele J, *Tort Law: Cases, Texts and Materials*, (Oxford University Press 2017)

Swadling W, 'Undue Influence: Lessons from America,' in Mitchell C & Swadling W, *The Restatement Third: Restitution and Unjust Enrichment:* Critical and Comparative Essays, (Oxford University Press 2013)

Tamblyn N, *The Law of Duress and Necessity: Crime, Tort, Contract*, (Routledge 2017)

Trebilcock M.J., *The Limits of Freedom of Contract,* (Harvard University Press 1993)

Tribe L, *American Constitutional Law*, (Foundation Press 1978)

van der Ven JA and Ziebertz HG, *Tensions Within and Between Religions and Human Rights*, (BRILL 2008)

van Eck Duymaer A, *Minority Religions and Fraud: in Good Faith*, (Ashgate 2014)
— *Minority Religions and Fraud: in Good Faith*, (Ashgate, 2nd Edition, 2016)

Vickers L, *Religious Freedom, Religious Discrimination and the Workplace*, (Hart Publishing 2008)

Witte J et al, *Religious Human Rights in Global Perspective: Religious Perspectives, Volume 1*, (Martinus Nijhoff Publishers 1996)

Zartner D, *Courts, Codes and Customs*, (Oxford University Press 2014)

CONTRIBUTIONS TO EDITED COLLECTIONS

Philip Ashton, 'Time-Spaces of Adjudication in the U.S. Subprime Mortgage Crisis,' in Beynon-Jones S and Grabham E, *Law and Time*, (Routledge 2018)

Barnhill A, 'What is Manipulation?' in Coons C and Weber M, *Manipulation: Theory and Practice*, (Oxford University Press 2014)

Beauchamp T.L., 'Autonomy and Consent,' in Miller F and Wertheimer S, *The Ethics of Consent: Theory and Practice*, (Oxford University Press 2009)

Birks P and Yin CN, 'On the Nature of Undue Influence,' in Beatson J and Friedmane D, *Good Faith and Fault in Contract Law*, (Clarendon Press 1997)

Bradney A, 'Faced by Faith,' in Oliver P et al, *Faith in Law: Essays in Legal Theory*, (Bloomsbury 2000)

Chen-Wishart M, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis,' in Burrows A et al, *Mapping the Law Essays in Memory of Peter Birk*s, (Oxford University Press 2006)

Cloatre E, 'Traditional Medicines, Law, and the (Dis)ordering of Temporalities,' in Sian Beynon-Jones and Emily Grabham, *Law and Time*, (Routledge 2018)

Collins J, 'Financial Abuse of Older Persons: A Criminal Law Perspective,' in Beverly Clough and Jonathan Herring, *Ageing, Gender and Family Law*, (Routledge 2017)

Degelling S, 'Undue Influence and the Spiritual Economy,' in Barker K et al, *Private Law and Power*, (Hart Publishing 2017)

Dworkin G, 'Should Physician-Assisted Suicide Be Legalized?' in Birnbacher D and Dahl E, *Giving Death a Helping Hand: Physician-Assisted Suicide and Public Policy. An International Perspective*, (Springer 2008)

Esposito F, 'Conceptual Foundations for a European Consumer Law and Behavioural Sciences Scholarship,' in Micklitz H.W. et al, *Research Methods in Consumer Law: A Handbook*, (Edward Elgar Publishing 2018)

Ferris G, 'Why is the Law of Undue Influence so Hard to Understand and Apply?' in Cooke E, *Modern Studies in Property Law, Volume 3*, (2005 Hart Publishing)

Fox-Decent E., 'Fiduciary Authority and the Service Conception,' in Gold A.S. & Miller P.B., *Philosophical Foundations of Fiduciary Law*, (Oxford University Press 2014)

Frankel T, 'Watering Down Fiduciary Duties,' in Gold A.S. & Miller P.B., *Philosophical Foundations of Fiduciary Law*, (Oxford University Press 2014)

Getzler G, 'Ascribing and Limiting Fiduciary Obligations,' in Gold A.S. & Miller P.B., *Philosophical Foundations of Fiduciary Law*, (Oxford University Press 2014)

Langlinais A and Leiter B, 'The Methodology of Legal Philosophy,' in Cappelemen H et al, *The Oxford Handbook of Philosophical Methodology*, (Oxford University Press 2016)

Honey R, 'Divergence in the English and Australia Law of Undue influence: Vacillation or Variance?' in Robertson A and Tilbury M, *Divergences in Private Law*, (Routledge 2016)

Kapitan T, 'A Master Argument for Incompatibilism?' in Kane R, *The Oxford Handbook of Free Will*, (OUP 2001)

Marmor A 'Farewell to Conceptual Analysis (in Jurisprudence)', in Wil Waluchow et al, *Philosophical Foundations of the Nature of Law*, (Oxford University Press 2013), 212

Miller P.B, 'The Fiduciary Relationship,' in Gold A.S. & Miller P.B., *Philosophical Foundations of Fiduciary Law*, (Oxford University Press 2014)

Ring S, 'On Delay and Duration: Laws' Temporal Order in Historical Child Sexual Abuse Cases,' in Beynon-Jones S and Grabham E, *Law and Time*, (Routledge 2018)

Roberts R, 'Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries,' in *Alldridge P and Brants C*, *Personal Autonomy, the Private Sphere and Criminal Law A Comparative Study*, (Hart Publishing 2001)

Saprai P, 'Unconscionable Enrichment?' in Robert Chambers et al, *Philosophical Foundations of the Law of Unjust Enrichment*, (Oxford University Press 2009)

Shute S, 'Knowledge and Belief in the Criminal Law' in Shute S, 'Knowledge and Belief in the Criminal Law,' in Shute S and Simester A.P., *Criminal Law Theory: Doctrine of the General part*, (Oxford University Press 2002)

Smith C, 'Allcard v Skinner Revisited: Historical Perspectives on Undue Influence' in Cooke E (ed.), *Modern Studies in Property Law, Volume 3*, (2005 Hart)

Sullivan G.R., 'Knowledge, Belief and Culpability,' in Shute S, 'Knowledge and Belief in the Criminal Law,' in Shute S and Simester A.P., *Criminal Law Theory: Doctrine of the General part*, (Oxford University Press 2002)

Natalie Stoljar, 'What Do We Want Law to Be? Philosophical Analysis and the Concept of Law,' in Waluchow W et al, *Philosophical Foundations of the Nature of Law* (Oxford University 2013).

van Kempen PE, 'Freedom of Religion and Criminal Law: A Legal Appraisal,' in van der Ven JA and Ziebertz HG, *Tensions Within and Between Religions and Human Rights*, (BRILL 2008)

ARTICLES

Andrews N, 'Undue Influence by a Third Party,' (1986) The Cambridge Law Journal, 45(2), 194-197

Anthony D and Robbins T, 'Negligence, Coercion, and the Protection of Religious Belief,' (1995) Journal of Church and State, 37(3), 509-536

Ashworth A, 'Is the Criminal Law a Lost Cause?' (2000) Law Quarterly Review, 116, 224-256

Bakht N and Palmer J, 'Modern Law, Modern Hammers: Canada's Witchcraft Provision as an Image of Persecution,' (2015) Windsor Review of Legal and Social Issues, 35, 123-146

Barborak N, 'Saving the World, One Cadillac at a Time: What Can Be Done When a Religious or Charitable Organization Commits Solicitation Fraud,' (2000) Akron Law Review, 33(4), 577-610

Barker E, 'The Not-So-New Religious Movements: Changes in 'The Cult Scene' Over the Past Forty Years,' (2014) Temenos- Nordic Journal of Comparative Religion, 50(2), 235-256

Barnett K, 'Thorne v Kennedy: A Thorn in the Side of 'Binding Financial Agreements'?' (2018) Australian Journal of Family Law, 31, 183-193

Becker L.C., 'Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality,' (1999) William & Mary Law Review, 40(3), 959-973

Benson P, 'Free Agency and Self-Worth,' (1994) The Journal of Philosophy, 91(12), 651-668

Bigwood R, ‘Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?’ (1996) Oxford Journal of Legal Studies, 16(3), 503-515

— 'Undue Influence in the House of Lords: Principles and Proof,' (2002) Modern Law Review, Volume 65(3), 435-450

— ‘Contracts by Exploitation: From Unfair Advantage to Transactional Neglect’ (2005) Oxford Journal of Legal Studies, 25(1), 65-96

Birks P, ‘Undue influence as wrongful exploitation,’ (2004) Law Quarterly Review, 120, 34-37

Brady K.L, ‘Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover under RFRA and RLUIPA,’ (2011), University of Chicago Law Review, 78(4), 1431-1464

Bratza N, ‘Freedom of Religion Under the European Convention on Human Rights,’ (2012) Ecclesiastical Law Journal, 14(2), 256-271

Burns F, 'Undue influence inter vivos and the elderly,' (2002) Melbourne University Law Review, 26, 499-536

Carmela A, 'After Hobby Lobby: The Religious For-Profit and the Limits of the Autonomy Doctrine,' (2015) Missouri Law Review, 80(2), 381- 450

Chapman N, ‘Adjudicating Religious Sincerity,’ (2017) Washington Law Review, 92(3), 1185-1254

Chen J, ‘Regulating Religious Fraud in Taiwan and Hong Kong: A Comparative Study on the Convergences and Deviations in the Understanding of Religious Freedom,’ (2019) Chinese Journal of Comparative Law, 7(1), 150-189

— ‘Joyous Buddha, Holy Father, and Dragon God Desiring Sex: A Case Study of Rape by Religious Fraud in Taiwan,’ (2018) National Taiwan University Law Review, 13(2), 183-237

— ‘Hong Kong’s Chinese Temples Ordinance: A Cautionary Case Study of Discriminatory and Misguided Regulation of Religious Fraud,’ (2018) Journal of Law and Religion, 33, 421-446

Chen-Wishart M, 'Legal transplant and undue influence: lost in translation or a working misunderstanding?' (2013) International & Comparative Law Quarterly, 62(1), 1-30

Chircorp J et al, ‘Does religiosity influence venture capital investment decisions?’ (2020) Journal of Corporate Finance, 62, 1-14

Chopko M, 'Regulating Religious Charity: Current Issues and Future Challenges,' (2013) Rutgers Law Journal, 44(1), 55-88

Christman J, ‘Constructing the Inner Citadel: Recent Work on the Concept of Autonomy,’ (1988) *Ethics,* 99(1), 109–124.

— ‘Autonomy and Personal History,’ (1991) Canadian Journal of Philosophy, 21, 1–24.

— ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves,’ (2004) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition, 117(1), 143-164

Collins J, 'Fraud by abuse of position: theorising section 4 of the Fraud Act 2006,' (2011) Criminal Law Review, 7, 513-523
— 'Fraud by Abuse of Position and Unlicensed Gangmasters,' (2016) Modern Law Review, 79(2), 513-523
— 'Exploitation of Persons and the Limits of the Criminal Law,' (2017) Criminal Law Review, 3, 169-186

Cohen M, 'Sincerity and Reason-Giving: When May Legal Decision Makers Lie,' (2010) DePaul Law Review, 59(4), 1091-1150

Conklin F.J., 'Religious Fraud and the First Amendment,' (1967) Conzaga Law Review, 2, 35-62

Cranmer F, 'Private prosecution - Latter-day Saints - doctrine,' (2014) Law & Justice, 172, 102
— 'How Relevant to the United Kingdom are the "Religious" Cases of the US Supreme Court?' (2016) Ecclesiastical Law Journal, 18(3), 300-315

Cuypers S.E., 'The Trouble with Externalist Compatibilist Autonomy,' (2006) Philosophical Studies, 129(2), 171-196

De Castella K et al, 'Retribution or restoration? Anglo-Australian's Views Towards Domestic Violence involving Muslim and Anglo-Australian Victims and Offenders,' (2011) Psychology, Crime & Law, 17(5), 403-420

Dickson J, Methodology in Jurisprudence,' (2004) *Legal Theory* 10(3), 117-156.

Dent N and Kervick A, 'Ghosh: a change in direction?' (2016) Criminal Law Review, 8, 553-557

Drescher K and Foy D.W., 'When Horror and Loss Intersect: Traumatic Experiences and Traumatic Bereavement,' (2010) Pastoral Psychology, 59(2), 153-158

Druzenko G, 'Svato-Mykhaylivska Parafiya v. Ukraine: A Thing Done by Halves?' (2009) Brigham Young University Law Review, 3(4), 555-574

Dworkin G, 'Paternalism,' (1972) The Monist, 56, 1, 64-84
— 'Autonomy and Behavior Control,' (1976) The Hastings Center Report, 6(1), 23-28

Dyson M and Jarvis P, 'Poison Ivey or herbal tea leaf?' (2018) Law Quarterly Review, 134, 198-203

Edge P, 'Religious drug use in England, South Africa and the United States of America,' (2006) Religion and Human Rights, 1(2), 165-177
— 'Religious drug use in England, South Africa and the United States of America,' (2006), Religion & Human Rights, 1(2), 165–177
— 'Determining Religion in English Courts,' (2012) Oxford Journal of Law and Religion, 1(2), 402-423
— 'Believer Beware: The Challenges of Commercial Religion,' (2013) Legal Studies, 33(4), 382-406

Eggert K, ‘Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending,’ (2003) Loyola of Los Angeles Law Review, 36(2), 693-775

Ekstrom L.W., ‘A Coherence Theory of Autonomy,’ (1993) Philosophy and Phenomenological Research, 53(3), 599-616

Flanagan S.M., ‘Go Therefore, and Make Disciples of all the Nations, But Do Not Offend the State: Tortious Religious Recruitment and the Free Exercise of Religion Defense,’ (1991) New England Law Review, 25(3), 1071-1100

Flick V, 'Constitutional Law - Author Can Be Prosecuted under Federal Mail Fraud Statute for Misrepresenting Contents of Book,' (1986) Villanova Law Review, 31(3 & 4), 1098-1141

Fischer J, ‘Responsibility and Autonomy: The Problem of Mission Creep,’ (2012) Philosophical Issues, 22(1), 167-179

Frankfurt H.F., ‘Freedom of the Will and the Concept of a Person,’ (1971) The Journal of Philosophy, 38(1), 5-20.

Freedland M and Vickers L, ‘Religious expression in the Workplace in the United Kingdom,’ (2009) Comparative Labour Law and Policy Journal, Volume 30, Number 3, 597-626

Frolik L.A., ‘The Biological Roots of the Undue Influence Doctrine: What's Love Got to do with It?’ (1996) University of Pittsburgh Law Review, 57(4), 841-882

Fudowska P and Mason H, 'Wills & probate update,' (2017) The New Law Journal, 167(7770), 17-18

Gibson M, ‘Rastafari and Cannabis: Framing a Criminal Law Exemption,’ (2010) Ecclesiastical Law Journal, 12(3), 324-344

Gobert J, ‘Corporate Criminal Liability: Four Models of Fault,’ (1994) Legal Studies, 14(3), 393-410

Gordon-Bouvier E, ‘The Open Future: Analysing the Temporality of Autonomy in Family Law,’ (2020) Child and Family Law Quarterly, 32(1)

Gottschalk P, ‘White-collar crime: Detection and Neutralization in Religious Organizations,’ (2017) International Journal of Police Science and Management, 19(2), 120-126

Greenfield S et al, 'From Beyond the Grave: The Legal Regulation of Mediumship,' (2012), International Journal of Law in Context, 8(1), 97-114

Grewal K, ‘The Protection of Sexual Autonomy under International Criminal Law: The International Criminal Court and the Challenge of Defining Rape,’ (2012) *Journal of* International Criminal Justice*,* 10(2), 373–396

Griew E, ‘Dishonesty: The Objections to Feely and Ghosh,’ [1985] Criminal Law Review, 431, 341-354

Haji I, ‘On Responsibility, History and Taking Responsibility (Comments on John Martin Fischer's Presentation),’ (2000) The Journal of Ethics, 4(4), 392-400

Hall M and Smith T, 'The disappearing Ghosh test,' (2017) Criminal Law and Justice Weekly, 181(42), 752-754

Halpin A, ‘The Methodology of Jurisprudence: Thirty Years off the Point,’ (2006) Canadian Journal of Law and Jurisprudence, 19(1), 67-105

Hayward J.O., 'Religious Pretenders in the Courts: Unmasking the Imposters,' (2014) Trinity Law Review, 20(1), 24-64

Haworth L, ‘Dworkin on Autonomy,’ (1991) Ethics, 102(1), 129-139

Hedlund R, 'Undue influence and the religious cases that shaped the law,' (2016) Oxford Journal of Law and Religion, 5(2), 298-318

Heins M, 'Other People's Faiths: The Scientology Litigation and the Justiciability of Religious Fraud,' (1981) Hastings Constitutional Law Quarterly, 9(1), 153-198

Herbert M, ‘Religious Issues in Litigation,’ (2015) Private Client Business, 3, 137-144

Heydon J, ‘Equitable Compensation for Undue Influence,’ (1997) Law Quarterly Review, 113, 8-10

Hodson J.D., ‘Mill, Paternalism, and Slavery,’ (1981) Analysis, 41(1), 60-62

Horton D, ‘The Uneasy Case for California’s “Care Custodian” Statute,’ (2008) Chapman Law Review, 12(1)(3), 47-69

Idleman S.C., ‘Tort Liability, Religious Entities, and the Decline of Constitutional Protection,’ (2000) Indiana Law Journal, 75(1)(14), 221-223

Jackson A, 'Goodbye to Ghosh: the UK Supreme Court Clarifies the Proper Test for Dishonesty to be Applied in Criminal Proceedings,' (2017) Journal of Criminal Law, 81(6), 448-450

James A, 'Duress: Objective Test,' (2007) Journal of Criminal Law, 71(3), 193-194

Jarboe J, 'Undue Influence and Gifts to Religious Organization,' (2017) Catholic Lawyer, 35(3), 271-282

Johnston C.D., ‘The Idea of Autonomy and The Foundations of Contractual Liability,’ (1983) Law and Philosophy, 2(3), 271-303.

Kapai P, ‘Undue Influence and Unconscionability in Comparative Common Law: Delivering Contextualized Justice for Minority Sureties,’ (2019) Transnational Law and Contemporary Problems, 28(2), 361-448

Kapitan T, ‘Autonomy and Manipulated Freedom,’ (2000) Philosophical Perspectives, 34*(*14), 81-104

Kaur J.P., 'Where There's a Will,' (2013) New Law Journal, Issue 7572, 13-14

Kerridge R, 'Undue Influence and Testamentary Dispositions: A Response,' (2012) Conveyancer and Property Lawyer, 2, 129-144

— 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator,' (2000) Cambridge Law Journal, 59(2), 310-344

Kronman A, 'Contract Law and Distributive Justice,' (1980) Yale Law Journal, 89, 472-511

Laird K, 'Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club),' (2018) Criminal Law Review, 5, 395-399

Law Magazine and Review, 'Undue Influence,' (1873) a Monthly Journal of Jurisprudence for Both Branches of the Legal Profession at Home and Abroad, 2(8), 742-749

LeDemoult J, 'Deprogramming Members of Religious Sects,' (1978) Fordham Law Review, 46(4), 599-640

Leslie M, 'Enforcing Family Promises: Reliance, Reciprocity and Relational Contract,' (1999), North Carolina Law Review, 77(2)(5), 551-636

Lyons D, 'Justification and Judicial Responsibility, (1984) California Law Review, 72(2), 178-199

McDonagh J, 'Leaving it to the Next Generation,' (2017) New Law Journal, 167(7762), 13-14

McGolgan A, 'Undue Spiritual Influence: An Historical Analysis,' (2017) King's Law Journal, 28(2), 279-308

MacCormick N, 'What Is Wrong with Deceit?' (1982) Sydney Law Review, 10(1), 5-19

Mason L, ' Undue influence and testamentary dispositions: an equitable jurisdiction in probate law?' (2011) Conveyancer and Property Lawyer, 75(2), 115-122

Magyarics C, 'The Effect of Victim Religion on Juror Perceptions of Hate Crimes,' (2016) Thesis and Dissertations—Psychology

Mawani R, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) UC Irvine Law Review, 4(5), 71-80

May T, 'The Concept of Autonomy,' (1994), American Philosophy Quarterly, 31(2), 133-144

Monica Miller et al, 'The Effects of Deliberations and Religious Identity on Mock Jurors' Verdicts,' (2009) Group Processes & Intergroup Relations, 14(4). 517-532

Miller M and Maskaly J, 'The Relationship Between Mock Juror's Religious Characteristics and Their Verdicts and Sentencing Decisions,' (2014) Psychology of Religion and Spirituality, 6(3), 188-197

Mujih E.C., 'From manifest disadvantage to transactions that call for explanation: have the difficulties been eliminated ten years after *Royal Bank of Scotland Plc v Etridge (No.2)*?' (2012) Journal of International Banking Law and Regulation, 27(10), 395-405

— 'The convergence and divergence of undue influence and misrepresentation as grounds for setting aside a guarantee: an uncertain future for misrepresentation in guarantee cases?' (2012) Journal of International Banking Law and Regulation, 27(6), 239-249

— 'Over ten years after Royal Bank of Scotland Plc v Etridge (No.2): Is the Law on Undue Influence in Guarantee Cases Any Clearer?' (2013) International Company and Commercial Law Review, 24(2), 57-67

Madoff R.D., 'Unmasking Undue Influence,' (1997) Minnesota Law Review, 81, 572-629

Marshall W.P., 'Smith, Ballard, and the Religious Inquiry Exception to the Criminal Law,' (2011) Texas Law Review, 44, 239-257

Mason C, 'What is Truth? Setting the Bounds of Justiciability in Religiously-Inflected Fact Disputes,' (2010) Journal of Law and Religion, 1, 91–139

Mayer R, 'What's Wrong with Exploitation?' (2007) Journal of Applied Psychology, 24(2), 137-150

Morton J, 'Deliberating for Our Far Future Selves,' (2013) Ethical Theory Moral Practice, 16(4), 809–828

Meyler B, 'Commerce in Religion,' (2009) Notre Dame Law Review, 84(2)(9), 887-912

Noonan J.T., 'How Sincere Do You Have to Be to Be Religious?' (1988) University of Illinois Law Review, 713-724

Norrie A, 'The Limits of Justice: Finding Fault in the Criminal Law,' (1996) The Modern Law Review, 59(4), 540-556

O'Connell R, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) Legal Studies, 29(2), 211-229

Ormerod D, 'The Fraud Act 2006--Criminalising Lying?' (2007) Criminal Law Review, 193-219

Oshana M.L.O., 'The Misguided Marriage of Responsibility and Autonomy, (2002) The Journal of Ethics, 6(2), 261-280

Parton C, 'When Courts Come Knocking at the Cult's Door: Religious Cults and the First Amendment,' (1986) Hastings Journal of Communications and Entertainment Law, 9(2), 279-306

Patrinelis C.S., Undue Influence in Nontestamentary Gift to Clergymen, Spiritual Adviser, or Church,' (1950) 14 American Law Reports, 2d 649- 657

Pawlowski M, 'Undue Influence: towards a Unifying Concept of Unconscionability,' (2018) Denning Law Journal, 30(1), 117-151

Rachels J, ‘God and Human Attitudes,’ (1971) Religious Studies, 7(4), 325-337

Rakay B et al, 'A Reconsideration of the Religious Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices,' (1978) Loyola University of Chicago Law Journal, 9(4), 889-90

Ridge P, ‘McCulloch v Fern’, (2002) Journal of Contract Law, (1-2), 138-144
- — 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: Allcard v Skinner Revisited in Australia,' (2003) University of New South Wales Law Journal, 26(1), 66-89
- — 'Uncertainties Surrounding Undue Influence: Its Formulation, Application, and Relationship to Other Doctrines,' (2003) New Zealand Law Review, 2003, 329-360
- — ‘Legal and Ethical Matters Relevant to the Receipt of Financial Benefits by Ministers of Religion and Churches,’ (2003) Griffith Law Review, 12
- — ‘Equitable Undue Influence and Wills,' (2004) Law Quarterly Review, 20, 616-640
- — 'Moral Duty, Religious Faith and the Regulation of Testation,' (2005) University of South Wales Law Journal, 28, 3, 720-739
- — ‘Legal Regulation of Religious Giving,’ Australian National University, College of Law, Social Science Research Network Legal Scholarship Network, (2007), 1st Edition
- — 'Third Party Volunteers and Undue Influence,' (2014) The Law Quarterly Review, 130, 112-130

Rienzi M, 'God and the Profits: Is There Religious Liberty for Moneymakers,' (2013) George Mason Law Review, 21(1), 59-11

Rosen M, 'God Will Not Provide: Hasidic Jews and Fraud,' (2012) Journal of Law and Social Deviance, 3, 245-292

Savage J, 'Preventing Non-Profit Profiteering: Regulating Religious Cult Employment Practices, (1981) Arizona Law Review, 23(3), 1003-1032

Scalise R.J., 'Undue Influence and the Law of Wills: A Comparative Analysis,' (2008) Duke Journal of Comparative & International Law, 19, 41-106

Schuhmann C and Damen A, ‘Representing the Good: Pastoral Care in a Secular Age,’ (2018) Pastoral Psychology, 67(4), 405–417

Scutt J, 'Human Rights, "Arranged" Marriages and Law: Should Culture Override or Inform Fraud and Duress?' (2014) Denning Law Journal, 26, 62-97

Seigel T, Deprogramming Religious Cultists, (1978) Loyola of Los Angeles Law Review, 11(4), 807-828

Senn S, 'The Prosecution of Religious Fraud,' (1990) Florida State University Law Review, 17(2), 325-352

Selway K, 'Establishing fraudulent calumny,' (2017) Law Society Gazette, 114(43), 22

Sheehan D, ‘Defendant-sided Unjust Factors,’ (2016) Legal Studies, 36(3), 415–437

Sherman J, ‘Undue Influence and the Homosexual Testator,’ (1981) University Pittsburgh Law Review, 42(2), 225-268.

— 'Can Religious Influence Ever Be Undue Influence,' (2008) Brooklyn Law Review, 73(2), 579-644

Sikkink D & Emerson M, 'Congregational Switching in an Age of Great Expectations,' (2020) Review of Religious Research, 62, 219–247

Simmons T.E., 'Testamentary Incapacity, Undue Influence, and Insane Delusions,' (2015) South Dakota Law Review, 60(2), 175-231

Sloan B, 'Due rewards or undue influence? – Property Transfers Benefitting Informal Carers,' (2011) Restitution Law Review, 19, 37-49

— 'The "Disinherited" Daughter and the Disapproving Mother,' (2016) Cambridge Law Journal, 75(1), 31-34

— 'Testamentary Freedom Reaffirmed in the Supreme Court,' (2017) Cambridge Law Journal, 76(3), 499-502

Spar J.E. et al, ‘Assessing Mental Capacity and Susceptibility to Undue Influence Behavioral Sciences and the Law,’ (1995) Behavioural Sciences and the Law, 13, 391-403

Spector H, ‘A Contractarian Approach to Unconscionability,’ (2006) Chicago-Kent Law Review, 81(1), 95-118

Spivack C, 'Why the Testamentary Doctrine of Undue Influence Should Be Abolished,' (2010) Kansas Law Review, 58, 245-308

Stanley C, 'Vulnerable gifts made by vulnerable people,' (2017) Trusts and Trustees, 23(5), 542-557

Su A, 'Judging Religious Sincerity' (2016) Oxford Journal of Law and Religion, 5(1), 28–48

Taylor J.S., ‘Autonomy and Organ Sales, Revisited,’ (2009) Journal of Medicine and Philosophy, 34(6), 632–648.

Thalberg I, ‘Hierarchical Analyses of Unfree Action,’ (1978) Canadian Journal of Philosophy, 8(2), 211-226

Thomas O.S., 'Restoring Free Exercise and Preventing Religious Fraud: A Response to Milner Ball,' (1991) Capital University Law Review, 20(1), 67-72

Thomas W.J., ‘Preventing Non-Profit Profiteering: Regulating Religious Cult Employment Practices,’ (1981) Arizona Law Review, 23(3), 1013-1032

Thornley T.J., ‘The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence,’ (1995) Indiana Law Journal, 71(2)(8), 513-549

Turley J, 'Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation,' (1988) William and Mary Law Review, 29(3), 441-500

Van Cappellen P et al, ‘Religiosity and the Motivation for Social Affiliation,’ (2017) Personality and Individual Differences, 113, 24-31

— ‘Beyond Mere Compliance to Authoritative Figures: Religious Priming Increases Conformity to Informational Influence Among Submissive People,’ (2011) International Journal for the Psychology of Religion, 21(2), 97–105.

Van Inwagen P, ‘The Incompatibility of Free Will and Determinism,’ (1975) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition, 27(3), 185-199

Virgo G, 'The Fraud Act 2006 - Ten Years On,' (2017) Archbold Review, Volume 10, 6-7

— 'Cheating and dishonesty,' (2018) Cambridge Law Journal, 71(1), 18-22

Waggoner L.W., ‘Class Gifts under the Restatement (Third) of Property,’ (2007) Ohio Northern University Law Review, 33(3), 993-1012

— ‘How the ALI's Restatement Third of Property Is Influencing the Law of Trusts and Estates,’ (2015) Brooklyn Law Review, 80(3), 1019-1028

Weiss J, ‘Privilege, Posture and Protection Religion in the Law,’ (1964) Yale Law Journal, 73, 594-595

Wesley C, 'A New Approach to Nineteenth-Century Religious Exemption Cases,' (2011) Stanford Law Review, 63(4), 973-1004

Westlund A.C., ‘Rethinking Relational Autonomy,’ (2009) Hypatia, 24(4), 26-49

White Hutton A.J., ‘Undue Influence and Fraud in Pennsylvania Wills,’ (1948) Dickson Law Review, 53, 12-28

Wood A, ‘Unjust Exploitation,’ (2016) The Southern Journal of Applied Philosophy, 54(1), 92-108

Wrosch A.P., 'Undue influence, Involuntary Servitude and Brainwashing: A More Consistent Interests-Based Approach,' (1992) Loyola of Los Angeles Law Review, 25(2), 499-554

CONFERENCE PAPERS

Ridge P, ‘Testamentary Gifts Motivated by Religious Faith and Family Provision Legislation’, Paper presented at the Centre for Cross-Cultural Research, Negotiating the Sacred conference, The Australian National University, Canberra, 31 May 2004

OFFICIAL REPORTS

Association of Certified Fraud Examiners, 'Report to The Nations on Occupational Fraud and Abuse: Global Fraud Study 2012 <http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-tonations.pdf>

Association of Certified Fraud Examiners, 'Report to the Nations on Occupation Fraud and Abuse 2014,' <http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf>

Coutts, '2016 Report: UNITED KINGDOM, The Number of £1m+ Gifts Increases by 19%,' <http://philanthropy.coutts.com/en/reports/2016/united-kingdom/findings.html>

Law Commission, 'Conspiracy to Defraud,' (1987) Working Paper No. 104< http://www.lawcom.gov.uk/app/uploads/2016/08/No.104-Criminal-Law-Conspiracy-to-Defraud.pdf>

Ipsos MORI, 'Veracity Index 2015,' (2016) <https://www.ipsos.com/sites/default/files/migrations/en-uk/files/Assets/Docs/Polls/ipsos-mori-veracity-index-2015-charts.pdf>

Ministry of Justice, 'Corporate Liability for Economic Crime: Call for evidence,' <https://consult.justice.gov.uk/digitalcommunications/corporate-liability-for economiccrime/supporting_documents/corporateliabilityoreconomiccrimeconsultationdocument.pdf>

Office for National Statistics, 'How religion has changed in England and Wales,' (2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/howreligionhaschangedinenglandandwales/2015-06-04>

Quinn M et al, Undue Influence: Definitions and Applications, A Project Supported by The Borchard Foundation Center on Law and Aging, Final Report, March 2010, 1-145 <http://www.courts.ca.gov/documents/UndueInfluence.pdf>

WEBSITES AND NEWS REPORTS

BBC World Service, Your Question of Faith, 'How do Religious Frauds and Imposters?' 17 Apr 2000 <https://www.bbc.co.uk/sounds/play/p0344sp1>

BBC News, 'Coronavirus: London church investigated over 'protection' oil,' 2 April 2020, <https://www.bbc.co.uk/news/uk-england-london-52136588>

Buss S and Westlund A, 'Personal Autonomy,' *The Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/spr2018/entries/personal-autonomy/>

Gayle D, ‘Met police examine fraud allegations at Space Nation church,’ Wed 13 Nov 2019 <https://www.theguardian.com/uk-news/2019/nov/13/met-police-examine-fraud-allegations-spac-nation-church>

InfoFreedomFighter ‘SATANIST Aleister Crowley ~ The Most Wicked Man In The World~Great Documentary,’ <https://www.youtube.com/watch?v=jsm6WI5i7p0>
McLoughlin S, ‘Mapping the UK’s Hajj Sector: Moving Towards Communication and Consensus,’ (2019) <https://hajj.leeds.ac.uk/wp-content/uploads/sites/69/2019/08/Mapping-the-UK-Hajj-Sector-Full-Report.pdf>

Kruse Jr C.B., ‘Reformation of Wills: The Implication of Restatement (Third) of Property (Donative Transfers) on Flawed but Unambiguous Testaments, (2000) ACTEC Notes, 25(4), 323-324 <http://www.actec.org/assets/1/6/Notes_V25_N4_Spring00.pdf>

Pavlo W, “Fraud Thriving in U.S. Churches, But You Wouldn't Know It,” 18 November 2013, Forbes <https://forbes.com/sites/walterpavlo/2013/11/18/fraud-thriving-in-u-s-churches-but-you-wouldnt-knowit/#7d688ec277bf>

Peters C.S., ‘More Than Just Good Deeds: Fraud Within Religious Organizations,’ (2015) A Capstone Project Submitted to the Faculty of Utica College in Partial Fulfillment of the Requirements for the Degree of Master of Economic Crime Management, 2 <https://pqdtopen.proquest.com/doc/1728329488.html?FMT=AI?>

Pilgrim’s Friend Society, <https://www.pilgrimsfriend.org.uk/christian-care-homes>

Puchalski C.M. et al, ‘Interprofessional Spiritual Care in Oncology: A Literature Review,’ (2019) ESMO Open, 4(1), <https://esmoopen.bmj.com/content/4/1/e000465.citation-tools>

Stanton-Ife J, "The Limits of Law", *The Stanford Encyclopedia of Philosophy* (2016) <https://plato.stanford.edu/archives/win2016/entries/law-limits/>