

2013

Unconscionability and the Contingent Assumptions of Contract Theory

M. Neil Browne

Bowling Green State University, nbrown2@bgsu.edu

Lauren Biksacky

Follow this and additional works at: https://scholarworks.bgsu.edu/econ_pub



Part of the [Contracts Commons](#)

[How does access to this work benefit you? Let us know!](#)

Repository Citation

Browne, M. Neil and Biksacky, Lauren, "Unconscionability and the Contingent Assumptions of Contract Theory" (2013). *Economics Faculty Publications*. 11.

https://scholarworks.bgsu.edu/econ_pub/11

This Article is brought to you for free and open access by the Economics at ScholarWorks@BGSU. It has been accepted for inclusion in Economics Faculty Publications by an authorized administrator of ScholarWorks@BGSU.

UNCONSCIONABILITY AND THE CONTINGENT ASSUMPTIONS OF CONTRACT THEORY

M. Neil Browne & Lauren Biksacky***

2013 MICH. ST. L. REV. 211

TABLE OF CONTENTS

INTRODUCTION.....	212
I. THE DOCTRINE OF UNCONSCIONABILITY.....	216
A. Early Forms of Unconscionability.....	216
B. The Uniform Commercial Code and Restatement (Second) of Contracts.....	217
C. Substantive vs. Procedural Unconscionability.....	219
D. Problems with U.C.C. § 2-302.....	224
E. Remedies for Unconscionability.....	225
II. QUESTIONABLE ASSUMPTIONS OF CONTRACT THEORY.....	226
A. Addressing Those Opposed to Unconscionability.....	226
B. Contracting Parties Are Rational Actors?.....	228
1. <i>Child or Adult?</i>	229
2. <i>Consumer Behavior</i>	232
3. <i>Superstition</i>	233
4. <i>Cognitive Biases</i>	233
C. Contracting Parties Make Decisions Based on Complete Information?.....	238
III. COMPARATIVE APPROACHES TO UNCONSCIONABILITY.....	240
A. Australia.....	240
B. Canada.....	242
C. Germany.....	243
D. France.....	246
E. Commonalities in U.S., German, and French Law.....	248
IV. CASE LAW: THE UNCLEAR DOCTRINE OF UNCONSCIONABILITY.....	249
A. <i>Harris v. Green Tree Financial Corporation</i>	250
B. <i>Doctor's Associates, Inc. v. Casarotto</i>	252
CONCLUSION.....	254

* Distinguished Teaching Professor of Economics, Bowling Green State University.

** Honors Scholars Research Associate, Bowling Green State University.

*Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tossed, to me,
 I lift my lamp beside the golden door.*

-Plaque on the Statue of Liberty

Unconscionability decisions mix radical rhetoric with conservative actions. The courts often sound like they are doing something extreme, but their actions do not bear this out. Parties remain free to determine with whom they will trade and upon what terms. This is true no matter how unreasonable a given contract may appear to an outside observer. Unconscionability maintains its relevance as a supplement to traditional contract defense doctrines.¹

INTRODUCTION

In 1971, W. David Slawson estimated that 99% of all contracts do not resemble the Platonic ideal of a document of jointly negotiated terms, but rather are lists of terms presented by one party to the other on a pre-printed form.² Although this estimate is forty years old, it underestimates our current market exchange situation; the pervasiveness of form contracts stipulated by one party has increased.³

Contract law generally provides for the enforcement of such contracts, allowing the powerful party to essentially govern over consumers and weaker parties.⁴ Classical contract theory allows for this enforcement of contracts based upon a number of assumptions about human nature and the bargaining process.

For instance, it assumes that the parties freely enter into an agreement or bargain as equals.⁵ To see why the legal community believes parties can freely bargain as equals, we must imagine a world in which the perfect contract exists. A perfect contract is one in which all contingencies are accounted for and efficiently allocated between the parties, all relevant information has been communicated, each resource is with the party who values it the

1. Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 583 (1992).

2. W. David Slawson, *Standard Form Contracts and Democratic Control of Law-making Power*, 84 HARV. L. REV. 529, 529 (1971).

3. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203-04 (2003).

4. Slawson, *supra* note 2, at 536.

5. LAURENCE KOFFMAN & ELIZABETH MACDONALD, *THE LAW OF CONTRACT* 4 (6th ed. 2007).

most, each risk is allocated to the least cost bearer, and no future gains from exchange are possible.⁶

Furthermore, classical contract theory assumes parties will be able to bargain equally because they have similar resources⁷ and all contracting parties are rational adults.⁸

In a world of perfect contracts and rational parties, the state should regulate or intervene as little as possible. It is not the task of the law to ensure that a fair bargain is struck or to inquire whether the parties had in fact met as equals.⁹ Rather, it is the task of the individual bargainers of the contract to ensure the terms of the contract are fair.

We live in a world where perfect contracts do not exist, and vulnerable contracting parties such as consumers, tenants, the poverty-stricken,¹⁰ and employees often suffer as a result.¹¹ The law of contract is engaged in trying to balance the upholding of traditional market liberalism with the need to protect those who may be vulnerable.¹² One way of protecting the vulnerable in contract law is through increasing the court's usage of the doctrine of unconscionability.

6. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 186 (2d ed. 1997).

7. Classical contract theory thus assumes the existence of general competition. See KOFFMAN & MACDONALD, *supra* note 5, at 4. In the classical model of contracts, true equality is a prerequisite for freedom of contract. *Id.*

8. See Paula England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 37, 37-38 (Marianne A. Ferber & Julie A. Nelson eds., 1993).

9. "The notion of contract as a bargaining process arose concomitantly with the doctrines of laissez-faire and of the free enterprise system. . . . In the laissez-faire market place, economic agents, unfettered by government restrictions, interacted freely. Agents met, conferred, and, acting in their own self-interest, contracted." Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1152-53 (1976).

10. Schwartz states:

A contracting party's poverty is commonly thought to militate in four ways against enforcing an agreement. First, poverty may impede the buyer's efforts to purchase a "fair" contract. . . . Second, poverty is thought to correlate strongly with a buyer's lack of commercial sophistication. . . . Third, poverty may restrict the flow of commercial information to poor consumers. . . . Fourth, poverty may exacerbate the consequences of certain contract clauses. An acceleration clause, for example, may bear more harshly upon a poor consumer than upon an affluent consumer.

Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1056-57 (1977).

11. See P.S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 27-34 (5th ed. 1995). Atiyah argues that since the 1980s the United States has witnessed a renaissance of classical principles of contract law. *Id.* at 27. The political emphasis on freedom of choice, the value of a free market economy, and a less paternalistic role for the state created an atmosphere of classical contract theory. *Id.* The political and economic climate since the 1980s has fostered a resurgence in the ideas of freedom of contract and emphasized less dependence on a benevolent state. *Id.*

12. See KOFFMAN & MACDONALD, *supra* note 5, at 4.

Unconscionability is not intended to erase freedom of contract,¹³ but to assure that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding¹⁴ and the ability to negotiate in a meaningful fashion.¹⁵ As Chief Justice Hughes said in *Morehead v. People of New York ex rel. Tipaldo*:¹⁶

13. In *Rowe v. Great Atlantic & Pacific Tea Co.*, 385 N.E.2d 566 (N.Y. 1978), the New York Court of Appeals highlights the opposition between freedom of contract and protecting the vulnerable through encouraging fair bargaining. The court asserts the need for the doctrine of unconscionability and in doing so states:

It is . . . far too late in the day to seriously suggest that the law has not made substantial inroads into such freedom of private contracts. There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socioeconomic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system. . . . [L]aw has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power.

Id. at 569.

14. It is for this reason that even the most stalwart Libertarians should be in favor of invoking the doctrine of unconscionability when applicable. Classical and Libertarian contract theory are both built around the foundational assumption of the existence of a meaningful choice. If one party is defrauded by another and deceived into making an agreement detrimental to them in some way, how can this be seen as a meaningful choice? *See, e.g.*, MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 133 (1982). Rothbard argues:

Unfortunately, many libertarians, devoted to the right to make contracts, hold the contract itself to be an absolute, and therefore maintain that any voluntary contract whatever must be legally enforceable in the free society. Their error is a failure to realize that the right to contract is strictly derivable from the right of private property, and therefore that the only enforceable contracts (i.e., those backed by the sanction of legal coercion) should be those where the failure of one party to abide by the contract implies the theft of property from the other party.

Id. (emphasis omitted). Implicit in Rothbard's argument is the idea that any contract, which when enforced legitimates a theft of private property by one party against another, is equally as illegitimate as not enforcing the contract he describes. He defines theft as the taking of one's property without their consent. *Id.* So, what if a contract is negotiated with such vast discrepancies in bargaining power between parties that one party is not, through no fault of his own, privy to all that they have agreed to? Since the more powerful party is taking possession of the other's property without the party's explicit consent, then is this act not theft as well? It does seem to fit under, "Mr. Libertarian," Murray Rothbard's definition of theft, and thus it appears even Libertarians should find such contracts unconscionable.

15. Robyn L. Meadows, *Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741, 744 (2005). Meadows argues that the doctrine of unconscionability should be adopted in many situations where the elderly are unfairly taken advantage of. *See generally id.* Specifically, in many contracts with elderly parties, the assumptions of classical contract theory do not hold true. *See generally id.* For example:

There were a number of unconscionability cases involving elderly women and dance studios, which frequently involved dance lessons for life at a cost of tens of thousands of dollars In finding these contracts unconscionable, some courts

We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.¹⁷

Likewise, this Article argues for the court's increased invocation of the doctrine of unconscionability in cases involving unfair contracts. Part I explains the doctrine of unconscionability, its theoretical foundations, and its legal precedents.¹⁸ Part I also clarifies the distinction between the forms of procedural and substantive unconscionability, and how the courts subsequently apply each form of the doctrine.¹⁹ Part II argues that the reason why courts should move away from classical contract theory and toward a jurisprudence embracing the doctrine of unconscionability is because of the many faulty assumptions of classical contract theory.²⁰ A summary of evidence from psychological and behavioral sciences, as well as consumer research, suggests that humans often behave irrationally and without complete information.²¹ In other words, because consumers are not fully rational and informed, the assumptions of classical contract theory are incorrect, and thus the theory crumbles under scrutiny. Part III provides alternative approaches to enforcing the unconscionability doctrine through a comparative lens.²² Specifically, the Article examines unconscionability law in Australia, Canada, Germany, and France, and clarifies areas in which the United States is both at the forefront and far behind in terms of unconscionability standards. Part IV critically evaluates the policing of unconscionability by the courts and points out the inherently contradictory approach to uncon-

considered the fact that the dance studio knew that it was unlikely that the elderly customer would ever reap the full benefit of the contract given the customer's age and physical condition [and the lack of understanding on the part of the elderly dancer].

Id. at 747. These dance contracts were a result of highly unequal bargaining power. *See id.* at 744-45; *see, e.g.*, *Bennett v. Bailey*, 597 S.W.2d 532 (Tex. Civ. App. 1980). In this case, the court determined there was evidence to support a jury's finding of unconscionable conduct because dance instructors used excessive pressure on a lonely, elderly widow. *Bennett*, 597 S.W.2d at 535. By exerting this pressure, the instructors were able to convince the woman to purchase excessively expensive dance lessons. *Id.* As a result, the court held the dance studio took advantage of the elderly customer's vulnerability and the terms of the agreement were unbalanced. *Id.*

16. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 627 (1936) (Hughes, J., dissenting).

17. *Id.*

18. *See infra* Sections I.A-B.

19. *See infra* Section I.C.

20. *See infra* Part II.

21. *See infra* Sections II.B-C.

22. *See infra* Sections III.A-D.

scionability since the inception of the doctrine.²³ If the courts were concerned with upholding the standards of unconscionability adopted in the Uniform Commercial Code and the Restatement (Second) of Contracts, far more court decisions would rule unconscionable provisions and contracts null and void.²⁴

I. THE DOCTRINE OF UNCONSCIONABILITY

A. Early Forms of Unconscionability

In its simplest terms, the doctrine of unconscionability permits a court to intervene into the contractual relations of parties and modify or reject an agreement because part of the contract is unfair.²⁵ The role of unconscionability in helping parties achieve fair bargains dates back to Roman law, which allowed a contracting party to rescind a contract “if the disproportion between the values exchanged was greater than two to one.”²⁶ In the United States, prior to any uniform adoption of the official doctrine of unconscionability, the eighteenth century courts acknowledged unconscionable agreements.²⁷ As early as 1816, American courts had the equitable power “to set aside a contract if ‘in conscience’ it should not be binding.”²⁸ Later in the 1800s, the courts elaborated on unconscionability and explained unconscionable contracts as ones “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”²⁹

23. See *infra* Part IV.

24. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302 (2011).

25. Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1820 (1994). Darr explains the texts of both § 2-302 of the Uniform Commercial Code (U.C.C.) and § 208 of the Restatement (Second) of Contracts recognize a court’s authority to intervene on behalf of the injured party. *Id.* at 1828-29. Thus, the doctrine of unconscionability is a tool courts use to help contracting parties create contracts with fair terms. See *id.*

26. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 599 (7th ed. 2012).

27. See, e.g., *Scott v. United States*, 79 U.S. (12 Wall.) 443 (1870). In *Scott*, the Court states that “[i]f a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.” *Id.* at 445.

28. Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 744 n.3 (1981) (quoting *Hepburn v. Dunlop & Co.*, 14 U.S. (1 Wheat.) 179, 197 (1816)).

29. *Hume v. United States*, 132 U.S. 406, 411 (1889); see also JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 96, at 486 (3d ed. 1990). Murray explains it is practically mandatory for unconscionability discussions to begin with this eighteenth century quote, which primed the legal system for further unconscionability discussions. *Id.* The decision in *Hume* was heavily influenced by British case law, specifically the celebrated decision in *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82; 2 Ves. Sen. 125, 155. The *Earl*

B. The Uniform Commercial Code and Restatement (Second) of Contracts

Despite some courts acknowledging the possible existence of a doctrine of unconscionability beginning in the 1800s, it was not until 1952³⁰ that the Uniform Commercial Code finally gave courts explicit authorization to rule that a contract was unconscionable. Section 2-302³¹ of the Uniform Commercial Code (U.C.C.) reads:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.³²

The Official Comments to U.C.C. § 2-302 further clarify how a court would test for unconscionability. They state:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.³³

Despite its publication in the U.C.C., it took nearly a decade for the courts to begin using § 2-302.³⁴ By 1968, fewer than twenty cases were de-

court defined unconscionability as a transaction “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice.” *Id.* However, rulings such as in *Hume* were not common. Rather, the common mentality of the courts regarding contracts was that the language of a contract suggests it is a private affair and not a social institution. MURRAY, JR., *supra*. The judicial system, therefore, provides only for their interpretation and should not actively engage in regulating or creating contracts for parties. *See, e.g.*, *Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 469-70 (1894); *Urian v. Scranton Life Ins. Co.*, 165 A. 21, 24 (Pa. 1933).

30. The Code was drafted in the 1940s and 1950s, but the first draft was not published until 1952. SINAI DEUTCH, *UNFAIR CONTRACTS: THE DOCTRINE OF UNCONSCIONABILITY* 41 (1977).

31. Since its publication, perhaps more has been written about § 2-302 than any other single provision of the Code. *See* I E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 578 (3d ed. 2004).

32. U.C.C. § 2-302 (2011).

33. *Id.* § 2-302 cmt. 1 (citation omitted).

34. *See* Eugene M. Harrington, *Unconscionability Under the Uniform Commercial Code*, 10 S. TEX. L.J. 203, 205 (1968).

cided on the basis of § 2-302.³⁵ But today, although U.S. contract law is based largely on common law, the U.C.C., including § 2-302, has been adopted by virtually all of the states.³⁶ Furthermore, the intention of § 2-302 was for the provision to be substantiated by court decisions. The very beginning of the Official Comments to the section states, “[t]his section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable.”³⁷

Technically, Article 2 of the U.C.C. applies only to the sale of goods.³⁸ However, the doctrine of unconscionability expands beyond the sale of goods. Courts can find contracts unconscionable in secured transactions,³⁹ contracts between a customer and his bank,⁴⁰ commercial leases,⁴¹ credit card fees,⁴² insurance policy provisions,⁴³ the termination of dealership franchise agreements,⁴⁴ regulations for tenure and promotion of university faculty,⁴⁵ and contracts for personal services.⁴⁶ Officially, the Restatement (Second) of Contracts § 208, asserts unconscionability is accepted as a general

35. *Id.*

36. After the first publication of § 2-302 of the U.C.C., the ambiguity of the term “unconscionability” induced the State of California to initially drop § 2-302 from their adoption of the Code. See Simon Reznikoff, *The Unconscionable Controversy*, 17 AM. BUS. L.J. 61, 61 (1979). See also CAL. COM. CODE § 2302 (West 2012) for an in-depth explanation as to why the provision was not enacted in California. Also, until 1971, the state of North Carolina also omitted this section from the Code. See N.C. GEN. STAT. ANN. § 25-2-302 (1966) for a discussion of why North Carolina did not initially adopt the provision.

37. § 2-302 cmt. 1.

38. Ostas, *supra* note 1, at 538. Specifically, the U.C.C. provides that “this Article applies to transactions in goods.” U.C.C. § 2-102 (2011). U.C.C. § 2-105 defines goods as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.” *Id.* § 2-105.

39. *Urdang v. Muse*, 276 A.2d 397, 401 (N.J. Essex County Ct. 1971).

40. *David v. Mfrs. Hanover Trust Co.*, 287 N.Y.S.2d 503 (Civ. Ct. 1968).

41. *Earlman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1299 (5th Cir. 1980). Decades ago, M. Michael Cramer argued that the doctrine of unconscionability should also apply to exculpatory lease contracts by analogy and since tenant–landlord lease contracts have also subsequently been deemed unconscionable. M. Michael Cramer, *Extension of the Uniform Commercial Code’s Unconscionable Contract Provision to Exculpatory Lease Clauses*, 5 AM. BUS. L.J. 287 (1967).

42. *Melso v. Texaco, Inc.*, 532 F. Supp. 1280, 1296 (E.D. Pa. 1982).

43. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 181 (Iowa 1975).

44. *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1375-77 (Mass. 1980).

45. *Meehan v. New England Sch. of Law*, 522 F. Supp. 484, 494 (D. Mass. 1981), *aff’d*, 705 F.2d 439 (1st Cir. 1983).

46. *Kaye v. Coughlin*, 443 S.W.2d 612, 613-14 (Tex. Civ. App. 1969); *Lazan v. Huntington Town House, Inc.*, 332 N.Y.S.2d 270, 271-72 (Suffolk County Ct. 1969) (dealing with a contract for the hire of a hall for a Bar Mitzvah party); *Nu Dimensions Figure Salons v. Becerra*, 340 N.Y.S.2d 268, 272 (Civ. Ct. 1973) (concerning a contract for a weight-loss program).

concept of contracts.⁴⁷ Thus, the doctrine has been broadened to the point where it serves as a protection for consumers in general and not just a provision in a commercial code designed for merchant-to-merchant transactions.⁴⁸

C. Substantive vs. Procedural Unconscionability

In terms of consumer and merchant transactions, the doctrine of unconscionability traditionally can be divided into two forms of unfair bargaining: substantive and procedural unconscionability.⁴⁹ Typically, unconscionability cases involve both issues.⁵⁰ Both prongs of the doctrine are en-

47. The Restatement (Second) of Contracts states:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (paraphrasing principally U.C.C. § 2-302).

48. See DEUTCH, *supra* note 30, at 115-16.

49. This framework for unconscionability apparently originated with Arthur Allen Leff's writings discussing unconscionability. See generally Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Leff explains that regardless of whether contracts are procedurally or substantively unconscionable, contracts obtained by these means should be avoided. *Id.* at 487-88. Although traditionally unconscionability is defined by these two variables since Leff's work, Daniel T. Ostas provides another classification of the types of unconscionability. See Ostas, *supra* note 1, at 541. Ostas suggests there are three critical variables in determining if a contract is unconscionable. *Id.* First, unconscionability cases may have:

"[S]uspect clauses," that have repeatedly generated litigation. Examples [of suspect clauses] include warranty disclaimers, nominal price terms, and penalty clauses. Although any express term can be a "suspect clause," one would expect that only those clauses which vary from custom would generate a claim of unconscionability. The second variable, "relational context," points to the relevance of both the transaction-type and the social setting of an exchange. . . . Examples of relational contexts include home-solicitation consumer sales, commercial leases, franchise agreements, and physician-patient contracts. Both the fundamental purpose of the transaction and the identity of the parties are relevant aspects of the relational context. The [third] variable is the "negotiation process." Contractual negotiations may be tainted with fraud or undue influence, or the parties may have used a form contract with confusing fine print. The means by which a contract is negotiated is always a critical variable in unconscionability litigation.

Id.

50. That is, the complaining party will allege that a particular clause is unfair and that the exchange process through which that clause was derived was tainted. Most courts also require some modicum of both procedural and substantive unconscionability to find in favor of the vulnerable party. See JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 164 (2d ed. 1980); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999). In *Harris*, the court recognized the need for both procedural and substantive unconscionability. *Harris*, 183 F.3d at 181; see also Leff, *supra*

tirely judge made rather than specified by legislative statute, so courts can legitimately modify unconscionability standards without legislative approval.⁵¹

First, substantive unconscionability refers to the unfair terms of the contract and the unfair results arising from the transaction, such as overall imbalance, unfair price,⁵² unfair disclaimer, promoting default, waiver of

note 49, at 487. Leff further discusses the requirement of procedural and substantive unconscionability for courts to find a contract unconscionable. Leff, *supra* note 49, at 489-528. However, some courts have disregarded the traditional approach to the doctrine of unconscionability that requires both substantive and procedural problems. For instance, the Arizona Supreme Court concluded that “a claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price–cost disparity or limitation of remedies.” *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995); *see also* *East Ford Inc. v. Taylor*, 2000-IA-01527-SCT (¶22) (Miss. 2002) (holding that when a term is found procedurally unconscionable, substantive unconscionability is not required); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (App. Div. 1998) (“While it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable.”); *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 829 (N.Y. 1988) (suggesting that procedural unconscionability may not be necessary if a term is already substantively “outrageous”).

51. *See* Korobkin, *supra* note 3, at 1279. Due to the judicial branch’s ability to modify unconscionability standards, Korobkin proposes an updated and improved approach to the doctrine. *Id.* He suggests:

Modifying the unconscionability doctrine to create the closest possible fit between the doctrine and either social welfare or buyer welfare requires adherence to four principles: (1) Employ the screening device of “procedural unconscionability” to sort contract terms into two groups: those highly likely to be efficient, and those most likely to be inefficient. (2) Use “substantive unconscionability” analysis to identify the terms in the latter category that actually are inefficient. (3) In order to minimize “false positives”—decisions that terms are unconscionable when they are, in fact, efficient—defer to terms included in form contracts in inconclusive cases. (4) In order to provide sellers with an incentive to draft efficient terms even when those terms are non-salient, provide substantial remedies to victims when terms are found unconscionable by courts.

Id.

52. In unfair price unconscionability cases, one party asserts that the price to be paid is grossly disproportionate to the value of the good or service received in exchange. *See, e.g.,* *Murphy v. McNamara*, 416 A.2d 170, 176 (Conn. Super. Ct. 1979). In *Murphy*, the court declared a contract was unconscionable because a buyer paid \$1,268 for a television worth \$499. *Id.* at 173. Another case affirmed it was unconscionable for a seller to charge \$4,322 for windows that only cost the seller \$1,080.50. *Sho-Pro of Ind., Inc. v. Brown*, 585 N.E.2d 1357, 1361 (Ind. Ct. App. 1992). In another case, a contract was orally negotiated in Spanish, but the contract was written in English. *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 758 (Civ. Ct. 1966). The written contract charged the buyer three times the value of an appliance, and the court subsequently invalidated the contract on unconscionability grounds. *Id.* at 759. After an extensive empirical analysis of price unconscionability cases, Darr notes that high price alone is only a necessary condition. Darr, *supra* note 25, at 1844. He explains:

defenses, acceleration of payments, and the repossession of goods without prior hearings.⁵³ In other words, substantive unconscionability prevents the burdensome allocation of risk on the shoulders of one contracting party.⁵⁴

In general, for a contract to be considered substantively unconscionable, the terms of the contract must unreasonably favor the stronger party.⁵⁵ Section 2-302 implies that substantive unconscionability should be evaluated as of the time the contract was executed,⁵⁶ and against the general commercial background of the specific case at hand.⁵⁷ Subsequently, if the contract is so one-sided as to affront the “mores and business practices of the time and place,”⁵⁸ then courts generally find the contract to be substantively unconscionable.

On the other hand, procedural unconscionability examines how each term became part of the contract and the actual process of bargaining.⁵⁹ Pro-

Neither process problems nor enforcement problems are sufficient in all cases to find unconscionability when price is high. If the contract price is high compared to the reference price the court selects, there is evidence of overreaching, and if market mechanisms are unlikely to rectify the situation, the courts are likely to intervene. Absent any one of these factors, the opposite result appears likely.

Id. DiMatteo and Rich explain unfair price contracts are often referred to as “per se unconscionab[le]” because the imbalance in consideration is so severe as to be considered unconscionable on its face. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1091 (2006) (quoting M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 789 (1969)). The authors further explain that many state legislatures also use the principles of unconscionability to stop unfair price gouging in contracts and sales. *Id.* at 1091 & n.138. Specifically, eighteen states, including New York and Florida, have anti-price-gouging statutes with sixteen triggered by a declaration of a state of emergency or natural disaster. *Id.* Under FLA. STAT. § 501.160 (2005), it is illegal to charge unconscionable prices for goods or services following a declared state of emergency. *Id.* New York’s price gouging statute is also similar. *Id.* For example, in an intriguing recent court battle, claiming defense against an unfair price under the doctrine of substantive unconscionability may have been a better route for Britney Spears after she objected to the unfair terms in her perfume distribution and royalties contract. Stephanie Rabiner, *Britney Spears Sued for \$10 Million over Perfume Deal*, FINDLAW BLOG (Apr. 1, 2011, 5:50 AM), http://blogs.findlaw.com/celebrity_justice/2011/04/britney-spears-sued-for-10-million-over-perfume-deal.html?DCMP=NWL-cons_blg-celebrity. As part of the deal to sell her own line of perfume, Spears agreed to let Elizabeth Arden market her line of fragrances, and also agreed to pay Brand Sense Partners 35% of all royalties for brokering the deal. *Id.* After a while, Spears decided 35% was too high and had all the royalties rerouted to her bank account. *Id.* Brand Sense Partners is now suing Spears for \$10 million. *Id.*

53. DEUTCH, *supra* note 30, at 121.

54. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982).

55. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

56. U.C.C. § 2-302(1) (2011).

57. *Id.* § 2-302 cmt. 1.

58. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

59. Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 472 (1995). Institutional economics also provides some insight into the notion of bargaining power. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF

cedural unconscionability is often referred to as “bargaining naughtiness.”⁶⁰ Procedural unconscionability can result from any of the following elements: (1) absence of meaningful choice;⁶¹ (2) superiority of bargaining power;⁶² (3) the fact that the contract is an adhesion contract;⁶³ (4) unfair surprise;⁶⁴ or (5) sharp practices and deception.⁶⁵ Additionally, in *Johnson v.*

CAPITALISM 54 (1924). Commons creates a taxonomy of three types of bargaining power: political, economic, and personal. *Id.* at 51-52, 54, 56. Political power, held uniquely by the sovereign, is the right to compel by force. *Id.* at 51-52. Economic power, the province of private property, is the right to withhold property from others. *Id.* at 54. Personal power is derived from the customary expectations generated by role-playing. *Id.* at 56. He suggests that the doctrine of unconscionability is particularly concerned with the abuse of personal power. *Id.* at 58.

60. Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 297 (2000) (quoting Leff, *supra* note 49, at 487).

61. *Williams*, 350 F.2d at 449. In *Williams*, the court explained that procedural unconscionability “generally [is] recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Id.*; see also *Telecom Int’l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 194 (2d Cir. 2001); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). A lack of meaningful choice has also been used to regulate the terms contained in standard form or adhesion contracts. Such contracts may indicate a lack of meaningful agreement. W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 11 (1974). For a detailed discussion of the problems associated with standard form agreements and unconscionability, see *Id.*

62. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121-22 (Ct. App. 1982). The California Supreme Court opined that an inequality of bargaining power constitutes “oppressive unconscionability.” *Id.* The opinion states: “Inequality of bargaining power . . . results in no real negotiation and ‘an absence of meaningful choice.’” *Id.* at 122 (quoting *Williams*, 350 F.2d at 449); see also *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964).

63. See, e.g., *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 783 (Ct. App. 1976). In *Wheeler*, the court found that an admission form requiring a patient to arbitrate claims with the hospital was an adhesion contract and was unconscionable. *Id.* at 793. The court stated: “Enforceability depends upon whether the terms of which the adherent was unaware are beyond the reasonable expectations of an ordinary person or are oppressive or unconscionable.” *Id.* at 783.

64. Surprise occurs most frequently when sellers hide supposedly agreed-upon contract terms from the consumer. See *A & M Produce*, 186 Cal. Rptr. at 122. “[F]or instance, unfair surprise can arise from the use of fine print (illegible wording) or from incomprehensible wording (legal terminology) . . .” DEUTCH, *supra* note 30, at 121. Unfair surprise can also result “because the limited warranty was delivered to the customer only after the transaction had already been concluded.” *Id.*; see also Leff, *supra* note 49, at 499-500. Leff explains unfair surprise arises when there is the presence of misleading bargaining conduct. *Id.* A court looking for unfair surprise then considers such factors as “hidden provisions, unintelligible language, and surreptitious attempts to contract out key provisions.” Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 745 (2003).

65. 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 18:10 (Richard A. Lord ed., 4th ed. 2010).

Mobil Oil Corp., the court provided a typical listing of factors to consider when evaluating procedural unconscionability.⁶⁶ Falling under the procedural prong of unconscionability are factors bearing upon the “‘real and voluntary meeting of the minds’ of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, [and] whether alterations in the printed terms were possible.”⁶⁷

Unequal bargaining power is not merely a form of procedural unconscionability, but one of the most common forms of unconscionability employed by the courts.⁶⁸ Courts sometimes find unequal bargaining power on the basis of evidence that the seller is a large company and the buyer is a small company or individual.⁶⁹ Additionally, unequal bargaining can be the result of a “situation-specific monopoly.”⁷⁰ Situation-specific monopolies occur when a seller publicizes a product’s price and encourages a potential buyer to make an investment in time or money in preparing to purchase the product.⁷¹ “Then, after the buyer’s investment . . . has been made, the seller presents a set of adhesive form terms that the buyer must sign or [else] forfeit his initial investment.”⁷² In these ways, courts have the means to find contractual provisions procedurally unconscionable due to unequal bargaining power.

66. 415 F. Supp. 264, 268 (E.D. Mich. 1976).

67. *Id.* (quoting *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971)). Furthermore, the court in *Nasco, Inc. v. Public Storage, Inc.* affirmed these considerations of unconscionability. No. 92-12731-RCL, 1995 WL 337072, *4 (D. Mass. May 20, 1995). The decision also explains courts may take into account whether the party claiming unconscionability was represented by counsel and whether the questionable clause was obscure or buried in fine print. *Id.*

68. See Korobkin, *supra* note 3, at 1279.

69. See, e.g., *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998) (quoting *Art’s Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co.*, 413 S.E.2d 670, 675 (W. Va. 1991) (footnote omitted)) (stating “[t]he relative positions of the parties, a national corporate lender on one side and elderly, unsophisticated consumers on the other, were ‘grossly unequal’”). However, some courts have held that size of contracting parties is not a relevant factor in determining unconscionability. See, e.g., *Mayflower Transit, Inc. v. Ann Arbor Warehouse Co.*, 892 F. Supp. 1134, 1140 (S.D. Ind. 1995).

70. Korobkin, *supra* note 3, at 1264; see, e.g., *Shell Oil Co. v. Marinello*, 307 A.2d 598, 601 (N.J. 1973). In this case, a service station dealer who invested in building his business and clientele had little choice but to agree to Shell’s terms when it was time to renew his lease with the oil company. *Id.*; see also *Sun Trust Bank v. Sun Int’l Hotels Ltd.*, 184 F. Supp. 2d 1246, 1259-62 (S.D. Fla. 2001); *Powertel, Inc v. Bexley*, 743 So. 2d 570, 574-76 (Fla. Dist. Ct. App. 1999).

71. See Korobkin, *supra* note 3, at 1264.

72. *Id.*

D. Problems with U.C.C. § 2-302

Controversial since its inception,⁷³ much of the debate surrounding the doctrine of unconscionability in contract law results from a lack of clear meaning of the term.⁷⁴ That is, the Code never provides an exact definition of “unconscionability.”⁷⁵ Section 2-302 allows the courts the option of not enforcing a clause or a contract or to limit its application when they find as a matter of law that a contract or clause is unconscionable.⁷⁶ However, the Code’s clarification of what deems a contract “unconscionable” is circular and vague.⁷⁷ Section 2-302’s Official Comments provide no more guidance for courts.⁷⁸

73. In fact, considerable controversy arose concerning § 2-302 even before the publication of the first official text in 1952. See H.L. Douglass, *A Discussion on SALES as Proposed in the Uniform Commercial Code*, 21 JOURNAL 808, 810 (1950); Alfred T. Goodwin, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Sales in Oregon*, 30 OR. L. REV. 139, 213-15 (1951). Goodwin opposed the doctrine of unconscionability due to its lack of workable procedures for enforcing the doctrine. Goodwin, *supra*, at 213-15.

74. See, e.g., J. Francis Ireton, *The Commercial Code*, 22 MISS. L.J. 273, 280 (1951). Ireton argued unconscionability suffered from a lack of a clear definition. *Id.*

75. This lack of a clear definition caused many to believe that unconscionability would be completely ineffectual. See Leff, *supra* note 49, at 558-59.

76. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 369 (1960).

77. Some legal scholars have attempted to defend the lack of definition for unconscionability in the Code. See, e.g., Ellinghaus, *supra* note 52, at 759. Professor Ellinghaus suggests the doctrine of unconscionability is not a rule, but a standard. *Id.* Naturally, standards create definitional problems associated with their application and use. *Id.* He compares the lack of a strict definition to the discussion of the standard of good faith in the law. *Id.* at 800. Standards, such as unconscionability, provide a continuum that gives the courts the needed flexibility to apply the law to a diverse set of cases. *Id.* at 759-60. Without this flexibility, courts could not adequately employ the doctrine of unconscionability. See Timothy Endicott, *Law Is Necessarily Vague*, 7 LEGAL THEORY 379, 380-85 (2001) (arguing vague laws are an important part of every legal system); H.L.A. HART, *THE CONCEPT OF LAW* 272-76 (2d ed. 1994) (responding to the problem of vagueness in laws by claiming that the law gives judges discretion to decide issues that the law does not determine). Thus, we would deem unconscionability cases as an area of the law allowing discretion of the courts to clarify the vagueness of the law.

78. U.C.C. § 2-302 cmt. 1 (2011). Although the comments to the U.C.C. are “official,” often state legislatures do not enact them when adopting the Code. The Code’s drafters provided comments “to promote uniformity” and “to safeguard against misconstruction.” U.C.C. Article 1: Official Comments, http://www.law.cornell.edu/ucc/1/general_comment.bak, (last visited May 31, 2013). However, at least in the area of unconscionability, this uniformity has not been achieved. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.9, at 34-35 (3d ed. 1999). Many in the legal community think the distinction between “rules” and “standards” undermines the law. See Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 206-07 (1998) (citing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 3-5 (1987)). Professor Kelman explains “the law is replete with a host of ‘fundamental contradictions.’ For example, in one context the law will hold that

Much of the controversy and disagreement regarding the doctrine of unconscionability stems from an underlying disagreement about two concepts of liberty.⁷⁹ One concept of liberty, often termed “positive freedom,” aims to allow people “to do what they would do if they knew enough, or were always at their best, instead of yielding to irrational motives.”⁸⁰ The second concept of liberty, often called “[n]egative freedom,” attempts to preserve a sphere of individual autonomy within which an individual can make his own decisions without assistance.⁸¹ Classical contract theory is based on a concept of individual liberty that is consistent with the concept of negative freedom, whereas the doctrine of unconscionability is more consistent with positive freedom.⁸²

E. Remedies for Unconscionability

In terms of what happens after a court rules a contract is unconscionable, the unconscionability doctrine “operates as a shield and not as a sword.”⁸³ In other words, parties can protect themselves against enforcement of an unconscionable provision in a contract, but cannot obtain damages for having been subject to an unconscionable offer.⁸⁴ Furthermore, a party cannot seek restitution for compliance with an unconscionable contract.⁸⁵

Although the doctrine of unconscionability has established a better defense against unfair contracts than the pre-Code doctrines, the lack of clear guidelines for applying the actual doctrine prevents its widespread use and acceptance.⁸⁶ We now look to the courts for developing guidelines to create fair contracts and invoke the doctrine of unconscionability and positive freedom. The doctrine of unconscionability allows courts to either deny enforceability of such contracts or to modify the terms of a contract to alleviate unconscionable portions.⁸⁷

‘rules’ are to be preferred to ‘standards’; yet, in other contexts one finds an equally potent set of precedents that holds that standards are to be preferred to rules.” *Id.* (emphasis added) (footnote omitted).

79. See Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1514-15 & n.9 (2003).

80. *Id.* at 1514-15 (quoting THE OXFORD COMPANION TO PHILOSOPHY 486 (Ted Honderich ed., 1995)).

81. *Id.* at 1515.

82. *Id.* at 1519-22.

83. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 229 (2000).

84. *Id.*

85. *Id.*

86. See DEUTCH, *supra* note 30, at 77.

87. This distinction is similar to the distinction between protection of entitlements by a property rule and a liability rule. See Guido Calabresi & A. Douglas Melamed, *Property*

II. QUESTIONABLE ASSUMPTIONS OF CONTRACT THEORY

A. Addressing Those Opposed to Unconscionability

The most prominent opposition against unconscionability revolves around the idea that classical contract theory is desirable because of a contract's reliance on market transactions.⁸⁸ A fundamental tenant of contract law is that parties can contract on whatever terms they choose because the market depends on such transactions.⁸⁹ But opponents of unconscionability must be reminded that freedom of contract in the United States is not unlimited. Courts have historically employed a number of traditional theories—such as duress, fraud, and lack of capacity—to police contracting parties and to alleviate the harshness of the “buyer beware” attitude of the law.⁹⁰ In employing these theories, we see courts acknowledging the need to protect the vulnerable by avoiding free market liberalism.

Some opponents of unconscionability also argue the doctrine is a form of paternalism.⁹¹ But consider the following manner in which unconscionability cases arise: the party who invokes the unconscionability doctrine actively opposes the enforcement of the contract. Therefore, how could rescis-

Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1092 (1972). Furthermore, Richard Craswell has applied this distinction to the entitlements established by the doctrine of unconscionability. See Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 44-63 (1993).

88. See, e.g., Harry R. Levy, *A Study of the Uniform Commercial Code—Sales*, 58 COM. L.J. 329, 331 (1953). Levy describes § 2-302 and the doctrine of unconscionability as troublesome because of the possible conflict between the court's sense of conscience and freedom of contract. *Id.*

89. See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315 (1975). Epstein explains that public policy requires men of full age and competent understanding to have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and enforced by the courts. *Id.* (citing *Printing & Numerical Registering Co. v. Sampson*, (1875) 19 L.R.Eq. 462 at 465).

90. Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 941 (1986).

91. See, e.g., David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 535-37 (1988) (characterizing unconscionability as a paternalist doctrine and further noting judicial reluctance to employ it effectively); Paul Burrows, *Analyzing Legal Paternalism*, 15 INT'L REV. L. & ECON. 489, 501 (1995); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 695 (1990); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 296-97 (1995) (stating there is a “widespread feeling among contract law scholars that paternalistic attitudes account for some judges' use of the unconscionability doctrine” and defending the unconscionability doctrine as promoting the welfare system's goals).

sion be paternalistic since that is what the party wills?⁹² Unlike many of the commonly cited examples of paternalism, such as drug prohibitions or seat-belt laws, the protected party does not resist or oppose the result or the procedure and therefore unconscionability is not a form of paternalism.⁹³ In unconscionability cases, the relevant agent actively endorses the supposedly paternalistic conduct.⁹⁴

Further, it is important to note that many areas of law aim to provide paternalistic protection for buyers or weaker parties. For example, “[p]roducts liability law determines a seller’s responsibility for physical injury caused by its products.”⁹⁵ Landlord–tenant law defines the landlord’s liability for unsafe or inadequate housing and limits the landlord’s powers “vis-à-vis tenants who damage the premises or are delinquent in paying the rent.”⁹⁶ Additionally, “[d]ebtor-creditor law limits the analogous powers exercised by creditors outside the rental housing market” and protects debtors from gross inequalities of bargaining power.⁹⁷

The doctrine of unconscionability, like the theories of duress, fraud, or products liability law, does not erase a party’s ability to contract freely. Rather, the unconscionability doctrine ensures that parties can actually contract freely and fairly. At least since John Stuart Mill, social theorists have acknowledged that some forms of paternalism can be reconciled with the principles of freedom of choice and contract.⁹⁸ That is, some types of government interference with an individual’s free choices protect the individual’s well-being without being detrimental to individual liberty.⁹⁹ One such

92. See Shiffrin, *supra* note 83, at 229.

93. *Id.*

94. *Id.*

95. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer–Seller Relationships*, 43 STAN. L. REV. 361, 361 (1991).

96. *Id.*

97. *Id.*

98. See generally DONALD VANDEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE (1986); Gerald Dworkin, *Paternalism*, 56 MONIST 64, 64–84 (1972). Dworkin’s argument is focused on the compatibility of paternalism and liberty. Dworkin, *supra*. He treats it as altogether obvious that if your head is screwed on straight, liberty and paternalism are compatible when not being paternalistic would be harmful to yourself. *Id.* Then the article argues that there are also grounds (warrants) for paternalism to make a person happier, more wise or more right. *Id.*; see also Christine Pierce, *Hart on Paternalism* 35 ANALYSIS 205, 205–07 (1975) (explaining how Hart uses a version of Mill’s harm principle to argue against those readings of Mill that are totally anti-paternalistic).

99. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY bk. V, at 966–67 (W.J. Ashley ed., 1909) (1848). For example, Mill suggests maximum hour regulations are such an example. *Id.* at 963. These measures are “required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law.” *Id.*

type of government interference that is not detrimental to individual liberty is the doctrine of unconscionability.

Additionally, opponents of unconscionability suggest that in finding contracts unfair, courts essentially alter the overall meaning of specific contracts.¹⁰⁰ However, it is important to note that of the remedial options generally considered appropriate by courts, reformation of the single offending term in a contract is the least disruptive method of correction.¹⁰¹ In other words, “[a] court seeking to reform an unconscionable term effectively rewrites that term, but the contractual relationship between the buyer and seller otherwise proceeds as the contract provides.”¹⁰² Therefore, the amending of unconscionable contracts is not overbearing, but often narrowly tailored to specific unfair provisions.

The biggest problem with the opposition to the doctrine of unconscionability is that the argument rests on many of the assumptions of classical contract theory discussed in the introduction of this Article. That is, contract theory assumes: (1) people are rational actors; and (2) have access to perfect information.¹⁰³

B. Contracting Parties Are Rational Actors?

The basic ideology of the market economy presumes that contracts are made by rational and informed parties.¹⁰⁴ Only if this prerequisite of our thought processes is fulfilled may one argue that the provisions of our current system of contract law will lead to balanced contracts and therefore the doctrine of unconscionability is unnecessary.¹⁰⁵ As the Nobel prize-winning psychologist Daniel Kahneman explains, there are two types of thought processes affecting our ability to be rational: “System 1” and “System 2.”¹⁰⁶

100. Brown, *supra* note 60, at 288 (citing 2 HAWKLAND UCC SERIES § 2-302:1 (1997-1999)).

101. See Korobkin, *supra* note 3, at 1286.

102. *Id.*

103. See *infra* Sections II.B-C.

104. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1053, 1053 (2000).

105. Granted, there are some contracts that will not be enforced no matter how voluntary, rational, and informed the parties' choices may have been. For example, a contract to become another's slave is unenforceable. So is a contract to sell one's babies. Often these absolute prohibitions are difficult to reconcile with a general principle of freedom of contract. See, e.g., Randy E. Barnett, *Contract Remedies and Inalienable Rights*, SOC. PHIL. & POL'Y, Sept. 1986, at 179; Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970 (1985); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850-51 (1987).

106. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697, 698 (2003). Similarly, other scholars have used

System 1 processes create actions that are automatic, associative, implicit (not available to introspection), emotionally charged, governed by habit, and difficult to control or modify.¹⁰⁷ Conversely, System 2 processes are slow, effortful, rule governed, relatively flexible, and more likely to be consciously monitored and deliberately controlled.¹⁰⁸ As rational adults, we might assume our judgments result from System 2 processes. However, a plethora of knowledge and recent publications by influential legal scholars suggest we should alter our current system of legal analysis in lieu of findings about human irrationality from the fields of biology¹⁰⁹ and cognitive psychology.¹¹⁰

1. *Child or Adult?*

Classical contract theory equates being a rational contracting party with being a rational adult.¹¹¹ In other words, adults are ipso facto assumed to be rational because of their age and experience. Most areas of law, economics, and government provide special safety and regulations for any transactions involving children because they lack age and experience.¹¹² That is, children are considered a protected class and not expected to be rational parties.¹¹³ For example, we do not permit children to sign contracts

terms like “experiential” and “rational” in place of System 1 and System 2. *See, e.g.*, Paul Slovic et al., *Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioral Economics*, 31 J. SOCIO-ECON. 329, 330 (2002) (citing Seymour Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 710 (1994)).

107. *See* Kahneman, *supra* note 106, at 698.

108. *Id.*

109. *See, e.g.*, Margaret Gruter, *Law in Sociobiological Perspective*, 5 FLA. ST. U. L. REV. 181 (1977); E. Donald Elliott, *Law and Biology: The New Synthesis?*, 41 ST. LOUIS U. L.J. 595 (1997); Richard A. Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980); Bailey Kuklin, *Evolution, Politics and Law*, 38 VAL. U. L. REV. 1129 (2004); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

110. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Korobkin & Ulen, *supra* note 104; Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

111. *See* Korobkin & Ulen, *supra* note 104, at 1053.

112. “Children” is sometimes used, but it is more common to find the terms “infancy” or “minority” used to describe people under twenty-one or eighteen. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 488-94 (1973); *see also* Victoria Slade, *The Infancy Defense in the Modern Contract Age: A Useful Vestige*, 34 SEATTLE U. L. REV. 613, 616-19 (2011).

113. Slade, *supra* note 112, at 619-20. Slade explains: “Many areas of law recognize that minors do not have the same capacity for decision making as adults. For instance, in

because they lack the capacity to engage in bargaining, and the contract is skewed in favor of the more powerful agent.¹¹⁴ In tort law, the attractive nuisance doctrine protects children from hazardous land through the child-proofing of property.¹¹⁵ Furthermore, the government places age restrictions on the purchasing of alcohol, cigarettes, and pornography.¹¹⁶ The assumption behind all of these regulations is that children are among the most vulnerable and irrational in society, thus requiring our protection.¹¹⁷

While the law generally creates age thresholds for when a child becomes an adult, psychological and behavioral research suggests that perhaps the distinction between child and adult is not so clear because adults are not as rational as they might believe.¹¹⁸ In other words, just because someone can legally be deemed an adult does not mean that person automatically possesses the level of rationality required to be a contracting party.¹¹⁹ For instance, one factor suggesting many adults are closer to children than once supposed is the fact that many adults lack emotional control.¹²⁰ To have a complete picture of human rationality, we have to unravel the role emotions play.¹²¹ We expect children to act out rashly when they do not get what they desire and to have outbursts of rage or sadness in public places. Conversely, adults have disciplined themselves not to act on these emotions.¹²² Yet increasing instances of road rage behaviors such as tailgating, obscene ges-

criminal law, a minor's consent to sexual contact does not absolve that minor's sexual partner. . . . In tort law, the reasonable person standard is altered for children." *Id.*

114. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212-13 (1995). Eisenberg explains: "Lack of capacity exists when a party is not competent to understand the nature and consequences of his acts. . . . [H]e cannot make adequate judgments concerning his utility." *Id.* at 212.

115. See *Peters v. Bowman*, 47 P. 113, 114 (Cal. 1896).

116. For example, states impose a smoking age for tobacco products. Some advocate for raising the smoking age in states to twenty-one, as is the case with alcohol. See Sajjad Ahmad & John Billimek, *Limiting Youth Access to Tobacco: Comparing the Long-Term Health Impacts of Increasing Cigarette Excise Taxes and Raising the Legal Smoking Age to 21 in the United States*, 80 HEALTH POL'Y 378, 378 (2007).

117. See Tamar Schapiro, *What Is a Child?*, 109 ETHICS 715, 715-16 (1999). Schapiro explains that society places special regulations on children to protect, nurture, and educate them, regardless of whether they want such protections. *Id.* at 716. The author argues that perhaps we should extend some of those protections to adults as well, as they may not be as drastically different from children as we presume. *Id.*

118. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

119. *Id.*

120. See David Kennedy, *Reconstructing Childhood*, 14 THINKING: J. PHIL. CHILD. 29 (1998).

121. The number of researchers exploring the roles of emotions in decision processes has increased in recent years. See, e.g., ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994); George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES 619, 619 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith eds., 2002).

122. Loewenstein & Lerner, *supra* note 121, at 619.

tures, and cutting off other drivers indicate that even some adults cannot control their emotions in all situations.¹²³ Another example of adults inappropriately acting on emotions includes violent acts of aggression in sporting-event fights and bar brawls.¹²⁴ Although one indicator of an adult psyche is the ability to repress emotional outbursts, we see that in some situations the rationality of adults breaks down and emotions guide behavior in a child-like fashion.

Another distinction society draws between a child and an adult revolves around happiness. That is, children do not know what is good for them or what will make them happy, but adults do. However, interdisciplinary evidence suggests that even adults do not understand how to achieve the happiness they desire. For instance, economic and marketing data suggest “that as national income grows, people do not spend their extra money in ways that yield significant and lasting increases in measured satisfaction.”¹²⁵ That is, the subjective well-being of society will be higher with a greater balance of inconspicuous consumption, such as time with family and friends, less traffic congestion, more vacation time, and favorable job characteristics.¹²⁶ Yet, the spending pattern of consumers does not create these situations that would lead to greater happiness.¹²⁷ Rather, many adults believe money can buy happiness and thus engage in conspicuous consumption, which can negatively affect a person’s overall happiness.¹²⁸

123. See Bruce S. Sharkin, *Road Rage: Risk Factors, Assessment, and Intervention Strategies*, 82 J. COUNSELING & DEV. 191 (2004). Sharkin discusses The American Automobile Association Foundation for Traffic Safety’s report citing that aggressive incidents of drivers behind the wheel increased roughly 50% between the years of 1990 to 1996. *Id.* at 191. This lack of emotional control on the part of adults suggests that certain situations alter one’s ability to behave normally or rationally. *Id.* at 191-98.

124. See, e.g., Kit R. Roane, *2 Jets and Ex-Teammate Are Arrested*, N.Y. TIMES (July 11, 1999), <http://www.nytimes.com/1999/07/11/nyregion/2-jets-and-ex-teammate-are-arrested.html>; Howard Bath, *Wiring Pathways to Replace Aggression*, 14 RECLAIMING CHILD. & YOUTH 249, 250 (2006). Bath, a psychologist, explains there are two types of human aggression: (1) reactive, characterized by strong and immediate emotions; and (2) proactive, characterized by planning and intent. Bath, *supra*, at 250. Whereas with proactive aggression, “the person’s behaviours are more goal directed and suggest more thinking brain processing,” people experiencing reactive aggression cannot relate to logic or reason until a person’s thinking brain “resumes control.” *Id.*

125. See ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 72, 77 (1999) (summarizing scientific evidence suggesting that the correlation between income and happiness is extremely weak).

126. *Id.* at 90.

127. *Id.* at 78.

128. *Id.* at 77; see also Richard A. Easterlin, *Does Economic Growth Improve the Human Lot? Some Empirical Evidence*, in *NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH: ESSAYS IN HONOR OF MOSES ABRAMOVITZ* 89, 118 (Paul A. David & Melvin W. Reder eds., 1974) (demonstrating that higher income in the United States is not systematically accompanied by greater happiness and concluding that economic growth does not improve the human condition); Richard A. Easterlin, *Does Money Buy Happiness?*, 30 PUB. INT. 3, 4

Much of an adult's inability to procure happiness is a result of poor forecasting about the future. Unfortunately, research indicates people are generally poor predictors of their future states.¹²⁹ This poor predicting ability about their future happiness leads to a dissonance between what is anticipated and what is experienced.¹³⁰ The high divorce rates of adults are just one example of evidence suggesting we cannot so easily attain the happiness we desire.¹³¹ The implication of the evidence is that although adults, unlike children, are supposed to know the means to their ends of happiness, even adults may not actually behave in a manner conducive to achieving those goals.

2. Consumer Behavior

Another dimension in which adults may not act completely rationally concerns consumer behavior patterns.¹³² There is a large body of research indicating the irrationality of consumers in purchasing goods and services.¹³³ For instance, does food taste better when served on fine china rather than paper plates? Rationally speaking, what the food is served on should not affect the actual taste or quality of the food.¹³⁴ Unfortunately, packaging still does affect a person's perception of the food's taste.¹³⁵ Research also suggests that the color of a food is empirically effective in influencing perceptions of flavor intensity, despite the fact it should not rationally affect flavor.¹³⁶ Color is manipulated by firms to signal freshness and taste, and a

(1973); Otis Dudley Duncan, *Does Money Buy Satisfaction?*, 2 SOC. INDICATORS RES. 267, 267-68 (1975) (studying the influence of income on happiness in Detroit, Michigan). Specifically, although the real median household income in the Detroit area increased by 40% between 1955 and 1971, there was no change in the satisfaction with the standard of living among wives. Duncan, *supra*, at 268.

129. See, e.g., Vanessa M. Patrick, Deborah J. MacInnis & C. Whan Park, *Not as Happy as I Thought I'd Be? Affective Misforecasting and Product Evaluations*, 33 J. CONSUMER RES. 479, 479 (2007).

130. *Id.*

131. *Id.* at 480 ("Marriage, for instance, involves making a forecast of how happy one is likely to feel about one's spouse 'till death do you part.'").

132. See Aradhna Krishna & Maureen Morrin, *Does Touch Affect Taste? The Perceptual Transfer of Product Container Haptic Cues*, 34 J. CONSUMER RES. 807, 807 (2008).

133. *Id.* (analyzing the ways in which buyers often equate the packaging or delivery of a product with judgments about the products themselves).

134. *Id.*

135. *Id.*

136. JoAndrea Hoegg & Joseph W. Alba, *Taste Perception: More than Meets the Tongue*, 33 J. CONSUMER RES. 490, 490 (2007). Specifically, Hoegg and Alba found the tint of orange juice had a huge effect on the taster's perceptions of taste demonstrating that color dominates taste. *Id.* at 491. In the experiment, the subjects were given two cups of the same Tropicana orange juice, with one cup darkened with food coloring. *Id.* at 492. The members of the researcher's sample group perceived differences in taste that in actuality did not exist;

consumer's perceptions of quality are influenced by this color manipulation rather than actual indicators of quality.¹³⁷ These studies indicate that although consumers are expected to be rational actors, a body of evidence suggests their behavior indicates otherwise.

3. *Superstition*

Furthermore, the high frequency of superstitious beliefs in society is also evidence of irrational consumer behavior.¹³⁸ For example, market decisions are governed by everything from lucky numbers to feng shui.¹³⁹ Similarly, nearly a billion dollars is lost in the U.S. business world on each Friday the thirteenth due to superstition.¹⁴⁰ A perfectly informed actor would not spend his money on products offering to do things they cannot possibly do, like increase luck or cast positive energy based on the arrangement of a room. This evidence furthers the idea that we should not unquestioningly assume adults are rational actors.

4. *Cognitive Biases*

In addition to a lack of emotional control, behavioral research suggests an adult's capacity to reason is also subject to many of the predictable cognitive biases¹⁴¹ that children engage in.¹⁴² For instance, instead of reasoning logically, adults have the tendency to commit confirmation bias, or believe evidence as confirming their own previously established views.¹⁴³ The pri-

however, when the subjects were given two cups of orange juice that were the same color but with one cup sweetened with sugar, the same people failed to perceive taste differences. *Id.* at 493. A rational consumer would undoubtedly notice a change in taste and not be affected by color, but Hoegg and Alba's research suggests that consumers do not always behave rationally. *Id.*

137. *Id.*

138. See Thomas Kramer & Lauren Block, *Conscious and Nonconscious Components of Superstitious Beliefs in Judgment and Decision Making*, 34 J. CONSUMER RES. 783, 783 (2008).

139. *Id.*

140. *Id.*

141. For a business law perspective of cognitive biases, see Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992).

142. See Tamara R. Piety, "Merchants of Discontent": *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 402-03 (2001).

143. *Id.* at 402; see also Carole Hill, Amina Memon & Peter McGeorge, *The Role of Confirmation Bias in Suspect Interviews: A Systematic Evaluation*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 357, 358 (2008) (examining the extent to which police officers presume suspects to be guilty prior to interviewing them). When police officers engage in confirmation bias, they may conduct their interviews by seeking information that confirms

macy and recency biases also cause people to place a greater importance on events that happen at the beginning or end of a sequence.¹⁴⁴ Furthermore, the marketing of products to adults relies heavily on availability and representativeness biases.¹⁴⁵ In other words, even adults (1) have the tendency to calculate probabilities on the basis of the most available information; and (2) often rely on the most vivid facts and attribute a greater weight to known occurrences than is representatively appropriate.¹⁴⁶ Another widespread cognitive bias adults regularly engage in is known as the denomination effect. Specifically, the denomination effect refers to the tendency to spend more money when it is denominated in small amounts (e.g. coins) rather than large amounts.¹⁴⁷ These cognitive biases demonstrate only a small fraction of the biases in which humans engage during decision-making. The chart below illustrates more examples of adults engaging in irrational behavior due to cognitive biases.

the guilty hypothesis and avoid information disconfirming the alternative hypothesis. Hill, Memon & McGeorge, *supra*, at 358. This confirmation bias in interrogation may prove to be detrimental to the entirety of the legal system if suspects are in essence “guilty until proven innocent.” See also Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998). Nickerson describes the confirmation bias of adults as “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.” *Id.*

144. See Dirk D. Steiner & Jeffrey S. Rain, *Immediate and Delayed Primacy and Recency Effects in Performance Evaluation*, 74 J. APPLIED PSYCHOL. 136 (1989). In their study, 333 undergraduate students viewed four videotaped lectures in one session. *Id.* at 136. “Overall performance ratings showed a recency effect when good performance occurred last.” *Id.*

145. See Piety, *supra* note 142, at 403. This bias infiltrates commercials through the concept of “brand identification.” *Id.*

146. *Id.*

147. See Chana Joffe-Walt, *Why We Spend Coins Faster than Bills*, NPR (May 12, 2009, 3:20 PM), <http://www.npr.org/templates/story/story.php?storyId=104063298>. Joffe-Walt summarizes the recent studies conducted by economists Priya Raghurir and Joydeep Srivastava, who did a series of experiments in the United States and China regarding the denomination effect. *Id.* Results confirmed the denomination bias hypothesis, and “showed people were much more willing to spend the same sum of money if they had smaller denominations instead of one large bill.” *Id.*; see also Alex Mindlin, *A Reluctance to Break the Large Bills*, N.Y. TIMES (Mar. 29, 2009), http://www.nytimes.com/2009/03/30/business/30drill.html?_r=0. Mindlin’s article also discusses Srivastava’s paper, which is soon to be published in *The Journal of Consumer Research* and investigates the denomination effect. Mindlin, *supra*.

In one study, college students who had been given four quarters were more likely to buy proffered candy—and bought more of it—than students given a single dollar bill. In another, 20 percent of Chinese women given a single 100-yuan note (\$14.66) chose not to spend the money on an array of shampoo, bedding and other household goods—but the rate of abstention was only 9.3 percent among women given the same amount of money in smaller notes.

Id.

Table 1: Irrational Behavior of Adults

Cognitive Bias	Irrational Behavior
Base-Rate Fallacy ¹⁴⁸	The tendency of people to be influenced more by salient, individual cases rather than by base rates drawn from larger samples. ¹⁴⁹
Contrast Effect ¹⁵⁰	The enhancement or diminishing effect of a judgment when compared with a recently observed contrasting object. ¹⁵¹
Endowment Effect ¹⁵²	The tendency of people to demand more to give up something that they own than they

148. See Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 237 (1973); Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative, and Methodological Challenges*, 19 BEHAV. & BRAIN SCI. 1, 1 (1996).

149. See Brian H. Bornstein, *The Impact of Different Types of Expert Scientific Testimony on Mock Jurors' Liability Verdicts*, 10 PSYCHOL. CRIME & L. 429, 442-43 (2004). Bornstein discusses how juries tend to give inappropriate weight to anecdotal evidence and ignore the most statistically significant data and examines how an expert's anecdotal testimony that is virtually worthless with respect to its probative value exerts a greater effect than the scientifically more probative experimental evidence. *Id.* at 442; see also Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659, 659 (1985). Belle and Loftus discuss why vivid information presented at trial may receive more weight than relatively pallid information. Bell & Loftus, *supra*, at 659. The reasons why juries give inappropriate weight to anecdotal evidence may be due to greater attention or memorability. *Id.* at 661-62.

150. See Albert Pepitone & Mark DiNubile, *Contrast Effects in Judgments of Crime Severity and the Punishment of Criminal Violators*, 33 J. PERSONALITY & SOC. PSYCHOL. 448, 457-58 (1976) (discussing the influence of the contrast effect on judgments about the severity of different crimes).

151. See Dennis M. O'Reilly et al., *The Effects of Immediate Context on Auditors' Judgments of Loan Quality*, 23 AUDITING 89, 89, 102 (2004) (examining "whether auditors, when making a series of similar, independent judgments [about loans] are non-normatively influenced by their earlier judgments," and finding that auditors "conclude very different outcomes, [are] subject to considerable bias [and contrast effect], and exhibit poor calibration given different immediate contexts").

152. See Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1935, 1939 (2008). Jones and Brosnan discuss "[r]ecent work at the intersection of law and behavioral biology [that suggests] numerous contexts in which legal thinking could benefit by integrating knowledge from behavioral biology." *Id.* at 1935. The authors define the endowment effect as a "phenomenon that appears to underlie some seemingly irrational pricing of property and to thereby impede efficient exchange." *Id.* at 1939. "Because the effect seems inconsistent with standard neoclassical, rational actor, [and] expected-utility theory economy," it is questionable whether we should ascribe to the law doctrines relying on these assumptions. *Id.*

	would be willing to pay for that same good if they did not own it. ¹⁵³
Loss Aversion	The tendency to prefer avoiding losses above acquiring gains. ¹⁵⁴
Optimism Bias ¹⁵⁵	The tendency of people to believe that their own probability of facing a bad outcome is lower than it actually is. ¹⁵⁶

153. See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 1006 (1998). Millon draws on recent economic research to advance the claim that the endowment effect alters the distribution of gains from trade in employment contracting. *Id.* at 1005-10; see also Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326-29 (1990). The authors discuss the endowment effect's impact on market efficiency. Kahneman, Knetsch & Thaler, *supra*, at 1325. Specifically, because owners of entitlements place a higher value on them than do prospective buyers, the endowment effect can lead to fewer trades of such entitlements than would occur if valuation were independent of ownership. *Id.* at 1326-28. As the gap between buyers' and sellers' valuations widens, the possibility of a mutually advantageous trade diminishes. *Id.* Supreme Court Justice Oliver Wendell Holmes put the principle this way:

It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.

O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

154. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199-203 (1991) (providing evidence supporting the endowment effect and status quo biases and discussing their relation to the bias of loss aversion). The discussion of "loss aversion" was first coined by Kahneman and Tversky in the 1980s. See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342 (1984). Furthermore, the bias of loss aversion is embodied in the old expression that "possession is nine-tenths of the law" and is subsequently reflected in many judicial opinions and areas of law. See David Cohen & Jack Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOOD HALL L.J. 737, 749-69 (1992). The authors explain, for example, in tort law, judges make the distinction between "loss by way of expenditure and failure to make gain." *Id.* at 753. A similar distinction is made in contract law; a party that breaches a contract is more likely to be held to the original terms if the action is taken to make an unforeseen gain than if it is taken to avoid a loss. *Id.* at 761.

155. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 199, 204 (2006). The authors "focus on scenarios in which optimism bias is thought to produce an overall underestimation by consumers of the risk associated with a given product" in consumer safety law. *Id.* at 208. They suggest possible ways to debias human behavior. *Id.* Specifically, "[i]n the consumer safety context, debiasing . . . would focus on putting at consumers' cognitive disposal the prospect of negative outcomes from use, or at least unsafe use, of a particular product." *Id.* at 212. For instance, the authors state: "[T]he law could require firms—on pain of administrative penalties or tort liability—to provide a truthful account of consequences that resulted from a particular harm-producing use of the product, rather than simply providing a generalized warning or statement that fails to harness availability." *Id.*

Outcome Effect	The tendency of a person who has knowledge of the eventual <i>outcome</i> of a decision to assess the quality of the judgment of that decision with the other decision in mind. ¹⁵⁷
Planning Fallacy	The tendency to underestimate task-completion times and to procrastinate. ¹⁵⁸
Status Quo Bias ¹⁵⁹	The tendency for people to desire things to stay relatively the same. ¹⁶⁰

Thus, when adults are acting in accordance with cognitive biases and childlike behavior, it is unclear whether they are the rational consumers contract theory expects them to be when engaging in market transactions. In combination, all of the evidence regarding child-like behavior of adults, superstition, consumer behavior patterns, and cognitive biases attacks assumptions of classical contract theory.¹⁶¹ Therefore, if we assume human beings may not be rational actors, the desire to protect vulnerable contract-

156. See Piety, *supra* note 142, at 403. Piety explains the tobacco industry relies heavily on the optimism bias to entice customers to purchase cigarettes. *Id.* If adults were not behaving irrationally and engaging in the optimistic bias, tobacco sales and cigarette-related deaths would undoubtedly plummet.

157. Peter M. Clarkson, Craig Emby & Vanessa W-S Watt, *Debiasing the Outcome Effect: The Role of Instructions in an Audit Litigation Setting*, AUDITING, Sept. 2002, at 7, 7. The authors examine the outcome effect when an evaluator has knowledge of the outcome of a judge's decision. *Id.* "If the evaluator has knowledge of a negative outcome, then that knowledge negatively influences [the] assessment of the *ex ante* judgment." *Id.* (emphasis added). The findings of their study suggest the "use of relatively nonintrusive instructions to evaluators [warning them of the outcome effect] may effectively counteract the potential for the outcome bias." *Id.* (emphasis added). However, in real life, humans do not always receive such instructions about the outcome effect, and thus engage in behavior not befitting a rational actor.

158. See Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 621 (2008). Wistrich argues statutes of limitation are deadlines. *Id.* at 609. He discusses how "psychologists have discovered a great deal about how people respond to deadlines during the past thirty years, [but] the basic structure of statutes of limitation has not changed since at least 1623." *Id.* at 607, 614. Wistrich concludes we need a more modern approach to the statute of limitations given our tendency to procrastinate and engage in the planning fallacy. *Id.* at 666-67.

159. See, e.g., Shane Frederick, *Automated Choice Heuristics*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 555 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

160. See Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 ETHICS 656-79 (2006). Bostrom and Ord focus on consequentialist ethical judgments and how a genuine status quo bias can be characterized as a cognitive error in these situations. *Id.* at 658-72. They examine instances where one option is incorrectly judged to be better than another because it represents the status quo. *Id.* at 658-62.

161. See *infra* Section II.B.

ing parties increases. Increasing the usage of the doctrine of unconscionability is one way in which the legal system can further shield susceptible parties from unfair contracts. Without genuine rationality, assent, bargaining power, and economic equality, freedom of contract merely becomes a recipe for exploitation and injustice.

C. Contracting Parties Make Decisions Based on Complete Information?

In addition to assuming contracting parties are rational actors, the rhetoric of classical contract theory also tends to leave out the neoclassical economic assumption that unrestricted economic activity produces efficient results only under conditions of perfect information.¹⁶² For argument's sake, even if all adults are rational actors, they still do not obtain sufficient information to make intelligent decisions in contracts. The expression of "contract failure" can be used to describe the absence of full understanding and information in contracts.¹⁶³

Contract failure due to a lack of complete information often occurs because buyers fail to read the terms in standard form contracts.¹⁶⁴ Furthermore, even if consumers do read a form contract, it is often inefficient for consumers to bear the "search and deliberation" costs necessary to understand the complex contractual legal language of the contract.¹⁶⁵ One explanation as to why contracting individuals do not read form contracts and thus fail to gain complete information is that buyers are boundedly rational.¹⁶⁶ That is, the rationality of individuals to attain information is affected by the

162. See David Bear, Comment, *Establishing A Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics*, 34 FLA. ST. U. L. REV. 491, 527 (2007).

163. Michael J. Trebilcock & Steven Elliott, *The Scope and Limit of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 45, 54 (Peter Benson ed., 2001). Trebilcock and Elliott explain that even if a contracting party has mental capacity, a contract could still not reflect the person's underlying preferences. *Id.* at 59-62. This failure to reflect a party's underlying preferences can be a result of coercion or information failure. *Id.* at 59. Specifically, information failure may be the result of misrepresentation by the other party or simply a lack of adequate information. *Id.* at 62.

164. See, e.g., John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 299 (2000) ("Courts know that parties sign or manifest assent to standard form contracts that they have not read, understood or negotiated."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (stating "[v]irtually every scholar who has written about contracts of adhesion" accepts the claim that "the adhering party is in practice unlikely to have read the standard terms"). Also, Rakoff explains that an additional factor to consider when evaluating whether form contracts are unconscionable is that many form contracts are offered on a take-it-or-leave-it basis where no negotiating occurs. Rakoff, *supra*, at 1225. This is because the buyer usually lacks access to an employee who has the authority to alter the terms of the contract. *Id.*

165. See Eisenberg, *supra* note 114, at 243-44.

166. See Korobkin, *supra* note 3, at 1218.

cognitive limitations of their minds, such as the biases discussed previously in this Article¹⁶⁷ and the finite amount of time they have to make decisions.¹⁶⁸ Therefore, it is unreasonable to expect consumers to be able to read and comprehend the information provided in complex contracts.

The relational context of contracts also can create an absence of complete information for contracting parties.¹⁶⁹ In other words, modern commerce is interdependent—multiple parties are all working together to buy and sell products and services. The result of this interdependence is that each party engages in specialization and relies on the information of other parties with whom they conduct business.¹⁷⁰ In reference to the interdependence among contracting parties, John R. Commons, a founding father of Institutionalism, states, “As this interdependence enlarges with commerce, the ignorance of each individual enlarges, and each depends more and more on confidence in the honesty, diligence, promptness and good management of others.”¹⁷¹ That is, parties become more ignorant about the information required for informed transactions because they can place confidence in other contracting parties.¹⁷² Thus, before specialization and interdependence in market transactions, parties were better informed on the individual level.¹⁷³

Advertising also makes it difficult for consumers to receive perfect information because by their nature, marketing and commercials are designed to shield consumers from some information about a product.¹⁷⁴ In most situations, the sellers have more knowledge than the buyer because they have the expertise about a particular product and understand the costs and benefits of the product. The sellers have much more information than the consumers; therefore, an exchange of information diminishes with advertising.¹⁷⁵

Furthermore, the prevalence of advertising affects a person’s ability to make decisions with relevant and full information. In terms of television advertising, the estimation that the average television stays turned on almost

167. See *supra* Section II.B.

168. See Korobkin, *supra* note 3, at 1209.

169. See Ostas, *supra* note 1, at 541.

170. See COMMONS, *supra* note 59, at 204.

171. *Id.*

172. See *id.* The economic significance of confidence is also found in tort law. *Id.* Since 1580, courts have used tort law “to protect the reputation of a manufacturer who had built up a business on the confidence that he had inspired in customers.” *Id.*

173. *Id.*

174. One study found that 70% of advertisement viewers knew very little about a discussed health condition and side effects of a product even after seeing drug advertisements about the health condition and product. See THE HENRY J. KAISER FAMILY FOUND., UNDERSTANDING THE EFFECTS OF DIRECT-TO-CONSUMER PRESCRIPTION DRUG ADVERTISING 7-8 (2001).

175. See JAMES W. HENDERSON, HEALTH ECONOMICS AND POLICY 300 (5th ed. 2012).

six hours a day creates a hugely influential source of information for most consumers.¹⁷⁶ Instead of providing a detailed explanation of product details or attributes, most advertisements give consumers catchy one-liners delivered through violence or sex appeal.¹⁷⁷ The conclusion from this information is that advertisers entice consumers to purchase their products not through informing them fully, but rather through psychological conditioning.¹⁷⁸ Because the television is such a common source of product information, consumers are encouraged vigorously to base their consumption decisions on incomplete information they receive through conditioning. This “conditioning effect is not based on rational [or informed] economic considerations,”¹⁷⁹ and thus the foundations of contract theory further disintegrate.

III. COMPARATIVE APPROACHES TO UNCONSCIONABILITY

Our vision and legal reasoning extends only as far as our experience permits. If all we know is American law, we limit ourselves from fully exploring the ways in which other legal systems help ensure fairness in contracts. Throughout history, other nations have looked to the United States as a leader in legal reasoning and public policy.¹⁸⁰ However, in terms of ensuring fairness in contract law, some nations are beginning to surpass their unconscionability predecessor, the United States.

A. Australia

Australia has followed the American lead in recognizing unconscionable contracts, but has since taken a greater interest in ensuring fair contracts

176. See Omar Lee Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171, 171 (1975) (summarizing statistics from the Report on the Twentieth Century Fund Commission on Campaign Costs in the Election Era).

177. *Id.* at 176-77. Reed explains how ad campaigns become successful not due to their ability to provide complete information, but rather from catch phrases. *Id.* For example, National Airlines had an ad campaign in which a seductive flight attendant used the slogans “Fly Me” or “I’m going to fly you like you’ve never been flown before.” *Id.* at 177 (emphasis omitted). As a result of this campaign, National Airlines reported a 23% increase that year, which was nearly twice that of the industry as a whole. *Id.* at 176.

178. *Id.* at 177. Reed further contends that advertisers have shown themselves attuned to conditioning theory by their reduction of commercial time slots from sixty seconds to thirty seconds or shorter. *Id.* Conditioning theory predicts that two thirty-second time slots would condition the audience to purchase a product better than one sixty-second advertisement. *Id.*

179. *Id.* at 180.

180. For example, in 1987, on the Constitution’s bicentennial, of the 170 countries that existed, more than 160 wrote charters modeled directly or indirectly on the U.S. version. Adam Liptak, *‘We the People’ Loses Appeal with People Around the World*, N.Y. TIMES (Feb. 6, 2012), <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>.

and bargaining.¹⁸¹ Now, Australia is at the forefront of unconscionability law.¹⁸² Australia's statutory regulation of unconscionable contracts can be found in the Trade Practices Act of 1974.¹⁸³ Part IV.A includes three provisions for unconscionability, sections 51AA (enacted in 1992), 51AB (1986), and 51AC (1998).¹⁸⁴ These provisions recognize unconscionability in consumer transactions, small business dealings, and everything else, respectively.¹⁸⁵ Specifically, 51AB(2) lists factors relevant to determining whether conduct is unconscionable, such as:

- (a) [T]he relative strengths of the bargaining positions of the corporation and the consumer;
- (b) [W]hether . . . the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- (c) [W]hether the consumer was able to understand any documents relating to the supply . . . of the goods or services;
- (d) [W]hether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer . . . ; and
- (e) [T]he amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from [another] person [or firm].¹⁸⁶

Similar to the United States, a plaintiff may sue for remedies if a party is in breach of the aforementioned provisions of the law.¹⁸⁷ However, in addition to private remedies, in Australia public law remedies are also a common response to unconscionable contracts.¹⁸⁸ In short, section 51AA adds a public law component to the policing of unconscionable conduct in a commercial setting.¹⁸⁹ "On the public law front, the Australia Competition and Consumer Commission (ACCC), the designated statutory watchdog, can sue for injunctions or declarations."¹⁹⁰ Furthermore, "[t]he ACCC may also bring representative actions claiming relief on behalf of the defendant's victims."¹⁹¹ This state-regulated protection for the fairness of contracts in

181. See Anthony J. Duggan, *The Trumping of Mateship: Unconscionability in the High Court of Australia*, 39 CAN. BUS. L.J. 275, 275 (2003).

182. See *id.*

183. *Trade Practices Act 1974* (Cth) (Austl.).

184. *Id.* at ss 51AA-AC; Duggan, *supra* note 181, at 276.

185. See Duggan, *supra* note 181, at 275.

186. s 51AB(2).

187. Duggan, *supra* note 181, at 277.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

Australia should act as an example to countries like the United States¹⁹² that are currently struggling to put the principles of their unconscionability doctrines into practice.¹⁹³

B. Canada

Despite the fact the United States falls behind Australia in terms of regulating unconscionability, the United States does remain influential in helping other developed nations develop their own canons of unconscionability law.¹⁹⁴ Specifically, our neighbors to the north in Canada have yet to

192. Perhaps the United States has the doctrine of unconscionability as codified in the U.C.C. because we lack the regulatory attention to power differences that other countries like Australia have.

193. Although some states in the United States have legislative acts preventing unconscionability, there is no uniform statutory provision like Australia's. *See, e.g.*, OHIO REV. CODE ANN. § 1345.03 (LexisNexis 2004). For example, consumer protection statutes, such as the Ohio consumer protection statute, generally list factors, similar to those considered by the courts under the U.C.C. or common law, to be weighed in making a determination of unconscionability under the statute. *Id.* § 1345.03(B). Ohio's statute takes into consideration many of the factors of Australia's. *Id.* The statute seeks to determine:

- (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;
- (2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;
- (3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;
- (4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;
- (5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;
- (6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment;
- (7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

Id.

194. Both the French and German legal systems also treat contracts that are "unbargained for" with broad, flexible provisions similar to the U.C.C. *See* James H. Agger, *Unconscionable Contracts Under the Uniform Commercial Code*, 4 AM. BUS. L.J. 127, 144 (1966). Article 138 of the German Civil Code takes both a general and specific approach to harsh contracts that are against "good morals (*gegen die guten Sitten*)." *Id.* Furthermore,

fully embrace a doctrine of unconscionability as broad as outlined in § 2-302 of the U.C.C. or the Restatement (Second) of Contracts. Currently in Canada, unlike in the United States, unconscionability is a basis for a rescission of a contract as a whole, but not necessarily for the non-enforcement of a particular term that would cause an unfair or unreasonable result.¹⁹⁵ Furthermore, the doctrine of unconscionability in Canada rests more heavily on finding “inequality of bargaining power,”¹⁹⁶ and “this phrase may stand in the way of adapting to a marketplace in which the vast majority of contracts do not involv[e] bargaining.”¹⁹⁷ In reality, most contracts are between a business and a consumer, and as such, the consumer is not able to bargain at all.¹⁹⁸

As Canada moves forward with adopting a more pervasive unconscionability doctrine, some provinces have enacted unconscionability laws for consumer transactions.¹⁹⁹ Furthermore, the Ontario Law Reform Commission recommended the enactment of a general unconscionability provision first for sales contracts²⁰⁰ and then for general contracts at large.²⁰¹ The inspiration for these initiatives has been § 2-302 of the U.C.C. In Canada’s acceptance of the U.C.C.’s provisions for unconscionability, the importance of U.S. regulations regarding unfair contracts becomes clear. Now if only U.S. courts could reflect the sentiments of the Code in their decisions, the United States could once again be at the forefront of protecting the vulnerable through contract law.

C. Germany

Germany introduced the main components of its unconscionability law in the German Civil Code of 1900.²⁰² The Code has three main provisions relating to unconscionability.²⁰³ Article 138 reads:

- (1) A transaction that offends good morals (*guten Sitten*) is void.

“[t]he French doctrine of *abus des droits* . . . has been used both as a shield and a sword” against unconscionability. *Id.*

195. See JOHN D. MCCAMUS, *THE LAW OF CONTRACTS* 420 (2005).

196. *Id.* at 407, 409-11.

197. Jean Braucher, *Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State*, 45 CAN. BUS. L.J. 382, 385 (2007).

198. *Id.* at 386 (citing MCCAMUS, *supra* note 195, at 191).

199. See JACOB S. ZIEGEL & ANTHONY J. DUGGAN, *COMMERCIAL AND CONSUMER SALES TRANSACTIONS: CASES, TEXT AND MATERIALS* 122-23 (2002).

200. ONT. LAW REFORM COMM’N, *REPORT ON SALE OF GOODS* 156 (1979).

201. ONT. LAW REFORM COMM’N, *REPORT ON AMENDMENT OF THE LAW OF CONTRACT* 136-37 (1987).

202. John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1044-45 (1976).

203. See *id.* at 1053.

- (2) Void in particular is a transaction whereby one person, with exploitation of the necessity, thoughtlessness or inexperience of another, is promised or acquires, for himself or for a third party, economic advantages whose value exceeds the value of his own performance to such a degree that, under the circumstances, there is a striking disproportion between them.²⁰⁴

Scholars have noted several differences between Article 138 and § 2-302 of the U.C.C. First, Article 138 appears in the General Part of the German Civil Code, meaning that it applies to all contract law.²⁰⁵ Second, Article 138 provides a more blunt remedy for unconscionable contracts, giving judges only the option to discard entire contracts, rather than reopening the contract, modifying terms, or pursuing other options American judges have.²⁰⁶ Third, Article 138 describes specific instances when a contract is “unconscionable.”²⁰⁷ Alternatively, § 2-302 is much more general and leaves unconscionable undefined.²⁰⁸ In theory, this generality gives U.S. judges much more discretion, but in practice, when German judges combine Article 138 with the other two articles discussed below, they have similar discretion.²⁰⁹

Article 242 of the German Civil Code states, “Obligations shall be performed in the manner required by good faith, with regard to commercial usage.”²¹⁰ Courts began to use this Article often during the period of high inflation post-WWI for contracts dealing with repayment of debt, but since then, the Article has made inroads throughout German contract law.²¹¹

A brief review of three broad classes of cases applying Article 242 will help distinguish it from Article 138. The first group of cases involves instances where the party who was given a promise by another misuses its contractual rights.²¹² An example is when an insurance company cancels a policy after a late premium payment, which courts have ruled violates good faith.²¹³ A second group involves cases where one party seeks a harsh remedy for a contractual breach by the other party when a less burdensome al-

204. *Id.* at 1052 (translating Article 138 of the German Civil Code).

205. *Id.* at 1046; A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 *LOY. L.A. INT’L & COMP. L.J.* 455, 495 (1992).

206. *See* Angelo & Ellinger, *supra* note 205, at 495-96.

207. *Id.* at 496.

208. *Id.* at 497.

209. *Id.* at 498.

210. *See* Dawson, *supra* note 202, at 1044 (translating Article 242 of the German Civil Code).

211. *Id.* at 1045. Reflecting its influence, Dawson notes that a standard commentary on the Civil Code devotes 1,388 pages to analyzing court decisions invoking Article 242. *Id.* at 1045 n.5.

212. *See* Angelo & Ellinger, *supra* note 205, at 491.

213. *Id.*

ternative exists.²¹⁴ For example, if one party receives damaged goods, that party should seek repairs before exiting the contract entirely.²¹⁵ The third group contains cases where one party tells the other certain provisions of a contract need not be followed, only later to enforce them, such as when deadlines are said to be lax, only later to be stringently enforced by an insurance company.²¹⁶

Generalizing from these cases, we can see that Article 242 is invoked primarily for cases involving the unconscionable *exercise* of contractual rights, whereas Article 138 applies to unconscionable contractual *terms*. Thus, under this Article 242, “the courts are able to combat the unfair use of contractual rights, even where the clause conferring these rights is not unconscionable per se.”²¹⁷ American courts have not attempted to rule against the unconscionable exercise of contractual terms, despite similarity in language between Article 242 and § 1-203 of the U.C.C.²¹⁸

Finally, Article 826 of the German Civil Code reads, “One who intentionally injures another by conduct offending good morals must make reparation.”²¹⁹ Under this article, German courts have developed a body of tort law that seeks to combat the harmful actions of groups with “overriding, economic power.”²²⁰

So it became an offense to good morals to interfere intentionally with present and prospective contracts or advantageous relations, when the motive was destructive, when disapproved means such as violence or fraud were threatened or used, or where harm inflicted was out of proportion to the interests being served. . . . As early as 1920, there had emerged a network of court-created rules providing damages or preventative relief over a wide and steadily expanding range of intentionally harmful conduct.²²¹

Overall, Germany can learn from U.S. unconscionability law in the way § 2-302 gives U.S. judges more flexibility to alter or delete specific terms of an unconscionable contract, rather than provide a blunt tool of deciding whether to let a contract stand or discard it in its entirety.²²² However, the United States can learn from German law in the way Article 242 provides extra protection against the unfair exercise of contractual rights.²²³

214. *Id.* at 492.

215. *Id.*

216. *Id.*

217. *Id.* at 506.

218. *Id.*

219. Dawson, *supra* note 202, at 1045 (translating Article 826 of the German Civil Code).

220. *Id.* at 1045-46.

221. *Id.* at 1046.

222. *See* Angelo & Ellinger, *supra* note 205, at 505.

223. *Id.* at 505-06.

D. France

Unlike Germany, Australia, and the United States, France does not have a general unconscionability doctrine.²²⁴ However, a patchwork of provisions throughout French law provides contracting parties protection against contractual unfairness in similar ways as other countries do under the scope of their unconscionability law.²²⁵ This protection is weighed against the important place freedom of contract has in the French Civil Code.²²⁶ Article 1134 states, “An agreement legally entered into is law for those who made it.”²²⁷

Contracting parties find some protection against unfairness in the French Civil Code. First, several articles outline some basic requirements of equality and fairness for contracts. Article 1108 of the Civil Code stipulates, “In order that a contract should be valid, it must comply with four conditions. There must be consent by the party bound; the person must be capable of contracting; the subject matter of the contract must be certain; [and] the “cause” of the contract must be lawful.”²²⁸ Articles 1109 through 1133 continue by declaring a contract void if a party consents as a result of mistake (*erreur*), duress (*violence*), or fraud (*dol*).²²⁹

Second, using *la lesion* (Article 1118), courts are able to annul a contract that, through an imbalance between the parties, has caused one party to be disadvantaged and incur an undue loss.²³⁰ The applicability of *lesion* is limited however because it applies only to certain types of contracts and under specific definitions of the size of the loss.²³¹

A third source for contractual fairness is the concept of cause. Article 1131 reads, “An obligation without cause, or one based on a false or illicit cause, can have no effect.”²³² Article 1133 specifies, “A cause is illicit when it is prohibited by law or when it is contrary to good morals or the public order.”²³³ Cause has been used to rescind contractual unfairness in cases

224. See Séverine Saintier, *Loyalty as a Tool to Combat Contractual Unfairness: A French Perspective*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE 62, 62-63 (Mel Kenny, James Devenney & Lorna Fox O’Mahony eds., 2010).

225. *Id.* at 62-73.

226. *See id.* at 73-78.

227. Angelo & Ellinger, *supra* note 205, at 472 (quoting THE FRENCH CIVIL CODE AS AMENDED TO 1976 (John H. Crabb trans., 1977)).

228. *Id.* at 473 n.84 (translating Article 1108 of the French Civil Code).

229. *Id.* at 473-74 & n.85.

230. *See id.* at 475.

231. *See* Saintier, *supra* note 224, at 64.

232. Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 195 n.12 (1967) (translating Article 1131 of the French Civil Code).

233. *Id.* at 195 n.13 (translating Article 1133 of the French Civil Code).

where continued adherence to a contract lacks a cause.²³⁴ For example, French courts declared void a contract in a case involving a video rental shop, which contracted to get the videos from larger companies, only to argue its contracts with the distributors lacked cause when the rental shop went out of business.²³⁵ French courts have also used cause as a basis for annulling a contract when the contracting parties lack proportional obligations.²³⁶

A fourth legal source for combating contractual unfairness is the *clauses abusives* in Article L 132-1 of the 1978 Consumer Code.²³⁷ It states, “[I]n contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair.”²³⁸

The Article continues with a non-exhaustive list of unfair contractual clauses; for example, restricting a party “from establishing irrefutably the consumer’s adherence to clauses that the latter has not actually had the opportunity to become aware of prior to conclusion of the contract;”²³⁹ “from authorising the business to terminate a contract of indeterminate duration without giving reasonable advance notice, without just cause;”²⁴⁰ or “from obliging the consumer who has failed to perform his/her obligations to pay compensation in a disproportionately high amount.”²⁴¹

A 1991 ruling by the Court of Cassation nullified a contract containing a clause it found abusive, even though the clause was not explicitly listed in any specific law.²⁴² The court thereby generalized the notion of offering general protection against unfair contractual clauses.²⁴³ Lastly, similar to Germany, French courts employ the concept of loyalty or good faith to ensure contractual fairness.²⁴⁴ One area where courts have used loyalty or good faith in their decisions is in cases of contractual fraud. The courts have linked loyalty and good faith to the obligation of disclosure for contracting parties.²⁴⁵ This link may be weakening, however, since the 1970s, because

234. *See id.* at 195.

235. *See* Saintier, *supra* note 224, at 65.

236. *Id.* at 66.

237. *Id.* at 64.

238. *Id.* at 64 n.13 (translating Article L 132-1 of the French Consumer Code).

239. CONSUMER CODE, LEGISLATIVE PART, ARTICLE L132-1 (2005), available at www.legifrance.gouv.fr/content/download/1960/13727/.../Code_29.pdf (translating the French Consumer Code 2005).

240. *Id.*

241. *Id.*

242. *See* Angelo & Ellinger, *supra* note 205, at 482.

243. *Id.*

244. *Id.* at 472.

245. *See* Saintier, *supra* note 224, at 69.

in more recent cases the Court of Cassation has held that silence about pertinent information is not punishable and has not mentioned loyalty or good faith in the decisions.²⁴⁶

Thus, the major difference between France and other legal systems is that France does not have a general unconscionability provision. However, there is evidence that France is moving toward more generality, as discussed above with the general provision courts are beginning to provide against unfair clauses.²⁴⁷ Additionally, like the United States, but unlike Germany, French judges do revise provisions of unconscionable contracts.²⁴⁸

E. Commonalities in U.S., German, and French Law

Despite different provisions and approaches, these three legal systems are in agreement in many broad principles, as Alphonse M. Squillante outlines:

1. Commonality of Language: Even though the language is not exactly the same, the meaning of public order, good morals and unconscionability is the same in all three systems, and the same are recurrent themes in the three Codes;
2. Overreaching: The courts of all three systems will react adversely to any contract that is overreaching, oppressive or so unfair as to shock the courts' consciences;
3. Bad Bargains: None of the systems will protect the person who makes a bad bargain. A bad bargain is not a basis for invoking the doctrine of unconscionability in the Codes;
4. Total Transaction: All three courts will look to the subjective and objective facts of the total transaction before reaching a decision of whether to enforce the contract;
5. Specific Contracts: Each system specifically scrutinizes certain types of contracts because by their very nature they are subject to possible abuse by one party of the other. Contracts involving labor, insurance, concessionaires of public services (called regulated monopolies in the United States) and standard form contracts are carefully policed to make sure that no unfair advantage is taken by one party over another;
6. Unbargained for Contracts: Broad provisions in all three Codes deal with unbargained for contracts to protect against unconscionability. Such contracts are governed by article 138 of the German Burgerliches Gesetzbuch, article 1382 of the French Civil Code, and section 2-302 of the Uniform Commercial Code;

246. *Id.* at 71.

247. *See supra* Section II.D and accompanying text.

248. *See generally* Pierre Legrand Jr., *Judicial Revision of Contracts in French Law: A Case-Study*, 62 TUL. L. REV. 963 (1988).

7. Grounds for Use: Factors that are considered relevant to granting or denying rescission or reformation of contract are uniquely similar; they include one-sidedness of the bargain, form and disclaimer of liability;
8. Use of the Doctrine: None of the courts base their decisions on the unconscionability doctrine merely because it can resolve a number of ills. Rather, unconscionability has taken on a distinct application revolving about notions of fair play.²⁴⁹

IV. CASE LAW: THE UNCLEAR DOCTRINE OF UNCONSCIONABILITY

Due to the uncertain criteria of the doctrine of unconscionability, many in the American legal community hoped courts would establish the necessary definitions, rules, and procedures for application.²⁵⁰ In using § 2-302 of the U.C.C. to rule contracts unconscionable, American courts question whether the traditional common law concept of freedom of contract is capable of adequately protecting the consumer and further clarify what makes a contract unconscionable.²⁵¹

The courts have not succeeded in establishing a general formula or clear guidelines for applying the vague concept of unconscionability.²⁵² The result is that court decisions have conflicted, and the doctrine's rules have been applied inconsistently.²⁵³ Courts therefore have applied the doctrine of unconscionability on a case-by-case basis using a totality of the circumstances test.²⁵⁴ Also, uncertainty remains as to whether both procedural and substantive unconscionability must be present, further muddying the waters of unconscionability. Additionally, case law does not indicate the weight to be given to the different factors involving unconscionable contracts and whether all forms of unconscionability are equally damaging to a con-

249. Alphonse M. Squillante, *Unconscionability: French, German, Anglo-American Application*, 34 ALB. L. REV. 297, 298 (1970) (footnotes omitted).

250. See DEUTCH, *supra* note 30, at 111.

251. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 84, 86 (N.J. 1960). The Henningsen court stated: "[T]he basic tenet of freedom of competent parties to contract is a factor of importance[, but] . . . such rules cannot be applied on a strict, doctrinal basis," because "in present-day commercial life the standardized mass contract has appeared . . . [and] is used primarily by enterprises with strong bargaining power and position." *Id.*

252. Some states have created tests for unconscionability, but these tests suffer from the same problems the doctrine of unconscionability and case law precedent suffer from vague or ambiguous standards or tests. See, e.g., *Am. Gen. Fin., Inc. v. Branch*, 793 So. 2d 738, 748 (Ala. 2000). The Alabama courts use a two-part test to assess unconscionability. A contract is unconscionable if: (1) Its terms are grossly favorable (2) to a party with overwhelming bargaining power. *Id.* However, the problems of systematically defining "grossly favorable" and "overwhelming bargaining power" still exist.

253. See DEUTCH, *supra* note 30, at xv.

254. See Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 354-55 (1970).

tract.²⁵⁵ As a result, courts are free to pick and choose among a range of factors in order to achieve a fair result and ensure unconscionable contracts are not enforced.²⁵⁶

However, in cases where factors suggest unconscionability, judges still rule against unconscionability and implicitly evoke Adam Smith's *laissez-faire* statement: "Every man, [so] long as he does not violate the laws of justice, is left perfectly free to pursue his own interest [in] his own way,"²⁵⁷ or John Stuart Mill's anti-paternalistic statement: "[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."²⁵⁸

Thus, it is surprising that so important a question as whether a contract must meet a general requirement of fairness has not been dealt with more authoritatively by the courts.²⁵⁹ One would expect that as research undermines the traditional assumptions of contract theory, judges would begin finding more contracts unconscionable. However, the number of cases in which the courts found unconscionability has not significantly increased over time.²⁶⁰ The following are two of the many cases in which the courts should have found contracts unconscionable but did not do so based on questionable assumptions about human rationality and information. These cases are merely illustrations of the countless cases warranting, but not relying on, the equitable arguments provided by the unconscionability doctrine.

A. *Harris v. Green Tree Financial Corporation*

*Harris v. Green Tree Financial Corp.*²⁶¹ is one of many cases in which companies have taken advantage of elderly customers.²⁶² In *Harris*, the U.S.

255. See Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 816 (1987).

256. See Gerald T. McLaughlin, *Unconscionability and Impracticability: Reflections on Two U.C.C. Indeterminacy Principles*, 14 LOY. L.A. INT'L & COMP. L.J. 439, 446 (1992).

257. ADAM SMITH, *THE WEALTH OF NATIONS* 745 (Edwin Cannan ed., Modern Library 2000) (1776). In other words, people should have the freedom to act and contract at their own discretion. Courts conform to the hands-off approach by refusing to regulate unfair contracts in unconscionability cases.

258. JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* 135 (Mary Warnock ed., 1962) (1861).

259. See KOFFMAN & MACDONALD, *supra* note 5, at 446.

260. See DiMatteo & Rich, *supra* note 52, at 1100. DiMatteo and Rich conducted an empirical evaluation of unconscionability cases. Their cases were drawn from two time periods: 1968–1980 and 1991–2003. *Id.* Results of this analysis revealed that for the period from 1968 to 1980, 34% of unconscionability claims were successful while 41% of unconscionability claims were successful for the time period from 1991 to 2003. *Id.* Although there was a slight increase (7%) in the percentage of cases where unconscionability was found between the two periods, this increase was not statistically significant. *Id.* at 1100-01.

261. 183 F.3d 173 (3d Cir. 1999).

Court of Appeals for the Third Circuit found an arbitration provision in a home improvement contract enforceable against the homeowners' challenges that the provision was unconscionable.²⁶³ However, the court should have found the contractual provisions void pursuant to the doctrine of unconscionability. In *Harris*, Green Tree Financial Corporation recruited building contractors to sell home improvements to homeowners to be financed by high interest, secondary mortgage contracts, which were in turn sold to either Green Tree.²⁶⁴ The contractors they selected were instructed to target "relatively unsophisticated, low- to middle-income, senior citizens."²⁶⁵ The plaintiffs claimed that Green Tree instructed the contractors to use high-pressure sales tactics, such as in-home sales and telemarketing, and to assure the customer that the cost of the improvements would be reasonable and that they did not have to pay until they were satisfied with the improvements.²⁶⁶

Furthermore, the contracts also potentially had misleading and fraudulent provisions, according to the plaintiffs.²⁶⁷ Also, some of the work was not completed as promised by the contractors and other work was unsatisfactory.²⁶⁸ Nothing was done by Green Tree to fix the unsatisfactory work, despite numerous complaints.²⁶⁹ As a result, some of the homeowners challenged the contract on the grounds that it was unconscionable, and Green Tree moved to compel arbitration.²⁷⁰

Many of the terms in the contract should have been considered unconscionable. First and foremost, the targeting of a vulnerable group triggers consideration that perhaps the contracts were not created in good faith or

262. For another case involving pressuring an elderly woman to engage in an unconscionable contract, see *Bennett v. Bailey*, 597 S.W.2d 532, 533 (Tex. Civ. App. 1980). See also Brooke Overby, *Contract, in the Age of Sustainable Consumption*, 27 J. CORP. L. 603, 616 (2002) (noting elderly targets have become the target of fraud and predatory lending practices).

263. *Harris*, 183 F.3d at 176, 184.

264. *Id.* at 176.

265. *Id.*

266. *Id.*

267. *Id.* at 177. For a summarized discussion of some of the more salient provisions, see also Meadows, *supra* note 15. Meadows explains:

One such provision . . . [challenged] high premiums for collateral protection insurance. Another . . . was an arbitration provision which required the homeowners to arbitrate all disputes but permitted the lender to use judicial proceedings to enforce the loan or the mortgage. Because collection of the debt and enforcement of the mortgage would be the only actions commenced by the lender, essentially the homeowners waived their right to a jury trial and were compelled to arbitrate all disputes, while the lender waived none of its comparable rights.

Id. at 750-51 n.76 (citations omitted) (citing *Harris*, 183 F.3d at 176, 177-78).

268. *Harris*, 183 F.3d at 177.

269. *Id.*

270. *Id.*

under fair terms. The inequality of bargaining power was aggravated with the high-pressure sales tactics used against the senior citizens.²⁷¹ Additionally, the arbitration agreement was highly inconspicuous and hidden on the back of a page in small print.²⁷² Small, inconspicuous fine print is one sign of procedural unconscionability. Furthermore, the lack of reciprocal obligations to arbitrate also created inequality of bargaining power.²⁷³ Pursuant to the contract, Green Tree was able to litigate some claims while the borrowers had to arbitrate *all* claims.²⁷⁴ However, this is unreasonably favorable to Green Tree, and thus substantively unconscionable. For all these reasons, the court should have found the contract Green Tree entered into with the elderly homeowners unconscionable. However, this court, like many that do not rule in favor of unconscionability, instead relied on the questionable assumptions underlying freedom of contract and rationality.²⁷⁵

B. *Doctor's Associates, Inc. v. Casarotto*

One type of contract with the potential to be held unconscionable is one containing arbitration agreements. *Doctor's Associates, Inc. v. Casarotto*²⁷⁶ concerns a standard form franchise agreement for the operation of a Subway sandwich shop in Montana.²⁷⁷ Doctors Associates, Inc. is a Connecticut corporation that owns Subway sandwich shop franchises, and a man by the name of Mr. Lombardi was its development agent in Montana.²⁷⁸ The Casarottos were franchisees, entering into an agreement to operate a Subway franchise in Great Falls, Montana.²⁷⁹ However, they were told by Mr. Lombardi, the development agent, that their first choice for a location was unavailable.²⁸⁰ As a result, the franchisees agreed instead to open a Subway sandwich shop in another location with the caveat that if their pre-

271. *Id.* at 176.

272. *Id.* at 182.

273. The Court held that "inequality in bargaining power, alone, is not a valid basis upon which to invalidate an arbitration agreement." *Id.* at 183.

274. *Id.*

275. *Id.* at 184.

276. 517 U.S. 681 (1996).

277. *Id.* at 682.

278. *Casarotto v. Lombardi*, 886 P.2d 931, 932 (Mont. 1994), *vacated*, *Doctor's Assocs., Inc.*, 517 U.S. 681. The judgment of this case was vacated and remanded for further consideration in light of *Allied-Bruce Terminex Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). However, *Allied-Bruce* was decided not in relation to unconscionability law, but rather to a provision of the Federal Arbitration Act. *Id.* at 272. The Court held that the Act's interstate commerce language should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause power. *Id.* Therefore, this case can still be instructive as a tool for discourse about the doctrine of unconscionability.

279. *Casarotto*, 886 P.2d at 932.

280. *Id.*

ferred location became available one day, they would have the exclusive right to open a Subway there.²⁸¹ However, the preferred location in Great Falls was instead awarded to another franchisee.²⁸² As a result, the Casarottos argue they lost business ultimately losing the collateral on their loan.²⁸³

Furthermore, the contract contained a provision for mandatory arbitration somewhere within the lengthy document.²⁸⁴ Pursuant to Montana law at the time, if a contract contains an arbitration clause, it must state so clearly on the first page of the contract so that contracting parties understand arbitration will occur.²⁸⁵ However, the Subway contract was not created in Montana, and therefore did not follow the regulations of Montana law.²⁸⁶ Therefore, whether the Casarottos had reasonable knowledge, understanding, or bargaining power given the fact the arbitration clause was not mentioned on the first page as in all other contracts they negotiated is also questionable. As such, the arbitration agreement was inconspicuous, and the Casarottos did not reasonably expect there to be an arbitration clause because it was not mentioned on the first page as required by law in Montana.

The Montana Supreme Court ruled against the arbitration agreement based on a Montana statute.²⁸⁷ Subsequently, the U.S. Supreme Court ruled that the Federal Arbitration Act preempted the Montana statute in question.²⁸⁸ However, if the Montana Supreme Court made its ruling based on unconscionability grounds, the U.S. Supreme Court would not have ruled the way it did because the unconscionability ruling would not be at odds with the Federal Arbitration Act.²⁸⁹ On this subject of unconscionability, the Supreme Court stated:

Repeating our observation in *Perry*, the text of § 2 [of the Federal Arbitration Act] declares that state law may be applied “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” Thus, gen-

281. *Id.*

282. *Id.* at 933.

283. *Id.*

284. *Id.*

285. *Id.* at 942 (Trieweiler, J., concurring).

286. *Id.*

287. *Id.* at 939 (majority opinion).

288. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (“We hold that Montana’s first-page notice requirement, which governs not ‘any contract,’ but specifically and solely contracts ‘subject to arbitration,’ conflicts with the FAA and is therefore displaced by the federal measure.”).

289. See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 193 (2004). In fact, a number of recent cases in California using the doctrine of unconscionability have attempted to circumvent the Federal Arbitration Act. *Id.* at 194-95. For a specific discussion of arbitration agreements being held unconscionable in a state other than California, see *O’Donoghue v. Smythe, Cramer Co.*, No. 80453, 2002 WL 1454074 (Ohio Ct. App. July 3, 2002). In this case, the court ruled a home inspector’s limitation of liability in an arbitration agreement unconscionable since it precluded any meaningful remedy. *Id.* ¶ 31.

erally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2.²⁹⁰

Therefore, the Montana Supreme Court should have held the arbitration agreement unconscionable because it was inconspicuous,²⁹¹ did not provide adequate notice of its contents, and ran counter to the reasonable expectations of average consumers.²⁹² Further adding to the U.S. Supreme Court's comment about arbitration and unconscionability, federal or state courts in California,²⁹³ Hawaii,²⁹⁴ Missouri,²⁹⁵ Ohio,²⁹⁶ and Illinois²⁹⁷ have ruled that certain clauses in arbitration agreements can be unenforceable under the Federal Arbitration Act because they are unconscionable.

CONCLUSION

Since the codification of the doctrine of unconscionability in the Uniform Commercial Code and the Restatement (Second) of Contracts, questions have persisted as to the meaning and the rationality of its application.²⁹⁸ However, the uncertainty surrounding the definition of the doctrine should lead to its flexibility and adaptability to a variety of situations in future court decisions. The doctrine, while well intentioned, has not ade-

290. *Doctor's Assocs., Inc.*, 517 U.S. at 686-87 (second emphasis added) (citations omitted).

291. Under the Federal Arbitration Act, the agreement could not be found to be one-sided, oppressive, and unfair simply because it is an arbitration agreement. Rather, more evidence of specific misconduct is needed. However, the underlying foundations of arbitration do suggest some superiority of bargaining power as well. For example, the large companies or drafters of arbitration agreements are likely repeat participants in arbitrations, and therefore have an advantage in arbitrator selection and case presentation. The inferior party has no hope of matching these advantages because information about past arbitrations is often kept secret. *See Randall, supra* note 289, at 219.

292. *Id.* at 193.

293. *See, e.g., Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888, 894 (Ct. App. 2001); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002); *GMAC Commercial Fin. LLC v. Superior Court*, No. B166070, 2003 WL 21398319, at *4 (Cal. Ct. App. June 18, 2003); *Stone v. Memberworks Inc.*, No. G030740, 2003 WL 21246771, at *6 (Cal. Ct. App. May 30, 2003).

294. *See, e.g., Domingo v. Ameriquest Mortg. Co.*, 70 F. App'x 919, 920 (9th Cir. 2003).

295. *See Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003).

296. *See, e.g., Hagedorn v. Veritas Software Corp.*, 250 F. Supp. 2d 857, 862 (S.D. Ohio 2002) (holding a forum selection clause requiring a life-long Ohio resident to travel to San Francisco for arbitration was unconscionable).

297. *See Plattner v. Edge Solutions, Inc.*, No. 03 C 2646, 2003 WL 22859532 (N.D. Ill. Dec. 2, 2003) (holding a portion of the arbitration agreement was unconscionable solely based on substantive grounds), *order rejected in part* by 2004 WL 1575557 (N.D. Ill. Apr. 1, 2004).

298. *See supra* Section I.B-D.

quately protected the needs of vulnerable members of society because courts have not used the doctrine to its fullest potential.²⁹⁹

There will always be some imbalance between contracting parties in terms of power, wealth, understanding, experience, and information. If lawmakers and judges insisted on absolute equality, we would have no more contracts. However, the law needs to adapt its philosophy of contracts to the recent research suggesting contracting parties may not be fully rational or informed. The antiquated assumptions of contract law prevent the courts from helping vulnerable parties prove unconscionability.³⁰⁰

Legislatures too have institutional advantages in promulgating contract terms relative to courts.³⁰¹ If the goal is to create fairer contracts for the greatest percentage of parties possible, legislatures are likely to be more institutionally effective. However, ultimately it is the job of the courts to police contracts for unconscionability. Until they begin to employ the doctrine of unconscionability more frequently, the doctrine will remain an underutilized tool in the court's arsenal.

299. *See supra* text accompanying note 162.

300. *See supra* Part II.

301. *See* Korobkin, *supra* note 3, at 1249.