

EMBRACING UNCONSCIONABILITY'S SAFETY NET FUNCTION

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Despite courts' and commentators' denial of morality and focus on efficiency in contract law, fairness and flexibility have remained the bedrocks of the unconscionability doctrine. This Article therefore departs from the popular formalist critiques of unconscionability that urge for the doctrine's demise or constraint based on claims that its flexibility and lack of clear definition threaten efficiency in contract law. Contrary to this formalist trend, this Article proposes that unconscionability is necessarily flexible and contextual in order to serve its historical and philosophical function of protecting core human values. Unconscionability is not frivolous gloss on classical contract law. Instead, it provides a flexible safety net for catching contractual unfairness that slips by formulaic contract defenses.

The prevailing formalism in contract law promotes a paradigmatic picture of classical contract doctrine that resembles Roman art with “cold-blooded” lines and rigid structure.¹ Followers of this formalism disclaim the relevance of “wilful” breach and generally disregard morality or motive in contract law.² Instead, they urge for clear enforcement of contracts that appear to have the doctrinal ingredients of offer, acceptance, and consideration, and they frown on excursions into subjective inquiry and proof.³ Many also claim that classical contract rules and strict promise enforcement foster economic efficiency and optimal distribution of resources.⁴

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1. MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 8 (4th ed. 2001) (noting how contract doctrine's focus on efficiency “is pretty cold-blooded”).

2. 5A ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 1123, at 6-11 (1964).

3. 3 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 12.17a, at 298-99 (3d ed. 2004) (also stating policymakers should define fault as “not doing one's best,” in order to eliminate “moralistic overtones” of terms such as “willful”).

4. See RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 66-67 (2d ed. 1977) (discussing how legal enforcement of agreements fosters efficient economic planning); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 530-31 & n.19 (1981) (advocating courts' legal enforcement of contracts as less costly).

The problem with the formalist⁵ painting of contract doctrine is that it does not reflect reality.⁶ Real-world contracting is more like a Claude Monet impressionist painting with loose and open brushwork. Oliver Wendell Holmes recognized this blurriness of reality in acknowledging that “the confusion between legal and moral ideas” is most manifest in contract law.⁷ Classical contract law denies promotion of normative values, but equity haunts its core. It cannot shirk concern for societal fairness.

Unconscionability therefore survives to protect these fairness norms. The history and philosophy underlying the doctrine’s conception show that it serves an important role of protecting humanity’s natural, or innate, sense of “fairness” that defies formulaic definition or intellectualized rigidity. The doctrine therefore serves as a flexible safety net which courts can use to address contracts that offend these fairness norms, even when other contract defenses such as mistake, fraud, or duress would not provide relief.⁸ In this way, unconscionability’s resistance to a “lawyer-like definition” is integral to its function in contract law.⁹

Unconscionability’s flexibility, however, also raises questions: What is “fair,” and why should contract law police transactional fairness? What norms should contract law promote? How should courts carry out this promotion? The list goes on. This Article does not purport to answer all of these questions. It seeks only to defend and protect unconscionability’s flexibility by exploring the evolution of unconscionability in contract law as a vehicle for protecting fairness and justice. It is the doctrine’s flexibility that has fueled its survival in the wake of contract law’s return to cabined, and sometimes cruel, focus on strict contract enforcement and economic efficiency.¹⁰

5. Labels such as “formalism” or “formalist” are surely problematic. Nonetheless, this Article uses these terms to refer generally to modern classical thought and law and economics theories that promote clear contract law as a means for promoting freedom of contract and economic efficiency.

6. See Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 235-39, 261-67 (2003) (explaining shortcomings of formalism and how it causes “disingenuous and incomplete” decision making because it fails to account for the interpersonal nature of contracts).

7. Oliver Wendell Holmes, Justice of the Sup. Jud. Ct. of Mass., *The Path of the Law*, Address Delivered at the Dedication of the New Hall of Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 462 (1897) (noting this confusion but describing classical contract law as requiring payment for breach “and nothing else”). Holmes later disclaimed the relevance of motive in breach of contract actions. See *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547 (1903).

8. See Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573, 1607-09 (2003); see also Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 947-48 (1991) (discussing how unconscionability is a question of degree which focuses on fairness).

9. 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.4, at 387-88 (rev. ed. 2002). Some believe the term came from moral philosophy and ethics. *Id.* Others attribute the term’s use in U.C.C. § 2-302 to an off-hand comment by Hiram Thomas, a spokesman and lawyer for the New York Merchant’s Association involved in early discussions regarding the sales law. Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 279, 306-08 (1998).

10. See Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 1-7 (2004) (emphasizing the modern renewal of formalism and classical law).

Unconscionability analysis is nonetheless losing its flexibility under the pressure of popular formalist thought in contract law.¹¹ A growing number of scholars promote formalism to the detriment of unconscionability by criticizing the doctrine for its vagueness and uncertainty.¹² They claim that these attributes conflict with classical “will theory” that supports individuals’ freedom to make contract choices and also that courts use the doctrine’s flexibility to second-guess contract choices based on subjective determinations. Law and economics supporters add to this criticism by claiming that unconscionability’s lack of clear definition and predictable application hinder economic efficiency. They base this claim on assumptions that individuals are perfectly rational and have all necessary information which they use to make contract choices and that enforcement of these rational choices will maximize overall societal wealth. Accordingly, they frown on unconscionability because it provides a means for parties to escape apparent contract choices.¹³

Courts also have implemented this formalist thought by becoming increasingly rigid in their application of a two-prong unconscionability test.¹⁴ Under this test, a party who wishes to avoid enforcement of a contract generally must show that the agreement is both substantively and procedurally unconscionable.¹⁵ Procedural unconscionability focuses on whether the bargaining process culminating in the contract was adhesive or unduly one-sided, whereas substantive unconscionability focuses on whether the contract terms are unduly oppressive or otherwise unfair.¹⁶ For example, adhesion, or “take-it-or-leave-it,” contracts are often considered procedurally unconscionable.¹⁷ A court will not provide relief from an adhesion contract, however, unless the contract also includes unreasonably harsh terms.¹⁸

The problem with this increasing rigidity is that it ignores the history and philosophy of unconscionability. Unconscionability’s value derives from its appropriately contextual concern for societal fairness norms. Its story of evolutionary survival from Aristotelian ideals and natural law norms to codification in the Uniform Commercial Code (U.C.C.) reveals the doctrine’s continual recognition as a “safety net” for flexibly protecting societal values and norms of morality, fairness, and equality that cannot be intellectualized.¹⁹ These values and norms are not mathematical. Instead, they rely on context, common sense, and conscience.

11. See *id.* at 15.

12. See *id.* at 16.

13. See *infra* Part II.B. (summarizing the main criticisms of unconscionability).

14. Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 486-501, 509-16 (1967).

15. See PERILLO, *supra* note 9, § 29.1, at 375-78.

16. See *id.* § 29.2, at 378-82.

17. Leff, *supra* note 14, at 497.

18. See PERILLO, *supra* note 9, § 29.4, at 387-95.

19. See James Gordley, *Why Look Backward*, 50 AM. J. COMP. L. 657, 664-68 (2002) (explaining natural theorists’ unstructured illumination of “law founded on nature and reason”); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) (providing a thoughtful analy-

Furthermore, unconscionability's protection of these norms promotes market integrity and productive exchange.²⁰ For example, formalist economic theorists often assume that form contracts foster economic efficiency. However, these form contracts often are products of one-sided dealings and market failure, and do not necessarily result in optimal allocation of resources. Unconscionability therefore should be available as an important consumer protection from such oppressive form contracts. This is especially true as we move from paper to electronic contracting. Indeed, economic efficiency is not the only goal of contract law. Instead, foundational societal norms promoting fair play and precluding raw deals became embedded in contract law before formalists began their quest to clarify predictable contract rules.²¹

This Article therefore counters popular formalism and seeks to re-energize unconscionability's contextual protection of fairness norms. Part I of the Article uncovers the history and philosophy underlying the evolution of unconscionability from natural and Aristotelian notions predating classical contract law, to its recognition in the Restatement (Second) of Contracts and U.C.C. Article 2 governing the sale of goods. Part II explores unconscionability's survival despite rising formalism and dominance of law and economics in contract thought and explains how flexibility remains the doctrine's greatest asset despite criticisms that this flexibility creates risks that courts will go too far, or not far enough, in protecting contract fairness. Part III therefore calls courts and commentators to openly embrace unconscionability's flexibility and generality. It further invites courts to ease rigid application of the two-prong unconscionability test in order to use the doctrine as a safety net to catch cases of contractual injustice that slip by formulaic contract defenses.

I. PHILOSOPHICAL AND HISTORICAL EVOLUTION OF UNCONSCIONABILITY

One cannot appreciate the safety net function of unconscionability without understanding the doctrine's emergence from philosophical foundations of contract law. Unconscionability is not an afterthought gloss on classical contract doctrine.²² Instead, it flows from an unshakable concern

sis of values and norms of contract). There is no clear or established conception of "natural law" or "contractual morality." *See id.* at 343; Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 76-78 (1998) (contrasting historical and modern conceptions of "natural law"). For further discussion of morality's role in contract and natural law see PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 43-60 (1965) and HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* (Thomas R. Hanley trans., 1947).

20. *See* James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 21-23 (2002) (explaining how we must escape the "circle of modern ideas" to understand economics and efficiency in contract law).

21. *See infra* Part I.B.1. (discussing survival of equitable principles in contract law despite preeminence of classical and economic legal theory).

22. *See* *Market St. Assocs. v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) (Posner, J.) (acknowledging that the defense is not a "newfangled" doctrine).

for fairness and equity that lies at the core of contract law.²³ Formalist doctrine promoting rigid enforcement of private agreements is relatively modern.²⁴ It was not until the nineteenth century that scholars crafted and policymakers advanced classical contract law's now familiar focus on free choice and limited judicial regulation of exchange.²⁵ Law predating classical contract doctrine valued fairness as endemic to the definition of contract and equality of exchange as a presupposition of individuality.²⁶ Unconscionability then developed as a key vehicle for protecting these principles. Moreover, this protection function advanced the doctrine's appearance in civil and common law courts, and its recognition in the Restatement of Contracts²⁷ and the Uniform Commercial Code Article 2 (U.C.C. Art. 2).²⁸

A. Philosophical Conceptions of Unconscionability

Philosophical underpinnings of unconscionability predating formalist contract doctrine confirm unconscionability's flexible concern for fairness.²⁹ Aristotelian notions underlying contract thought promoted "rectificatory," or corrective, justice in contractual dealings and demanded that contracting parties maintain the "moral quality" of their bargaining conduct.³⁰ In addition, the Aristotelian virtue of liberality limited contractual freedom to assure sensible giving, while justice required that "each received something of equivalent value to what he gave."³¹ Aristotle acknowledged "that a person

23. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 146-47 (1979) (explaining how contract law "was being profoundly influenced by moral ideals").

24. Peter Huber, *Flypaper Contracts and the Genesis of Modern Tort*, 10 *CARDOZO L. REV.* 2263, 2268-69 (1989) (highlighting how classical contract law can "operate very harshly"); see also Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 *J.L. & ECON.* 293, 293 (1975) (noting that strict enforcement exists under classical contract doctrine).

25. ATIYAH, *supra* note 23, at 743 (explaining how classical law used will theory to justify presumed enforcement of contracts); Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 *U. CHI. L. REV.* 1513, 1516-19 (2003) (emphasizing centrality of free will in classical contract theory).

26. See James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 *CAL. L. REV.* 1815, 1849-50 (2000) (discussing the history of contract law); see also Gordley, *supra* note 20, at 6-9, 17 (discussing fairness in contract law); Gordley, *supra* note 19, at 666-67 (discussing fairness as it relates to damages for breach of contract).

27. *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (1981).

28. U.C.C. § 2-302 (1998).

29. See Melvin Aron Eisenberg, *The Bargain Principle and its Limits*, 95 *HARV. L. REV.* 741, 801 (1982) (discussing how "[c]oncepts of fairness were smuggled into contract law even when the [bargain] principle seemed most secure"); William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering*, 35 *J. MAR. L. & COM.* 561, 571-73, 583-89 (2004) (discussing unconscionability as an overriding theme among the "piecemeal solutions" for addressing good faith in common contract law); see also Gordley, *supra* note 20, at 20 (explaining how German courts recognize these same ideas under "*Treu und Glauben* or good faith" and European Union courts "protect[] consumers against terms which give a seller a disproportionate advantage").

30. HENRY MATHER, *CONTRACT LAW AND MORALITY* 45-47 (1999) (emphasizing how "Aristotelian rectificatory justice is linked to morality in a very direct and pervasive way," and explaining how this theory of justice bases remedy on "whether the defendant's conduct was morally wrongful" although it seeks to limit remedy to restoring the status quo ante).

31. Gordley, *supra* note 26, at 1849-50 (explaining how Aristotelian concepts of "liberality" and exchange were linked with "commutative justice" and seeming to equate this "commutative" justice with

acts for an immediate end, or *causa finalis*, and that commutative justice requires equality in exchange.”³² These flexible notions of contractual justice became core propositions of contract law.³³

These same flexible notions continued to flow through contract thought revealed in the seventeenth and eighteenth century writings of legal scholars. This was especially true among those who espoused so-called “natural law.”³⁴ These writers earned the name “natural lawyers” because they explored age-old philosophical tensions between divine and civic law.³⁵ They proposed that fairness and equity were at the heart of both divine and common sense conceptions of the law.³⁶ They presumed law should preserve divinely and secularly formulated standards that rational beings share simply by virtue of their “common humanity.”³⁷ This included standards derived from humanity’s collective “conscience” as well as corporate notions of economic fairness.³⁸ These ideals warranted against enforcement of exchanges that were so one-sided that they violated the public conscience.³⁹ They also required some level of equality with respect to exchanged information and values as rational and necessary for peaceful societal relations.⁴⁰

Diverging theorists therefore agreed that equity mattered in law, even if they disagreed regarding the “good” of man.⁴¹ For example, both Rousseau and Hobbes advanced the importance of equity in exchange, although Rousseau found it emanated from the human quest for happiness and enlighten-

corrective justice); Gordley, *supra* note 20, at 6-9, 17 (discussing how modern legal systems’ refusal to enforce contract terms that are “sufficiently unfair” does not comport with will theory, which assumes enforcement of all consensual terms, but emphasizing that this aversion to unfair terms easily conforms to Aristotelian traditions, borrowed by the Late Scholastics and the early northern natural lawyers).

32. Gordley, *supra* note 26, at 1850.

33. See MATHER, *supra* note 30, at 46-47 (emphasizing how Aristotle counseled against requiring “more precision than the subject matter permits” and left questions of “good or just” to “a rough and general sketch”).

34. *Id.*; see also Gordley, *supra* note 19, at 666-67 (explaining that the northern natural lawyers of the seventeenth century borrowed equitable concepts and conclusions from Aristotelian and Thomistic principles, although they were not concerned with linking their ideas to these schools of thoughts).

35. See ROMMEN, *supra* note 19, at 3-4 (discussing emergence of so-called “natural lawyers”).

36. *Id.* at 4-6 (emphasizing how natural law relied on both religious law and human reason).

37. *Id.*

38. See WEBSTER’S NEW COLLEGIATE DICTIONARY 240 (Henry Bosley Woolf et al. eds., 1973) (stating the adjective “conscionable” comes from “conscience,” derived from the Latin “conscire,” meaning to be conscious, generally of guilt); Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences Into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 858-62, 868-69 (1999) (also noting how civic and communitarian principles emanated in works of Cicero and G.W.F. Hegel); Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145, 170 (1992) (proposing courts’ recognition of “an equitable ‘corporate conscience’”).

39. See Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 288-90 (1999) (exploring how unconscionability stems from natural law).

40. See Charles L. Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1058-71, 1079-88 (2004) (explaining legal science’s inductive discovery of “moral” truths derived from natural experience and common sense, and emphasizing how natural assumptions of fairness and equality limited the *caveat emptor* norm in American courts).

41. See ROMMEN, *supra* note 19, at 4-7, 75-98 (highlighting two conceptions of natural law).

ment, while Hobbes believed it was a product of human selfishness.⁴² Hobbes also continued to recognize the role of equity, despite his distaste for vague standards.⁴³ Hobbes acknowledged nineteen "moral" precepts that flowed from both conscience and rational self-preservation.⁴⁴ These precepts included the obligation to perform private contracts as well as the duty to ensure their relative equality.⁴⁵

To be sure, reference to natural law and moral precepts is problematic. This is because reasonable minds disagree about what is "wrong" or "right," and such contextual norms and values defy easy definition.⁴⁶ These ideals nonetheless survive in conceptions of unconscionability because they acknowledge real-world social conventions that weave throughout our human relations.⁴⁷ Their familiarity and popular acceptance also give credence to unconscionability's legitimacy as a reasonable contract defense.⁴⁸ Unconscionability's protection of these conventions helps stabilize contract law by enhancing its reputation as "fair" law worthy of public obedience.

B. Historical Development of Unconscionability in Common Contract Law

Fairness and equality concerns in contracting did not disappear as mere philosophical invention or aberration with the rise of a distinct body of contract law. Instead, these concerns became critical threads in the delicate weave of civil and common law exchange standards, which eventually evolved into common contract law. Before chancery and law courts unified, civil law administered by chancery courts incorporated fairness ideals in "just price theory,"⁴⁹ while courts of law used "imaginative flanking devices" such as interpretation and limited remedies to defeat oppressive con-

42. *Id.* at 75-89.

43. Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 718-25 (1992) (explaining Hobbes's positivist view).

44. *Id.* at 718, 731-32 (explaining how Hobbes viewed submission to a sovereign and "natural laws" as necessary to quell humankind's "natural condition" of war).

45. *Id.* at 731-32 (discussing Hobbesian "commutative justice" as requiring equality in exchange). Although Professor Gordley speaks in terms of Aristotle's "commutative justice," Professors Allen and Morales emphasize distinctions between Aristotle's "corrective justice" and Hobbes's "commutative justice." Compare *id.*, with Gordley, *supra* note 26, at 1849-50 (linking Aristotle with "commutative justice").

46. H.L.A. HART, *THE CONCEPT OF LAW* 163-76 (1961). Hart ostensibly denies a connection between morality and law, but he nonetheless recognizes four "simple truisms" being "human vulnerability, approximate equality, limited altruism, and limited understanding and strength of will." Allen & Morales, *supra* note 43, at 725.

47. See Rob Atkinson, *Nihilism Need Not Apply: Law and Literature in Barth's The Floating Opera*, 32 ARIZ. ST. L.J. 747, 778-82 (2002) (noting social and political norms flow from natural law).

48. These universally valid natural principles are similar to the *Lex Mercatoria*, to the extent the "Law Merchant" represents "the law which natural reason makes for all mankind." Richard A. Epstein, *Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1, 4-5 (2004) (quoting *Institutes* 1.2, in JUSTINIAN'S INSTITUTES 37 (Peter Birks & Grant McLeod trans., Paul Krueger trans. (Latin), Cornell 1987) (internal quotation marks omitted) (discussing the "Law Merchant" in a symposium regarding its history and significance).

49. DiMatteo, *supra* note 38, at 840-44.

tracts.⁵⁰ As the courts unified and society industrialized, however, academics and lawyers sought to formalize contract rules as “classical” law, which later eased into the “neoclassical” contract law incorporated in the Restatement (Second) of Contracts and the U.C.C. Article 2, which governs the sale of goods.⁵¹ Nonetheless, this formalization could not squelch the flexible fairness norms lying at contract’s core. Instead, the Restatement and the U.C.C. Article 2 have continued to recognize the unconscionability doctrine as a means for flexibly protecting these norms.⁵²

1. *Early Recognition of Fairness and Equality in Civil Law and Equitable Remedies*

Although civil contract rules did not use the term “unconscionability,” they provided means for policing contract fairness under just price notions shunning disproportionate and inequitable contracts as immoral.⁵³ The Roman civil law incorporated this theory through *laesio enormis* rules allowing for the rescission of contracts based on inadequacy of the price.⁵⁴ These rules sought to “rectify gross economic injustice” in order to promote public good, even at the expense of self-interest.⁵⁵ Other civil codes also allowed for avoidance of sales contracts if the values exchanged were disproportionate at a ratio greater than two to one.⁵⁶ These laws further evolved into the “equitable conception of contract,” which deemed “unjust” the payment of prices outside the relevant customary range.⁵⁷

Chancery courts also protected fairness and equality through their use of equitable remedies to deny enforcement of grossly unfair contracts.⁵⁸ Chan-

50. PERILLO, *supra* note 9, § 29.2, at 380 (noting reluctance of early common law courts to directly apply unconscionability as a defense).

51. *Id.* § 29.2, at 378-80, § 29.11, at 425-26.

52. *Id.*

53. DiMatteo, *supra* note 38, at 840-50. Just price theory evolved from Aristotelian notions of proportionality and equality and the similar teachings of Thomas Aquinas. *Id.* at 840-44. Contract law under Aristotelian philosophy was “a behavioral modifier” premised upon “the virtuous person,” who pursues fair bargains and does not take undue advantage of others. *Id.* at 844-50.

54. See Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 467 (1995) (explaining further that the initial *laesio enormis* doctrine focused on land sale contracts and “did not grant broad license to police for fairness”); see also ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 129-30 (Francisco Laporta et al. eds., 1997) (also noting how “[a]ll legal systems include some method of introducing ethics and fairness in law”).

55. See DiMatteo, *supra* note 38, at 850-51 (quoting John W. Baldwin, *The Medieval Theories of the Just Price: Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries*, TRANSACTIONS AM. PHIL. SOC’Y., July 1959, at 1, 27) (noting how this concept agreed with Thomas Aquinas’s “definition of goods as community-centered”).

56. See Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 289 (2000) (discussing history of unconscionability); see also DiMatteo, *supra* note 38, at 850-52 (discussing Roman doctrine of *laesio enormis*).

57. See DiMatteo, *supra* note 38, at 858 (also noting that civil law “required that the true value of the goods or services be the litmus test for unconscionability”).

58. ATIYAH, *supra* note 23, at 147 (explaining how Chancery’s assumption of contract fairness was especially important in the eighteenth century because most contract litigation took place in the Chancery courts); see also DiMatteo, *supra* note 38, at 865-66 (noting that this created tensions in the dual

cellors used these remedies to build “a protective jurisdiction of *conscience* as a refuge for those unfitted to a world of hard bargaining.”⁵⁹ For example, chancellors refused to specifically enforce grossly inadequate exchanges and used interpretation and reformation principles to temper harsh contract provisions.⁶⁰ They also employed the doctrine of equitable unconscionability to void agreements or promises that resulted from “bargaining unfairness.”⁶¹ They often used this doctrine to preserve estates and family relations, protect the “weak,” and prevent enforcement of grossly unfair or quasi-fraudulent exchanges.⁶²

In a 1686 case involving a marriage agreement, for example, the chancellor reformed terms in the agreement to provide the son-in-law an estate for life instead of full ownership in his wife's father's estate.⁶³ The chancellor provided this relief in order to keep the land in the father's family, even though no clear legal defense applied to the agreement's express transfer of full ownership to the son-in-law.⁶⁴ Similarly, a 1716 court refused to enforce a son's sale of his remainder interest in his father's estate, where the sale would have harmed family cohesion by preventing the estate from passing to heirs sent to town for their education.⁶⁵ The court based its decision on an amorphous equitable edict that relief was appropriate to remedy “unconscionable practices.”⁶⁶

English courts of law also recognized these fairness norms during the late eighteenth century. A case often cited for this recognition is *Earl of Chesterfield v. Janssen*.⁶⁷ In that case, executors of John Spencer's estate sought relief from a debt agreement Spencer executed on the condition that he survived his grandmother.⁶⁸ The court denied the executors' claims that

courts of law and equity).

59. DiMatteo, *supra* note 38, at 865 (quoting W.R. Cornish & G. de N. Clark, *LAW AND SOCIETY IN ENGLAND 1750-1950*, at 202 (1989)) (internal quotation marks omitted); *see also id.* at 874-75 (contrasting classical contract law focused on certainty and formalism).

60. *See* ATIYAH, *supra* note 23, at 147-48 (noting that “the very enforcement of a contract in Chancery was a matter of discretion, and was not uncommonly denied if the contract seemed excessively unfair”).

61. *See* HILLMAN, *supra* note 54, at 131; *see also* PERILLO, *supra* note 9, § 29.2, at 378-80. Indeed, Justice Stone described unconscionability as the basis for “practically the whole content of the law of equity.” *Id.* § 29.2, at 378 (quoting Harlan F. Stone, Book Review, 12 *COLUM. L. REV.* 757, 757 (1912)).

62. *See* Kamp, *supra* note 9, at 310-13 (describing equitable unconscionability cases that focus on bargaining “naughtiness”); *see also* P.S. ATIYAH, *The Liberal Theory of Contract*, in *ESSAYS ON CONTRACT* 121, 136-38 (1986) (noting how English political theory assumes one can identify “a ‘neutral’ and objectively fair public interest which it is appropriate to adopt”).

63. *Griffith v. Buckle*, (1686) 23 Eng. Rep. 620, 620 (Ch.).

64. *Id.* (expressly disagreeing with the father's insistence that “he was surprised in the wording” of the agreement conveying the land to the son-in-law).

65. *Twisleton v. Griffith*, (1716) 24 Eng. Rep. 403, 403-04 (Ch.).

66. *Id.* at 404 (adding that keeping land in the family may force an heir to return home, to “submit to his father . . . and in the mean time, he might grow wiser, and be reclaimed”).

67. (1750) 28 Eng. Rep. 82 (Ch.); *see also* Kamp, *supra* note 9, at 310-12 (quoting *Earl of Chesterfield*, 28 Eng. Rep. 82).

68. *Earl of Chesterfield*, 28 Eng. Rep. at 82-83. The opinion states few facts but notes that Spencer “was addicted to several habits prejudicial to his health” while his grandmother was “of a good constitution,” implying that the defendant took a risk in agreeing to repayment of the loan on condition that Spencer survive his grandmother. *Id.* at 82.

the contract was unenforceable under usury laws or equitable rules against “unconscionable bargains” because Spencer executed the agreement “fully informed and with his eyes open.”⁶⁹ Individually, however, the judges left room for what later became known as the unconscionability doctrine.⁷⁰ The Lord Chancellor’s widely quoted dicta for the doctrine stated that common courts may provide relief “against every species of fraud,” including bargains that “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.”⁷¹

Justice or fairness of exchange remained an important limitation on contractual obligation throughout the eighteenth century. Courts at law and equity limited enforcement of contracts in which they found inadequate consideration.⁷² Courts in England and America employed various tools to require sound prices for exchanges.⁷³ In this way, flexible fairness norms planted the seed for the unconscionability defense in the core of contract thought.

2. *Modern Common Law’s Incorporation of the Unconscionability Doctrine*

Classical contract doctrine did not stake its claim on contract thought until the nineteenth century. It was then that contracts scholars began to erode prior convictions that only fair exchanges warranted enforcement.⁷⁴ Classical theorists also began to espouse the will theory focused on clear enforcement of apparent convergence of wills, and to denounce equitable ideals of justice as arbitrary and uncertain.⁷⁵ They used the growth of our industrialized market economy to justify this strict enforcement, and placed their faith in the market to ensure equality and overall distributional efficiency.⁷⁶

Despite the emergence of this formalist view, however, judges could not squelch their human inclinations to protect fairness. They clandestinely pro-

69. *Id.* at 83-85, 100-03.

70. *See id.* at 92-103 (acknowledging that this was a matter of first impression in their court and struggling with how and why law courts should apply an unconscionability concept dependant on divergent views of morality and justice). Chief Justice Lee voiced the struggle shared by the other judges: “It is difficult to form any general rule, that can meet every case of this kind, that may happen: but they must in general be governed by the circumstances in each case . . .” *Id.* at 97.

71. *Id.* at 100. Lord Chancellor explained that it was unnecessary for the court to rule explicitly on the defense because the evidence showed that the loan agreement was fair, Spencer freely executed the agreement, and he confirmed it after his grandmother’s death. *Id.* at 100-02. Furthermore, Lord Chancellor emphasized that the court would “adhere to precedents” with respect to this broad notion of “fraud” and was not willing to “scruple to follow” decisions in equity such as *Twisleton*, 24 Eng. Rep. 403 (discussed *supra* notes 65-66 and accompanying text). *Earl of Chesterfield*, 28 Eng. Rep. at 101-03.

72. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 160-73 (1977).

73. *See id.* at 164-67 (discussing sound price rule).

74. *See id.* at 160.

75. *See id.*

76. *Id.* at 181.

tected fairness norms by twisting legal doctrines such as duress, misrepresentation, failure of consideration, and lack of mutual assent, to provide relief from unfair contracts.⁷⁷ This, in turn, led scholars and policymakers to attempt to formalize the unconscionability doctrine in order to contain these “covert tools” for policing fairness.⁷⁸ Their attempt produced the vague standards codified in sections 208 and 211(3) of the Restatement (Second) of Contracts, further evidencing unconscionability's inherent flexibility.⁷⁹

Section 208 applies generally to all contracts or terms and allows a court to refuse to enforce or limit application of any contract or term that “is unconscionable at the time the contract is made.”⁸⁰ Neither section 208 nor its comments define unconscionability, apparently leaving the doctrine's definition to common law.⁸¹ Section 211(3) provides a murky standard and limits its application to standardized contracts and terms.⁸² It authorizes courts to avoid enforcement of standardized terms where the drafter “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.”⁸³ Courts, therefore, may strike terms that are “bizarre or oppressive,” usually due to deficient bargaining.⁸⁴

Section 211 therefore emphasizes flexibility and leaves courts free to find a contract unconscionable based solely on its substantively unfair terms.⁸⁵ Professor Farnsworth, as a Reporter for the Restatement (Second) of Contracts, condoned the open-ended and flexible nature of unconscionability as necessary to allow courts to use their discretion.⁸⁶ Comments to section 211 nonetheless warned that “[o]rdinarily, . . . an unconscionable contract involves other factors as well as overall imbalance.”⁸⁷ In addition,

77. PERILLO, *supra* note 9, § 29.2, at 380-81 (noting these and other “highly unreliable and unpredictable” devices courts used to avoid likely “unconscionable” contracts in equity).

78. *See id.* § 29.2, at 381.

79. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 208, 211(3) (1979). Professor Williston, lead architect of the Restatement of Contracts, explained that although judicial “paternalism” should not impede contractual liberty, courts should not enforce contracts that are “so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice.” WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 632, at 51-52 (3d ed. 1972) (quoting *Carlson v. Hamilton*, 332 P.2d 989, 991 (Utah 1958)) (internal quotation marks omitted).

80. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

81. *Brown*, *supra* note 56, at 295-96 (noting how the Restatement (Second) of Contracts' provision for unconscionability provides little guidance).

82. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1190 (1983).

83. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979)) (internal quotation marks omitted) (discussing unconscionability formulation).

84. *Id.* at 1191 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1979)).

85. RESTATEMENT (SECOND) OF CONTRACTS § 211 & cmt. f (1979); Rakoff, *supra* note 82, at 1191 (discussing the Restatement (Second) of Contracts' provision for unconscionability).

86. Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1424-25 (2005) (highlighting Professor Farnsworth's defense of justice in the Restatement).

87. *See* Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 525, 559 (David B. Wexler & Bruce J. Winick eds., 1996) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c and explaining its requirement that both the bargaining process and the resulting terms are oppressive or otherwise unfair) (internal quotation marks omitted).

although section 211(3) seems to place the unconscionability focus on the drafters' expectations, many courts focus instead on whether a term is within the reasonable expectations of the non-drafting party.⁸⁸ Courts often ask whether form terms in sellers' contracts comport with consumers' "reasonable expectations" based on experience, fairness, "or some other dimension of morality."⁸⁹

Common law unconscionability, thus, has evolved in the shadows of a rigid rule of law that emphasized clear contract enforcement.⁹⁰ This flexible doctrine has survived despite dominance of formalism and dogma denouncing inquiry into the fairness of exchange.⁹¹ It also has remained flexible in the Uniform Commercial Code (U.C.C.), despite proposals for its containment.⁹² Indeed, it continues to allow courts to grant relief from contracts that appear consensual but are not in fact the products of real choice.⁹³

C. U.C.C. Section 2-302's Incorporation of Unconscionability in Commercial Law

The U.C.C.'s incorporation of unconscionability also is a testament to the defense's safety net function. The U.C.C. is the product of a joint effort of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) to formalize rules, standards and norms for commercial dealings.⁹⁴ U.C.C. Article 2 governs the sale of goods, and section 2-302 of this Article codifies the concept of unconscion-

88. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 119-21 (2003) (noting that "no generally accepted tests have emerged" for unconscionability).

89. See Catherine Mitchell, *Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law*, 23 OXFORD J. LEGAL STUD. 639, 656-65 (2003) (quoting Ronald Dworkin, TAKING RIGHTS SERIOUSLY 22 (1977)) (internal quotation marks omitted) (discussing how the institutional, empirical, and normative dimensions of "reasonable expectations" provide easy manipulation that is at odds with contract law's search for "a general underlying and unifying philosophy"). This inquiry, however, has not gained general acceptance and has not produced a coherent body of precedent for drafting parties to rely on. See Maxeiner, *supra* note 88, at 120.

90. DiMatteo, *supra* note 38, at 898.

91. *Id.* (citing P.S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1, 9 (1985) (stating that courts essentially rebel against this dogma through "covert operation" of interpretation and remedial tools)). Professor DiMatteo notes that this rule flows from the role of contract as "an outgrowth of an essentially procommercial [sic] attack on the theory of objective value which lay at the foundation of the eighteenth century's equitable idea of contract." *Id.* (quoting Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 947 (1974)).

92. Carol B. Swanson, *Unconscionability Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 386-88 (2001) (noting "common criticisms" regarding section 2-302 of the U.C.C.).

93. ATIYAH, *supra* note 23, at 743 (also noting that any classical recognition of pressures on contracting parties was limited and unsatisfactory). "Commercial, economic, or social pressures may be such as to leave a person with no effective choice by the standards of modern life, yet these pressures were ignored by the classical law." *Id.*

94. HENRY D. GABRIEL & LINDA J. RUSCH, *THE ABCS OF THE UCC 1-3* (2004) (also explaining that each of the ten articles in the U.C.C. represents a different substantive area within the Code). NCCUSL and the ALI develop the "Official Version" of the Code and recommend it to the states for uniform adoption. *Id.* at 1. Each state then must adopt the Code for it to become law. *Id.*

ability.⁹⁵ This section, however, merely confirms unconscionability's flexibility and does not prescribe a formula for its application. Indeed, unconscionability's incorporation of flexible fairness norms is what led Professor Llewellyn, the Chief Reporter and architect of Article 2, to describe this section as "perhaps the most valuable section in the entire Code."⁹⁶

1. *Llewellyn's Realism Embodied in Unconscionability*

Llewellyn sought through the U.C.C. to create a regulatory scheme for commercial law that would promote market efficiency and contractual liberty as well as "the desirable social practices of merchants."⁹⁷ His realism and social sciences background also drove his quest to use norms of merchant behavior to promote fairness "that would result from balanced trade rules and equality of bargaining."⁹⁸ He believed that fair contracting builds goodwill, which, in turn, promotes prosperity and a robust market.⁹⁹

Llewellyn borrowed from "Germanist" lawyers who rejected Roman formalism and believed that "the law of any given case . . . should be decided according to the '*Natur der Sache*'—the nature of the matter" instead of systematic treatise rules.¹⁰⁰ He recognized the importance of context, commercial relations, and trade-specific standards.¹⁰¹

95. See U.C.C. § 2-302 (1962). Drafters of the U.C.C. originally promulgated Article 2 in 1957, but the amended 1962 version has become the "Official Version" adopted by most states. GABRIEL & RUSCH, *supra* note 94, at 1-2; see also Leff, *supra* note 14, at 485 n.1 (noting the transmigrations of the U.C.C. during drafting but using the 1962 version). The discussion here focuses on the 1962 version of U.C.C. section 2-302, which is the same as the 1957 Official Draft version. See also Kamp, *supra* note 9, at 276-78 (providing another recount of the drafting process for U.C.C. Article 2). By 1966, forty-eight jurisdictions had enacted U.C.C. Article 2. *Id.* at 277. In 2003, however, the ALI and ABA revised Article 2 and states are now considering its adoption. GABRIEL & RUSCH, *supra* note 94, at 2. This Article will refer to the newly revised U.C.C. Article 2 as "Revised Article 2."

96. Memorandum by K.N. Llewellyn replying to the Report and Memorandum of Task Group 1 of the Special Comm. of the Commerce and Indus. Ass'n of N.Y., Inc., on the Uniform Commercial Code (Aug. 16, 1954), in 1 STATE OF N.Y., REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 106, 121 (1954) [hereinafter N.Y. LAW REVISION COMM'N].

97. Kamp, *supra* note 9, at 282-83 (also noting Llewellyn's expressed belief that the U.C.C. should promote certain "behavior sequences" that are "desirable"). As Professor Epstein noted, "a certain strong logic indicates that merchants are in fact the strongest candidates for a general regime of freedom of contract." Epstein, *supra* note 48, at 7 (explaining how concerns regarding "unconscionability, inequality of bargaining power, and exploitation of the weak and helpless" do not give rise to the arguments against contractual freedom that arise in other contexts).

98. Kamp, *supra* note 9, at 284.

99. *Id.* at 286-89.

100. James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 159-65 (1987) (explaining that "Germanist" lawyers led an intellectual rebellion against the strictures of Roman law and appreciated "Volksgeist," or soul of the people, as being alive in communal norms).

101. See Kamp, *supra* note 9, at 283-89 (noting Llewellyn's folkways concept of trade norms and how he "equated trade with tribe"); see also Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1813-14 (contrasting relational theory with classical contract law); James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 64-66 (2003) (noting that Professor Slawson's proposal that courts regulate form contracts according to trade standards and transactional context seems "eminently relational"); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 720-25 (1974) (further explaining this relational under-

Llewellyn also borrowed from Germanist Romantics by seeking to revive customary commercial law through use of lay commercial courts, instead of ordinary courts that lacked commercial understanding.¹⁰² Llewellyn proposed that such merchant tribunals would provide mercantile expertise and promote public interests.¹⁰³ He believed that these specialized courts' determination of legal and factual mercantile issues would reduce uncertainty and any improper "chiseling" that could result from merchants taking advantage of proposed rules that relaxed perfect performance standards.¹⁰⁴ He emphasized that specialized courts would be better equipped than generalist judges or juries to make mercantile judgments on questions regarding compliance with trade usage.¹⁰⁵

In this context, Llewellyn's first proposal for policing fairness focused on containment of form provisions. He thus proposed section 1-C in the 1941 draft of what later became U.C.C. Article 2 as means for allowing merchant courts to determine whether form contracts comported with commercial trade norms.¹⁰⁶ This provision targeted "a group or bloc of provi-

standing of economic exchange).

102. Whitman, *supra* note 100, at 162. In Anglo-American law, the "law merchant" and determinations by mercantile tribunals date back to the 1200s. KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 3-5 (1990). Merchant tribunals "stressed flexible informality, and, in contrast to the exchange-oriented common law, mercantile courts heard important transactions in a money economy and they recognized a variety of devices for transmitting credit." *Id.* at 3.

103. UNIFORM SALES ACT (Draft 1940) [hereinafter 1940 Draft], reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS, 381-84, 530-35 (Elizabeth Slusser Kelly ed., 1984) [hereinafter U.C.C. DRAFTS] (also explaining how tribunal members would be chosen by the parties in manner similar to current arbitrator selections); see also Kamp, *supra* note 9, at 290-93 (discussing how Llewellyn's proposed merchant juries were to decide what conduct constituted "mercantile performance," the effect "of mercantile usage, or of the usage of the particular trade," and "[a]ny other issue which requires for its competent determination special merchants 'knowledge'") (quoting SECOND DRAFT OF A REVISED UNIFORM SALES ACT § 59 (1941), reprinted in 1 U.C.C. DRAFTS, *supra* at 534) (internal quotation marks omitted). Llewellyn's merchant tribunals did comport with some Romantic thinkers who believed commercial law was a product of the merchant community and not the general populace. Whitman, *supra* note 100, at 163. Nonetheless, Llewellyn expressed a belief that merchant tribunals would promote "friendly . . . neighborly" commercial practice. *Id.* at 173 (quoting Karl Llewellyn, Memorandum to Executive Comm., Comm. on Scope and Program Section on Uniform Commercial Acts Re: Possible Uniform Commercial Code (on file at University of Chicago Law Library)) (internal quotation marks omitted).

104. Kamp, *supra* note 9, at 290-93. Llewellyn's proposal was based on the success of arbitration in particular trades but differed from arbitration as his proposed commercial courts were to remain under public control. 1940 Draft, *supra* note 103, at 381-84, 252-55 (indicating these thoughts in the Comments to section 11-A of the 1940 draft act, and also stating that Llewellyn expected determinations by merchant juries to induce settlement). Notably, Llewellyn proposed these courts in 1925, the same time Congress adopted the Federal Arbitration Act (FAA) requiring enforcement of agreements to arbitrate issues arising out of commerce. Whitman, *supra* note 100, at 167.

105. 1940 Draft, *supra* note 103, at 384, 531. Llewellyn believed that determination by specialized tribunals would provide for "speedy, reliable, and therefore reasonable and reckonable, determination of questions of mercantile fact" that underlie sales law. *Id.* at 531. It bears noting, however, that the comments also indicated that this view of juries was based on the arguably condescending assumption that juries were made up of "schoolteachers and men of crafts and trades not concerned in the case." *Id.* at 533.

106. Kamp, *supra* note 9, at 276-80, 300-03, 318-19, 346-48 (emphasizing how Llewellyn's visualization of a regulatory regime crumbled under political pressure but was the impetus for current section 2-302). Llewellyn proposed section 1-C as a means for policing the growing "machine production of transactions" through standardized contracts, and the proposal stemmed from the fear that those with

sions [that] are not studied and bargained about in detail by both parties.”¹⁰⁷ It provided that courts should examine such bloc provisions in context to determine whether they alter the sales act “in an unfair and unbalanced fashion not required by the circumstances of the trade” and without the other party’s knowledge and consent.¹⁰⁸ In this way, section 1-C targeted unintended bargains and use of form contracts to create one-sided “private codification[s].”¹⁰⁹ It sought to contain lawyers’ tendencies to draft contracts “to the absolute limit of what the law can conceivably bear.”¹¹⁰

Llewellyn’s proposal failed, however, due to political pressures and concerns for contractual freedom.¹¹¹ In its place, Hiram Thomas, a spokesman for the New York Merchant’s Association, introduced the term “unconscionability” as a limitation on remedies.¹¹² Thomas proposed: “If you are going to have some standard, let it not be pure reason. You might use ‘unconscionable’ or something the court can look at and say, this is so arbitrary and oppressive and unconscionable that we won’t stand for it.”¹¹³

This led to use of the term in the 1944 formulation of section 1-C. The new section 1-C eliminated particularized standards for form contracts and simply stated that form provisions are enforceable “unless the writing in its entirety including the form clauses is an unconscionable contract.”¹¹⁴ The 1948 and 1949 formulations continued to bar unconscionable contracts but expunged express reference to form contracts.¹¹⁵ Nonetheless, comments to

superior bargaining power would use these contracts to dictate private “legislation” governing their relations with disadvantaged parties. *Id.* at 301 (quoting KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 51 (1930)) (internal quotation marks omitted).

107. 1 UNIFORM COMMERCIAL CODE: CONFIDENTIAL DRAFTS 19 (Elizabeth Slusser Kelly & Ann Puckett eds., 1995) [hereinafter 1941 RUSA] (quoting the lengthy section 1-C, including 1-C(1)(d) providing this general recognition); *see also* Maxeiner, *supra* note 88, at 116-17 (noting how German law influenced Llewellyn’s ideas).

108. 1941 RUSA, *supra* note 107, at 20 (providing terms of 1-C(2)(a)).

109. *Id.* at 20-21. Furthermore, section 1-C allowed courts to also enforce bloc provisions that were not clearly balanced “by any circumstance which would justify treating a single provision as one of the particularized terms of the bargain.” *Id.* “[F]air expectation, in the light of the circumstances of the trade,” was to be a primary consideration in these determinations. *Id.* at 21.

110. N.Y. LAW REVISION COMM’N, *supra* note 96, at 176-78 (explaining how common law courts had been covertly rewriting contracts to avoid enforcement of these provisions).

111. Kamp, *supra* note 9, at 290, 306-08, 315-18 (noting criticism of Llewellyn’s proposals as undermining contractual liberty, and emphasizing how Llewellyn’s initially proposed “tight regulatory scheme” based on trade and merchant needs gave way to Article 2’s scheme based on “vague terms such as ‘unconscionable’ and ‘commercially reasonable’”). Hiram Thomas and others questioned Llewellyn’s faith in merchant tribunals’ ability or impetus to impartially ascertain an “objective reality” of trade custom. *Id.* at 317-18. Furthermore, many doubted the political feasibility of the merchant tribunals and whether practitioners would accept “a procedure of this sort.” *Id.* at 317. This seems surprising in light of merchants’ and practitioners’ support for the 1925 Federal Arbitration Act (FAA). Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 Minn. L. Rev. 240, 247-49 (1927) (discussing prevalence of merchant and trade arbitrations pursuant to organizations’ codes and rules, and explaining merchant support for the arbitration law that Congress enacted as the FAA).

112. Kamp, *supra* note 9, at 306-08.

113. *Id.* at 308 (quoting National Conference of Commissioners on Uniform State Laws, Fifty-Second Annual Conference 33 (1942)) (internal quotation marks omitted).

114. UNIFORM REVISED SALES ACT § 23 (Draft 1944) [hereinafter 1944 Draft], *reprinted in* 2 U.C.C. DRAFTS, *supra* note 103, at 24. The provision also gave courts express power to reform any contract found unconscionable. *Id.*

115. The 1948 draft provision, “Section 23. Unconscionable Contract or Clause,” provided: (1) If the

the 1949 version used un-bargained form provisions as examples of unconscionable contracts.¹¹⁶

2. *Drafters' Codification of Flexible Unconscionability Standards in U.C.C. Section 2-302*

In the end, political haggling produced the flexible and generally applicable U.C.C. section 2-302.¹¹⁷ The 1972 official text allows a court to refuse or limit enforcement of a contract provision that it finds "unconscionable."¹¹⁸ The provision adds that if the parties raise a genuine issue of unconscionability in their motion papers, then the parties may present evidence "as to its commercial setting, purpose and effect to aid the court in making the determination."¹¹⁹ The provision also preserves efficiency by making questions of unconscionability a matter of law for a court to determine based on circumstances at the time of contract formation.¹²⁰ This also ensures that unconscionability determinations are subject to appellate review and produce precedents to guide future courts.¹²¹

The comments to section 2-302 do not clarify the term's meaning. They merely explain that courts should use the provision to "police explicitly against the contracts or clauses which they find to be unconscionable" with

court finds the contract to be unconscionable, it may refuse to enforce the contract or strike any unconscionable clauses and enforce the rest of the contract or substitute for the stricken clause such provision as would be implied under this Act if the stricken clause had never existed. (2) A contract not unconscionable in its entirety but containing an unconscionable clause, whether a form clause or not, may be enforced with any such clause stricken. THE CODE OF COMMERCIAL LAW § 23 (1948) [hereinafter 1948 Draft], *reprinted in* 5 U.C.C. DRAFTS, *supra* note 103, at 213, 241; *see also* U.C.C. § 2-302 (1949) [hereinafter May 1949 Draft], *reprinted in* 6 U.C.C. DRAFTS, *supra* note 103, at 82. The 1948 and 1949 provisions are identical, except for the 1949 replacement of the word "Act" with the word "Article." *Id.* 116. May 1949 Draft, *supra* note 115, at cmt. 3. Revisors in 1972, however, dropped this guidance regarding form contracts in the comments to 2-302 by eliminating this warning and explaining that section 2-302 requires "minimum incidents" of sales contracts "laid down by the law as embodied in this Article." Kamp, *supra* note 9, at 325-30, 338-41 (quoting U.C.C. § 2-302. cmt. 4 but nonetheless noting that 1949 drafters dropped the General Comments to the U.C.C., which had explained U.C.C. concerns regarding form contracts and preference for enforcement of "dickered," or bargained for, terms) (internal quotation marks omitted).

117. *See* Maxeiner, *supra* note 88, at 117-18.

118. "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." U.C.C. § 2-302(1) (1972); *see also* PERILLO, *supra* note 9, § 29.3, at 385 (emphasizing that courts limit evidentiary hearings on unconscionability in order to prevent the defense from becoming "the primary dilatory defense in contract litigation").

119. U.C.C. § 2-302(2) (1972); *see also* 1 FARNSWORTH, *supra* note 3, §4.28, at 579-80.

120. U.C.C. § 2-302 (1972). Although the 1949 provision and comments indicated unconscionability is a question for the court, the provision did not specify that courts decide the issue as a matter of law based on the time of contract formation. *Compare* May 1949 Draft, *supra* note 115 (failing to state this explicitly but comments explain that unconscionability is a question for the court), *with* U.C.C. § 2-302 (1972) (stating this explicitly).

121. Any factual questions going to unconscionability are also generally for the court to decide. U.C.C. § 2-302 cmt. 3 (1972) (explaining that commercial evidence regarding context "is for the court's consideration, not the jury's"); N.Y. LAW REVISION COMM'N, *supra* note 96, at 178-79; HAWKLAND U.C.C. Series § 2-302:5 (Art. 2).

an eye toward preventing enforcement of contracts or clauses that are “so one-sided as to be unconscionable.”¹²² They emphasize “prevention of oppression and unfair surprise” but caution courts not to disturb the “allocation of risks because of superior bargaining power.”¹²³ They also provide courts with contextual guidance by including a smattering of illustrative cases, although drafters abandoned earlier delineation of problematic clauses.¹²⁴ The comments further condone flexibility by confirming that courts may exercise discretion in crafting remedies “so as to avoid unconscionable results.”¹²⁵

3. *Affirmation of Unconscionability's Flexibility in the Revised U.C.C. Article 2*

Every state except Louisiana adopted the 1972 U.C.C. Article 2 in some form.¹²⁶ In 1989, however, NCCUSL and the ALI began the fourteen-year process of revising Article 2.¹²⁷ The process produced significant changes in the model law but resulted in no change in section 2-302.¹²⁸ Despite proposals for containment or targeted consumer protections, drafters agreed to affirm the generality, flexibility, and safety net quality of unconscionability.¹²⁹

Revisers of the U.C.C. Article 2 sought to clarify and modernize sales law amidst tensions between industry and consumer interest groups.¹³⁰ Consumers proposed particularized protections from form contracts and other objectionable practices, but by the year 2000, industry groups had defeated these proposals.¹³¹ As a compromise, U.C.C. revisers reenforced the vitality

122. U.C.C. § 2-302 cmt. 1 (1972).

123. *Id.*

124. U.C.C. § 2-302 cmts. 1-3 (1972). The 1949 comments did not set forth these cases but instead explained that clauses in form contracts may be subject to an unconscionability challenge, especially when they defy accepted standards envisioned by the Code. May 1949 Draft, *supra* note 115, at cmt. 3.

125. U.C.C. § 2-302 cmt. 2 (1972) (suggesting a court may strike or limit a clause but not allowing judicial substitution of new terms).

126. GABRIEL & RUSCH, *supra* note 94, at 2.

127. *Id.* at 2 (also explaining that states are now in the process of considering whether to adopt the 2003 revised Article 2). Note that the U.C.C. is merely a proposed uniform law that states must adopt for it to have legal force. *Id.* at viii; *see also* Swanson, *supra* note 92, at 372-76 (discussing Article 2 revisions as an “Endless Process”).

128. Again, this Article's references to “Revised Article 2” indicate the 2003 revision. *See generally* GABRIEL & RUSCH, *supra* note 94, at 1-8 (discussing the revision process and the scope of Article 2). Note also that this Article briefly outlines a few consumer statutes in order to provide examples of legislative attempts to target contractual unfairness, but a comprehensive discussion of these statutes is beyond the scope of this paper.

129. *See* PERILLO, *supra* note 9, § 29.3, at 382-87; *see also* European Code of Contract Art. 140(1)(a) (Harvey McGregor trans.), 8 EDINBURGH L. REV. 1, 67 (2004) (also providing flexible rules for voiding unfair contracts deemed “contrary to public policy or morals or to a mandatory rule adopted for the protection of the general interest or for the safeguarding of situations of primary importance for society”).

130. Swanson, *supra* note 92, at 373 (emphasizing the difficulty of revising a “semi-permanent code” (quoting ALI & NCCUSL, Report and Second Draft of the Revised Uniform Sales Act (1941), *reprinted in* 1 U.C.C. DRAFTS, *supra* note 103, at 269, 301) (internal quotation marks omitted)).

131. *See id.* at 374-76 (further explaining how the process “stalled” as of the publication of this 2001

of the general unconscionability provision. They embraced the flexible provision based on findings that it “had not proven to be the unruly and fearsome creature that critics first anticipated.”¹³² They recognized that formalists’ fears had not proved to be true.¹³³

Drafters also reaffirmed the lack of a precise definition for unconscionability.¹³⁴ They rejected claims that section 2-302 had become irrelevant due to small consumer claims; the rise of arbitration and mediation; and the absence of provisions for punitive damages, attorney fees, and class actions.¹³⁵ Therefore, they declined an ABA Article 2 task force proposal targeted to augment and clarify remedies in consumer cases and fill gaps left by state consumer protection laws.¹³⁶ They also rejected a proposal similar to Llewellyn’s section 1-C, deeming merchants’ form contract terms unconscionable where the adherent was unaware of the terms that unreasonably varied from industry practice or the contract’s purpose.¹³⁷

Unconscionability, therefore, has retained its flexibility and generality despite modern attempts to curtail its functions and meaning. This result is both rational and justified in light of the doctrine’s philosophical and historical underpinnings. Indeed, scholars and policymakers have been unable to intellectualize unconscionability into a formulaic doctrine. Unconscionability should therefore survive modern formalism’s fight against flexible contract standards, and embrace its flexibility in order to serve as a safety net for protecting societal fairness norms.

II. THREATS AGAINST UNCONSCIONABILITY BY TRENDS TOWARD CONTRACT FORMALISM AND OVER OR UNDER INCLUSIVE LEGISLATION

Academic criticisms of unconscionability in the modern tide of contract formalism have pushed courts to rigidly restrain the application of unconscionability. Critics of unconscionability complain that it is too vague and

article and questioning “whether the revisions will ever become reality”). Consumers’ consolation is that Article 2 does not affect statutes providing particular protections. GABRIEL & RUSCH, *supra* note 94, at 8-11 (discussing Article 2’s application to merchant and non-merchant transactions and explaining how 2-102 and 2-108 clarify that Article 2 does not affect enforceability of consumer protection statutes).

132. Prince, *supra* note 54, at 464 & n.20 (reporting findings of the study group).

133. *Id.* at 463.

134. Swanson, *supra* note 92, at 384-85.

135. *Id.* at 377-78 (reporting and quoting drafting committee’s comments regarding the ineffectiveness of section 2-302).

136. *Id.* at 377-79 (discussing the drafters’ debate regarding consumer protections and explaining concerns that states’ consumer protection laws had not remedied the lingering problems posed by adhesion contracts).

137. *Id.* at 380-81 (explaining other revision proposals). They also rejected the Consumer/Industry Task Force proposed draft provision 2-105, which largely replicated the original section 2-302 but added special consumer protections. *Id.* at 381-84 (citing and explaining the task force proposal). They also rejected a proposal to allow a court to provide relief from a consumer contract “induced by unconscionable conduct” or where “unconscionable conduct has occurred in the collection of a claim arising from a consumer contract.” *Id.* at 382 (quoting U.C.C. § 2-105 (Revision Draft June 1999)); see also Memorandum by K.N. Llewellyn, *supra* note 103 and notes 106-110 and accompanying text (describing Llewellyn’s section 1-C).

uncertain, which leads to inefficient application that impedes contractual freedom.¹³⁸ Nevertheless, consumer and employee interest groups lament that the lack of targeted statutory protections has merged with courts' undue constraint of unconscionability to leave individuals without adequate protections from oppressive contracts. In this way, forces for and against contractual fairness threaten the vitality and flexibility of unconscionability.¹³⁹ Despite these forces, however, the doctrine should survive as a flexible consumer protection, especially because of its ability to adapt to our evolving market.

A. Courts' Constrained Analysis and Application of Unconscionability

The unconscionability doctrine has not become the wild and unwieldy beast some have feared.¹⁴⁰ Instead, courts' current constraint of the doctrine threatens its ability to serve its safety net function.¹⁴¹ Courts have become more formulaic in their applications of unconscionability. They have allowed cases of contractual unfairness to slip by due to their increasingly rigid adherence to the two-prong unconscionability analysis first suggested by Professor Arthur Leff.¹⁴²

This Leff analysis calls courts to assess whether a contract is substantively and procedurally unconscionable.¹⁴³ Substantive unconscionability focuses on whether the terms of the contract are oppressive or unreasonably one-sided.¹⁴⁴ Procedural unconscionability focuses on the bargaining process and generally involves lack of knowledge regarding terms or lack of voluntary consent due to uneven bargaining power.¹⁴⁵ Most courts require strong showings on both of these prongs for a finding of unconscionability.¹⁴⁶ Nonetheless, a few courts have tempered this by applying a sliding scale, allowing a court to require less of one prong where there is a strong showing on the other.¹⁴⁷

Procedural unconscionability requires what Professor Leff referred to as "bargaining naughtiness."¹⁴⁸ This generally occurs when a party with dis-

138. See *infra* notes 175-76 and accompanying text.

139. See *infra* note 176 and accompanying text.

140. See Prince, *supra* note 54, at 472-78 (noting circumscribed application of unconscionability).

141. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 812-13 (2004) (emphasizing slow and restrained application of unconscionability in the wake of intellectual and social developments that have stymied courts' embrace of an "unconscionability norm"); 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, 306-07, 318-19 (1995) (noting extreme rarity of more "controversial" cases applying unconscionability but condoning these cases as consistent with an economic "minimum welfare theory").

142. Prince, *supra* note 54, at 471-73.

143. *Id.*

144. *Id.* at 473-74.

145. *Id.* at 474-78.

146. *Id.* at 472.

147. *Id.* at 472-73.

148. Leff, *supra* note 14, at 539.

proportionate bargaining power over a contract partner takes advantage of that power imbalance.¹⁴⁹ Such bargaining disparity often results in “adhesion” or “take-it-or-leave-it” contracts, especially in consumer and employment contexts involving agreements among parties with unmatched economic and informational resources.¹⁵⁰ These cases usually target form or standardized contracts, drafted by powerful parties to include pro-drafter terms that accepting parties may not understand or have the power to protest.¹⁵¹ The procedural prong, therefore, comports with classical will theories of promise enforcement by considering whether a contract lacks true consent.¹⁵²

Substantive unconscionability refers to the “evils in the resulting contract.”¹⁵³ It is different from the procedural prong in that it looks beyond the parties’ contracting process to focus on fairness of contract terms.¹⁵⁴ Some therefore question the appropriateness of this prong. They propose that courts should strictly require separate and specific proof that terms “violate[] the reasonable expectations of the non-drafting party”¹⁵⁵ or are “so one-sided as to ‘shock the conscience.’”¹⁵⁶ Some scholars also ask that courts not use this as a vehicle for judging prices, although others have considered excessive price cases as prime examples of substantive unconscionability.¹⁵⁷

Nonetheless, academic cries for formalism have pushed courts to become more rigid in requiring both procedural and substantive unconscionability.¹⁵⁸ It is fashionable for courts to quickly deny unconscionability claims based on declarations that they will not grant relief from solely unfair advantage or “harsh result.”¹⁵⁹ Instead, they require both that a contract

149. Brown, *supra* note 56, at 297 (adding that courts look for evidence of oppression and surprise in the bargaining process).

150. See Ronald L. Hersbergen, *Consumer Protection*, 43 LA. L. REV. 343, 353 (1982) (explaining the Louisiana Consumer Credit Law’s attempt to define unconscionability in terms of oppression that undermines a consumer’s consent); Timothy Patton, *Case Law Under the Texas Deceptive Trade Practices—Consumer Protection Act*, 33 BAYLOR L. REV. 533, 540 n.48 (1981) (defining unconscionable action or course of action in terms of contracting practices which take unfair advantage of consumers’ lack of knowledge or experience).

151. Brown, *supra* note 56, at 297.

152. See ATIYAH, *supra* note 23, at 405-08 (discussing will theory at the heart of classical contract-as-promise enforcement).

153. Leff, *supra* note 14, at 487.

154. *Id.* at 539-40.

155. John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 968 (1969).

156. *Kinney v. United Healthcare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 353 (Cal. Ct. App. 1999) (quoting *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 482 (Cal. Ct. App. 1996)) (internal quotation marks omitted).

157. See Brown, *supra* note 56, at 298-99 (noting these as the “more common” cases and gathering examples); Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1820 (1994) (stating that courts require both procedural and substantive unconscionability but emphasizing “price unconscionability” as a “special subclass of this doctrine” allowing courts to protect consumers from “extortionate prices”).

158. See Brown, *supra* note 56, at 296-98 (explaining the “two prongs” of Leff’s accepted analysis).

159. PERILLO, *supra* note 9, at 391-93 (emphasizing that uneven bargaining or “[t]he mere fact that there is a lack of equivalence between the performances of the parties does not even get close to the

is scarred by “an absence of meaningful choice on the part of one of the parties” as well as terms that “are unreasonably favorable to the other party.”¹⁶⁰ Moreover, the contract must be badly scarred in both ways.¹⁶¹ A bad blow in the bargaining process is not sufficient if it merely leaves a bruise on the contract terms.¹⁶² The terms must be “grossly unfair” or “glaringly noticeable, flagrant, complete and unmitigated.”¹⁶³

In some cases, this will allow a court to find a price disparity oppressive if it exceeds at least two to one.¹⁶⁴ One court, for example, found a consumer's purchase price of \$1,145.80 for an appliance excessive where the seller's cost for the appliance was \$348.¹⁶⁵ Similarly, a California Court of Appeals found a 200% per annum interest rate on a loan secured by a consumer's residence procedurally and substantively unconscionable, where the lender imposed the rate on the consumer when he needed the money to pay for the medical expenses of his ailing parents living in Peru.¹⁶⁶ The rate was ten times the prevailing rate for similar loans, and it had driven the original \$4,000 debt up to \$390,000 in twenty months.¹⁶⁷

Despite these cases, however, the evidence indicates that most courts quickly deny such unconscionability claims.¹⁶⁸ For example, a search in the

establishment of unconscionability”); *see also* John N. Adams, *Unconscionability and the Standard Form Contract*, in WELFARISM IN CONTRACT LAW 230, 233-34 (Roger Brownsword et al. eds., 1994) (describing the theory as a “species of duress” based on the notion that “a person should not be prejudiced by a contract which, in effect, has been forced on him”).

160. PERILLO, *supra* note 9, § 29.4, at 387 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)) (internal quotation marks omitted).

161. *Kinney*, 83 Cal. Rptr. 2d at 352 (noting the sliding scale analysis courts sometimes use for unconscionability but explicitly requiring both procedural and substantive unconscionability); Stempel, *supra* note 141, at 795 (citing *Kinney* in questioning whether courts always require both prongs of the analysis).

162. *See* Prince, *supra* note 54, at 471 (reporting general consistency of courts' unconscionability analysis); Stempel, *supra* note 141, at 794, 841 (finding considerable acceptance of Leff's unconscionability analysis and that most courts require both procedural and substantive unconscionability).

163. James M. “Jamie” Parker Jr. et al., *A Rose Is a Rose Is a Rose—or Is It? Fiduciary and DTPA Claims Against Attorneys*, 35 ST. MARY'S L.J. 823, 852 (2004) (quoting *Latham v. Castillo*, 972 S.W.2d 66, 72 (Tex. 1998) (Owen, J., dissenting)) (internal quotation marks omitted).

164. Spanogle, *supra* note 155, at 968-69. This comports with the civil law's *lassio enormous*, which contributed to the development and meaning of unconscionability in modern contract law. *See* Prince, *supra* note 54, at 466-70 (discussing unconscionability's evolution).

165. *Brown*, *supra* note 56, at 299-300 (gathering cases, including one in which a court found a sales price of \$2,568.60 overly harsh where the wholesale value was \$959).

166. *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 846-51 (Cal. Ct. App. 1991) (also finding that the consumer signed the note for his father, Jorge Sr., who needed the money to cover his parents' medical expenses and the lender had agreed not to record the deed of trust on the residence); *see also* Prince, *supra* note 54, at 464-66 (finding that California courts have been less restrained than others in applying unconscionability); *Kohl v. Bay Colony Club Condo., Inc.*, 398 So. 2d 865, 867-69 (Fla. Dist. Ct. App. 1981) (finding that a class action complaint could sufficiently allege unconscionability but noting courts' indications to the contrary and emphasizing the difficulties the class will have in attempting to prove unconscionability at trial).

167. *Carboni*, 2 Cal. Rptr. 2d at 846-51.

168. *See* PERILLO, *supra* note 9, at 392 (highlighting rarity of “s.U.C.C.ess” on unconscionability claims); Hunter, *supra* note 38, at 169-70 (concluding that courts apply section 2-302 sparingly to cases evidencing both procedural and substantive unconscionability); Posner, *supra* note 141, at 306-07, 318-19 (noting extreme rarity of more “controversial” cases applying unconscionability); Stempel, *supra* note 141, at 812-13 (emphasizing slow and restrained application of unconscionability due to reluctance to embrace an “unconscionability norm”).

“ALLCASES” database on Westlaw for federal and state cases involving unconscionability reported between January 1, 2004, and January 1, 2005, revealed only thirty-three cases in which courts allowed unconscionability claims to proceed or even survive summary judgment.¹⁶⁹ Furthermore, the courts invalidated the contracts in only seven of these cases, while the courts in eighteen of the cases limited the remedy by enforcing the contracts without the offending provisions.¹⁷⁰

The rarity of successful unconscionability claims is also supported by another commentator’s survey of federal cases in the early 1980s.¹⁷¹ He found that of the thirty-three cases involving U.C.C. section 2-302 reported during that time, only one case clearly accepted the unconscionability claim.¹⁷² Of course, these surveys of reported cases do not capture cases that were settled or unreported.¹⁷³ Case searches, however, do help attorneys predict likely outcomes of their clients’ claims and may dissuade them from representing claimants in unconscionability cases.¹⁷⁴ This, in turn, weakens the doctrine’s vitality.

B. Chief Criticisms of Unconscionability

Despite evidence of courts’ restrained application of unconscionability, commentators continue to critique the doctrine’s flexibility. Modern formalists complain that unconscionability threatens contractual liberty and conflicts with will theory at the core of classical contract law.¹⁷⁵ They also urge that unconscionability’s lack of precise definition creates uncertainty, which gives way to inefficient economic exchange.¹⁷⁶ Meanwhile, consumer protection advocates also criticize the imprecision of unconscionability. They

169. The search in the ALLCASES database on Westlaw on Feb. 11, 2005, used the following query: “DA(AFT 01/01/2004) & DA(BEF 01/01/2005) & SY(UNCONSCION!).” The total result was 151 cases, of which 105 involved contractual unconscionability. See Search Conducted by Timothy O’Neil, Research Assistant to Professor Amy J. Schmitz (Feb. 11, 2005) (on file with author).

170. *Id.* Notably, most of these cases concerned arbitration provisions, the current hotbed for unconscionability claims. See Stempel, *supra* note 141, at 757-860 (generally addressing prevalence of unconscionability claims as means for attacking arbitration agreements).

171. See James Wm. Johnson, *Unconscionability and the Federal Chancellors: A Survey of U.C.C. Section 2-302 Interpretations in the Federal Circuits During the 1980’s*, 16 LINCOLN L. REV. 21 (1985) (reviewing application of the unconscionability doctrine in the federal circuit courts).

172. See *id.* (finding that the courts in twenty-two of the cases rejected the unconscionability claims, and of the seven cases involving motions for summary judgment on the unconscionability claims, four were allowed to proceed).

173. See Darr, *supra* note 157, 1842-43.

174. *Id.* (reporting findings regarding case search and explaining limits and utility of such searches).

175. Feinman, *supra* note 10, at 15-17 (discussing return to rigid insistence on freedom of contract and resistance to reviewing bargains for fairness).

176. See Posner, *supra* note 141, at 318-19 (describing unconscionability as a law “restricting freedom of contract” but finding the restriction justified by its “function of countering distortions produced by the welfare system”); Stempel, *supra* note 141, at 764 (noting “[l]aw and economics criticisms of the doctrine focused on the potential inefficiencies of ad hoc judicial interference with contract terms”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 105-15, 142-43 (1997) (discussing his and other scholarly criticisms of courts’ unconscionability analysis and application).

claim that targeted consumer protection legislation could better address predatory contracts.¹⁷⁷ Some, nonetheless, also promote proactive and progressive application of unconscionability in order to prevent contractual misconduct that continues to thrive, especially in consumer and employment contexts.¹⁷⁸

1. *Revived Formalism and Individualism in Contract Law and Scholarship*

Current trends in contract law and scholarship emphasize enforcement of contracts as written and denounce “the tug to a more paternalistic conception” of courts’ role in policing contracts.¹⁷⁹ Scholars within these movements suggest that strict enforcement and formulaic rules foster certainty. They argue that this promotes the parties’ long-term interests and efficient distribution of resources for the public at large.¹⁸⁰ They also reject moral or ethical inquiry in contract law.¹⁸¹ They urge that contract law should ignore fault because subjective standards of fairness frustrate commercial certainty.¹⁸²

This also coincides with criticisms that the unconscionability doctrine’s lack of definition threatens individualism by allowing parties to evade their

177. See Stempel, *supra* note 141, at 763-64, 840-41 (discussing prevailing hostility to judicial intervention in contractual liberty and “unconscionability’s fall from grace,” and noting how supporters of “greater paternalism in policing contracts” have also shunned broader judicial application of unconscionability).

178. See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 13-18 (2002) (discussing various expansions of the unconscionability doctrine in the context of consumer form contracts); 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, 960-62 (1986) (suggesting the use of the implied covenant of good faith and fair dealing in conjunction with unconscionability in consumer credit analysis).

179. *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 524 (7th Cir. 1986) (Posner, J.).

180. Brian Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QUINNIPIAC L. REV. 715, 717 (2000) (noting how the works of law-and-economics theorists suggest that presumed enforcement of “adhesion contracts” may be in “the long-term interests of those who sign” them).

181. See *id.* at 720-21 (suggesting that contracts scholars fail to “dig[] down as deep as one might into the moral question: why, or under what circumstances, should ‘consent’ justify state enforcement of agreements?”). It would be inefficient for every court “to consider the deep questions of moral justifications of consent” in every case. *Id.* at 720. Furthermore, any critique of presumed enforcement must be careful to consider whether another approach will have “better or worse” long-term effects. *Id.*; see also Eisenberg, *supra* note 29, at 744-48 (discussing “the bargain principle,” which assumes courts should not question the substantive fairness or adequacy of consideration for contracts).

182. See, e.g., Bridwell, *supra* note 25, at 1529-31 (proposing that courts rely on negative, instead of positive, freedom in assessing unconscionability under U.C.C. section 2-302 in order to prevent courts from “decid[ing] cases based on intuitive conceptions of fairness”); Epstein, *supra* note 24, at 294-95 (proposing that unconscionability not “allow courts to act as roving commissions to set aside those agreements whose substantive terms they find objectionable” but instead be used “only to facilitate the setting aside of agreements that are as a matter of probabilities likely to be vitiated by the classical defenses of duress, fraud, or incompetence”); see also Jack Beatson & Daniel Friedmann, *Introduction: From ‘Classical’ to Modern Contract Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 3, 13-14 (Jack Beatson & Daniel Friedmann eds., 1995) (explaining how commentators have used these same arguments in denouncing the public policy defense).

contracting choices.¹⁸³ Such critics argue that the unconscionability doctrine conflicts with classical contract principles focused on promise enforcement.¹⁸⁴ Some worry, albeit without empirical support, that courts will use unconscionability to free parties from contract commitments regardless of whether the parties deliberately entered into the contract, or the agreement as a whole served the parties' interests at the time of contracting.¹⁸⁵

Individualism also accepts people's rights to pursue their own self-interests through contracts and rejects imposition of limits on these rights that reflect any particular vision of justice.¹⁸⁶ Critics accordingly allege that unconscionability infringes on this individualism by allowing judges to use the doctrine as a vehicle for imposing their own subjective notions of justice.¹⁸⁷ They fear that judges rely on their personal values in applying unconscionability because there are no objective measures for what is a "just term" or "just price."¹⁸⁸ They argue this leaves judges to make unconscionability determinations based on what makes their "pulses race or their cheeks redden, so as to justify the destruction of a particular provision."¹⁸⁹

In reality, however, these fears of unconscionability have not come to fruition. Judges are quite qualified to apply societal fairness norms as humans who interact in society. Human existence provides them with better understanding of such norms than of complex formulaic rules. Indeed, drafters of U.C.C. section 2-302 condoned the doctrine's dependence on judicial discretion by codifying the flexible standard of "so one sided as to be unconscionable."¹⁹⁰ Furthermore, drafters' use of the word "oppression"

183. See generally Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 776-83 (1985) (explaining how individualism is the underlying ideology of classical and contemporary contract law and discussing its rejection of "any social organization that seeks to impose a particular vision of the good above all others").

184. Epstein, *supra* note 24, at 293 (noting the classical focus on strict enforcement of bargained terms); see also Horowitz, *supra* note 178, at 942 n.14 (noting how courts have rarely applied unconscionability based solely on substantive unfairness).

185. Kamp, *supra* note 9, at 335. Courts have very rarely applied unconscionability in those cases, however, because it defies traditional contract theory to void a harsh term that served the parties' interests at the time of contracting. *Id.* (also noting how it would be impossible to gather all the examples of different contract clauses that raise unconscionability issues).

186. Rosenfeld, *supra* note 183, at 778-79 (noting Rawls's conception of individuals as self-interested and emphasizing individualism's "strict neutrality among the various individual conceptions of the good").

187. See Brown, *supra* note 56, at 287-89 (discussing the U.C.C. and the courts' attempts to define unconscionability and the resulting difficulty in predicting its use); Leff, *supra* note 14, at 516 (finding that U.C.C. section 2-302's failure to provide guidance regarding unconscionability's meaning shifted courts' focus to their own notions of fairness); Rosenfeld, *supra* note 183, at 779-804 (discussing how even adherents to individualism have different conceptions of distributive and commutative, or compensatory, justice); Schwartz, *supra* note 176, at 105-15, 142-43 (noting how most contracts scholars criticize courts' haphazard analysis and application of the unconscionability doctrine).

188. Epstein, *supra* note 24, at 306.

189. Leff, *supra* note 14, at 516.

190. *Id.* at 498 (quoting UNIFORM COMMERCIAL CODE OFFICIAL DRAFT § 2-302 cmt. 1 (1952)) (internal quotation marks omitted) (noting how drafters' early comments revealed their equivocal description of "bargaining vice" as "a failure of discussion, a failure of bargaining and a failure to have one's attention 'directed specifically' to a clause"). Professor Leff concluded in 1967 that U.C.C. section 2-302's ambiguity highlighted that "it is easy to say nothing with words." *Id.* at 559.

in the comments confirmed the provision's flexibility.¹⁹¹ They essentially concluded that the doctrine must remain general, flexible, and discretionary in order to serve its purpose.¹⁹² Formalism should not squelch unconscionability's concern for equity and justice.¹⁹³ Unconscionability's flexibility should remain its greatest attribute.¹⁹⁴

2. *Unconscionability's Alleged Counter-Efficiency Effects*

Economics scholars also have advanced formalism in contract law as means for fostering efficiency.¹⁹⁵ They argue that courts' use of unconscionability to scrutinize consumer transactions can hinder freedom of contract and unduly interfere with fluidity and innovation of a market economy.¹⁹⁶ They assume that buyers and sellers make rational contracting choices that will lead to inclusion of efficient terms in both negotiated and standardized contracts.¹⁹⁷ They further propose that merchants' fears of courts' unpredictable determinations of unconscionability may cause them to avoid transactions with those likely to assert unconscionability claims.¹⁹⁸ They also warn that such unpredictability augments dispute resolution costs that merchants pass on to consumers through increased prices and decreased quality.¹⁹⁹

In an effort to justify these criticisms, these commentators focus on alleged activism of some courts. One scholar, for example, highlights California courts' reputation for assessing substantive unconscionability based on

191. See *id.* at 499-500 (emphasizing how generalized reference to "oppression" leaves undecided whether unconscionability focuses on procedural or substantive unfairness).

192. See Brown, *supra* note 56, at 288 (arguing that courts "continue to manipulate the unconscionability principle in order to reach the equitable results they desire" and have only been consistent with respect to "the lack of any consensus as to how the section should be applied").

193. See Bix, *supra* note 180, at 722-25 (proposing that we consider the "tradeoffs of less efficiency for more fairness or justice" and concluding that economics is "only a tool," whereas "[j]ustice, in all of its infuriating vagueness, remains the ultimate goal"); DiMatteo, *supra* note 38, at 898; see also Mitchell, *supra* note 89, at 664-65 (critiquing how courts approach "reasonable expectations" in contract law and concluding that courts should be alert to "perennial problems for contract law—the balance to be struck between freedom and regulation, procedural rights and substantive rights, the place of moral principles in contract law").

194. Mitchell, *supra* note 89, at 664-65; DiMatteo, *supra* note 39, at 304 (also concluding that "[f]reedom of contract's reign during the early part of the twentieth century was never without limits"); see also European Code, *supra* note 129, at 67 (stating "a contract is void . . . if it is contrary to public policy or morals").

195. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 842-44 (2003) (noting how "[e]conomics has been better at deflating standard explanations for unconscionability and related doctrines than at explaining these doctrines").

196. *Id.* at 842-45.

197. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204-06, 1243-44 (2003) (discussing law-and-economics's assumptions regarding consumer rationality and proposing that "buyers are boundedly rational rather than fully rational decisionmakers," and therefore market forces often will lead to inefficient terms in sellers' form contracts). Professor Korobkin points out that buyers do not make fully rational contracting choices, often because they do not expend the time and resources necessary to maximize the accuracy of their choices. *Id.* at 1222-25.

198. *Id.* at 1244.

199. *Id.* at 1206.

hindsight and for its use of reformation remedies in unconscionability cases.²⁰⁰ Some see such use of reformation as improper judicial contract drafting. These stories, in turn, lead to accusations that unconscionability is an inconsistent “slippery animal” that must be tamed.²⁰¹

Some scholars further propose that unconscionability’s lack of clarity destroys its value.²⁰² They therefore invite courts to abandon unconscionability and limit their fairness review of contracts to procedural facts under formulaic defenses.²⁰³ Professor Epstein, for example, argues that application of unconscionability in a substantive sense undercuts contractual liberty “in a manner that is apt to do more social harm than good.”²⁰⁴ He concludes, “The difficult question with unconscionability is not whether it works towards a legitimate end, but whether its application comes at too great a price.”²⁰⁵ Judge Posner further proposes that “[e]conomic analysis reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract.”²⁰⁶

These and other efficiency arguments have energized formalism movements, and it is beyond the scope of this Article to discuss and respond to the full panoply of these arguments. Instead, this Article emphasizes that unconscionability’s philosophical and historical underpinnings justify its flexibility regardless of whether it comports with formalist and efficiency theories. Indeed, flexibility is a key strength of unconscionability that transcends economic efficiency goals.²⁰⁷

3. *Claims Unconscionability Fails to Fix Contractual Wrongs*

In contrast to these critics of contract regulation, other commentators assert that unconscionability does not go far enough in regulating contracts. Some commentators critique courts’ failures to more proactively use the defense to adequately redress bargaining inequities, especially in consumer

200. Prince, *supra* note 54, at 465 (finding that “California courts have been both less restrained and more inconsistent than courts in other jurisdictions in applying the unconscionability doctrine”).

201. Brown, *supra* note 56, at 306 (reporting Professor Rofes’s reference to unconscionability as a “slippery animal” and his warning to use unconscionability “only as the last line of argument”).

202. *Id.* at 306-07.

203. *Id.*

204. Epstein, *supra* note 24, at 315 (further concluding that “the lofty perspective of public policy” does not justify unconscionability in light of overriding policy supporting contractual liberty).

205. *Id.* at 303-05 (proposing that unconscionability should be strictly limited, perhaps legislatively, in order to minimize application costs); see also Bridwell, *supra* note 25, at 1528-31 (proposing that courts should apply unconscionability with reference to negative freedom in order to confine their considerations to external factors, which would “allow[] clear precedent to develop”).

206. Adams, *supra* note 159, at 236 (explaining “the rationale behind the ‘market-individualist’ paradigm”).

207. See Epstein, *supra* note 24, at 304 (stating unconscionability’s flexibility is necessary because it is “difficult to identify in advance all of the kinds of situations to which it might in principle apply”). Instead of rehashing the depths of the efficiency debate, this Article merely summarizes some reasons why flexible application of unconscionability does not necessarily hinder efficiency, and highlights unconscionability’s function as a flexible safety net for catching contractual unfairness.

and employment contexts.²⁰⁸ They lament courts' eager rejection of unconscionability challenges of remedy limitation, loan acceleration, and other arguably anti-consumer provisions in form contracts.²⁰⁹

In addition, many consumer advocates reject courts' modern embrace of form contracting as a means for fostering efficient exchange.²¹⁰ They question the justification of such forms based on "'social' goals of a somewhat communitarian or even redistributive nature."²¹¹ They note that form contracts have become unreadable, adhesive, and nonnegotiable.²¹² They therefore lament courts' rigorous application of Leff's two-prong test and enforcement of form contracts on an assumption that adhering parties have the opportunity to read them.²¹³ They further observe that courts do not question whether the adhering parties truly assented to form terms.²¹⁴

This has led some commentators to propose consumer protection legislation or more proactive use of contract defenses to police harsh bargaining.²¹⁵ Some add that courts should apply these defenses with a presumption *against* enforcement of form contracts.²¹⁶ One scholar emphasizes that such reversal of classical law is necessary because courts' use of unconscionability and other common law defenses inevitably fails if courts assume enforceability based on appearance of acceptance per a signed form.²¹⁷ Simi-

208. See, e.g., Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 12-20 (2003) (arguing that unconscionability and other contract defenses do not adequately redress and deter bad bargaining behavior, and therefore, a new tort should be developed to provide needed remedies); Korobkin, *supra* note 197, at 1275-85 (explaining how some form contract provisions are inefficient products of bad bargaining behavior).

209. E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222-25 (1990) (highlighting "the trend disfavoring the unconscionability defense" and concluding that the attempt to expand the defense was "noteworthy mainly for its lack of success"); see also *Martin v. Peoples Mut. Sav. & Loan Ass'n*, 319 N.W.2d 220, 229-30 (Iowa 1982) (rejecting an unconscionability attack on a due-on-sale clause in an adhesion loan contract).

210. This may be why most commentators' complaints regarding proactive application of unconscionability focus on pre-1980 cases. See, e.g., Bridwell, *supra* note 25, at 1523-28 (critiquing courts' application of unconscionability in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), and other consumer cases in the 1960s and 1970s, as improperly imposing "positive freedom" by applying unconscionability based on what the parties should have agreed to).

211. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 774 (2002) (highlighting courts' "U-turn" back to classical formalism).

212. *Id.* at 768-75 (also discussing tensions regarding consent caused by proliferation of form contracts imposed on consumers without power to negotiate the terms).

213. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 233-35, 255-56, 262-63 (2002) (emphasizing courts' failure to redress oppressive or unreasonable consumer contracts due to rigid adhesion to Leff's two-prong test).

214. Knapp, *supra* note 211, at 771-75.

215. HILLMAN, *supra* note 54, at 133-35 (discussing the U.C.C. drafters' inclusion of section 2-302 to combat courts' covert application of seemingly neutral contract devices to police contracts); Morant, *supra* note 19, at 112-13 (emphasizing the need to flexibly apply equitable contract defenses to account for bias, unfairness, and other harsh bargaining realities).

216. See Rakoff, *supra* note 82, at 1180-83, 1282-84 (discussing the lack of real choice in accepting standard form contracts and proposing that courts should, therefore, no longer begin their analysis of these contracts with the presumption that they are valid); Bates, *supra* note 178, at 22-25 (characterizing Rakoff's approach as a proposal to shift the burden to businesses to justify enforcement of standard form contracts they impose on consumers and approving this shift as an initial step in improving analysis of these form contracts).

217. Rakoff, *supra* note 82, at 1180-83, 1190-97, 1283-85.

larly, another scholar argues that courts' lax use of unconscionability to regulate fairness of consumer contracts warrants creation of an administrative regime for this important task.²¹⁸

Still, there are others, like myself in this Article, who propose courts should resist the "excessive formalism" that has prevented courts from more flexibly policing unreasonable form contract terms.²¹⁹ Some scholars add that courts should more vigilantly police form contracts in order to curb companies' oppressive use of these contracts.²²⁰

Professor Morant builds on this assertion by proposing that Dr. Martin Luther King's contract philosophy would have promoted courts' contextual application of unconscionability.²²¹ He proposes that a "Kingian" approach would invite courts to flexibly apply unconscionability in order to adequately acknowledge the inequalities of bargainers and negotiations.²²² This would include evaluating the human dynamics, idiosyncrasies, and perceptual biases of individual bargainers.²²³

Frustrated with contract formalism, others propose that courts should craft a new tort to address bargaining inequities. One commentator argues this is necessary due to limitations on punitive and consequential damages under contract law.²²⁴ Another commentator proposes that legislators should more directly attack price discrimination as the "most unconscionable practice."²²⁵ He calls on legislators to extend the treble damage framework of other statutes to cover services and consumers.²²⁶

Policymakers involved in revising U.C.C. Article 2 also called for statutory remedies to enhance unconscionability's ability to redress abuses of adhesion contracts.²²⁷ During the Article 2 revision process, consumer groups advocated more direct regulation of merchants' use of form consumer contracts.²²⁸ They asserted that this was necessary to address merchants' overreaching, and they rebuffed industry representatives' findings of few reported cases of oppressive form contracts.²²⁹ They explained that

218. Bates, *supra* note 178, at 28-30.

219. See White & Mansfield, *supra* note 213, at 233-35, 255-56, 262-63.

220. Knapp, *supra* note 211, at 775 (also noting the increased danger of oppression through Internet contracting).

221. Morant, *supra* note 19, at 108-10 (proposing that unconscionability "would easily accommodate" consideration of all these bargaining realities but that application of such doctrines has been too rigid to embrace this potential).

222. *Id.* at 110-13.

223. *Id.* at 112; see also Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1405-07, 1442-59 (1984) (critiquing unconscionability's restrained application in family law and proposing that courts more closely police substantive fairness of spousal agreements).

224. Marrow, *supra* note 208, at 53-62 (nonetheless acknowledging that the tort should only apply where a court also finds unconscionability).

225. Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 373-75, 380-83 (2002).

226. *Id.* at 382-83.

227. Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 UCC L.J. 115, 145 (1999).

228. See *id.* at 125-27.

229. See *id.* at 144.

these reports ignored the many cases consumers never file or settle due to high litigation costs, mandatory arbitration provisions, small dollar amounts, and courts' reluctant attitudes toward unconscionability claims.²³⁰ U.C.C. drafters nonetheless reaffirmed the role of unconscionability in catching cases of contractual unfairness and rejected proposed form contract provisions.²³¹

Meanwhile, states' attempts to legislate fairness standards have produced mostly fragmented and piecemeal statutes that tend to be under and over inclusive.²³² They assume the unfairness of certain consumer contracts and overlook inequities in other contexts.²³³ For example, Alabama has adopted fragmented statutory requirements for advertising or labeling catfish products.²³⁴ Similarly, Arkansas has enacted specific contracting and cancellation requirements for health spa memberships,²³⁵ and Florida has provided guidelines ensuring proper labeling of used watches.²³⁶ Colorado mandates that contracts for dance lessons include specific disclosures and cancellation policies in bold-faced type,²³⁷ and Arizona targets extended financing, long-term commitments, and other "prohibited provisions" in contracts for dating referral services.²³⁸

Because these statutes narrowly target certain contracts, they fail to provide a sufficiently general safety net to catch contractual unfairness. Rigid legislative nets also leave gaps that merchants may manipulate by drafting contracts to the edge of permissible practice. They also allow merchants to evade consumer protections through choice of law clauses designating the law of states that strictly enforce form contracts.²³⁹ In this way,

230. *See id.*

231. *See id.* (concluding with respect to the debate that "[t]he absence of reliable and objective empirical research on the issue stymies attempts to reach a workable solution as neither side acknowledges the validity of the other side's world view"); *see also supra* notes 126-37 and accompanying text (discussing the revision process).

232. Swanson, *supra* note 92, at 378 (discussing how the committee revising Article 2 noted gaps left by piecemeal consumer protections).

233. "Unfair" contracts may exist in any context. I focus on the consumer context solely because it has been a particularly problematic area for unconscionability and the subject of Article 2 debate.

234. ALA. CODE § 2-11-33 (1999).

235. ARK. CODE ANN. §§ 4-94-101 to -109 (2001).

236. FLA. STAT. ANN. § 501.925 (West 2006); *see also* GA. CODE ANN. § 43-4A-16.1 (2005) (outlining specific terms that must be included in contracts between agents and athletes); N.C. GEN. STAT. § 66-74 (2005) (defining and prohibiting unfair trade practices in the diamond industry).

237. COLO. REV. STAT. ANN. § 6-1-705 (West 2002 & Supp. 2005) (outlining deceptive trade practices with regard to the advertisement, sale, or performance of dance studio services).

238. ARIZ. REV. STAT. ANN. § 44-7154 (2003) (prohibiting certain provisions and sales practices with respect to contracts for dating referral services); *see also* 815 ILL. COMP. STAT. ANN. 420/4 (West 1999) (requiring certain disclosures be made to those who purchase trips from travel promoters). Some states have enacted broad and comprehensive consumer protection laws. Mississippi, for example, prohibits a long list of "unfair or deceptive trade practices." MISS. CODE ANN. § 75-24-5 (2000 & Supp. 2005); *see also* N.M. Stat. Ann. § 57-12-3 (LexisNexis 2000) (providing a broad attack on unfair or deceptive and unconscionable trade practices).

239. *See* Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1387-90 (2001) (noting courts generally enforce forum selection clauses and that cases protecting consumers from manufacturers' contractual specifications of applicable law "are the exception rather than the rule").

merchants may effectively contract out of a state's consumer protection laws.²⁴⁰ Although some courts may deny or limit enforcement of such choice of law clauses, others eagerly enforce these provisions as means for facilitating national and international commerce.²⁴¹

Courts and commentators therefore continue their love-hate debate regarding fairness in contract law. While some remain uncomfortable with flexible protection of fairness, others call for more targeted protections. The unconscionability doctrine, nonetheless, continues to weather these debates due to its flexibility and generality. Indeed, it survives due to the same characteristics that formalists attack.

III. EMBRACING UNCONSCIONABILITY'S SAFETY NET FUNCTIONS

Unconscionability should retain its flexibility and generality due to its philosophical and historical underpinnings. Fairness standards underlying unconscionability flow from natural and generalized norms of civil behavior deemed necessary to societal survival. These behavioral norms, therefore, should drive unconscionability's flexible application despite a modern resurgence of classical rigidity and resistance to fairness review.²⁴² Accordingly, this Article invites courts to resist formalist trends and use unconscionability as a safety net to catch cases of contractual unfairness that slip through more formulaic contract defenses. In doing so, this Article incorporates the Leffian two-prong test, but urges courts to loosen their increasingly rigid applications of this test to allow for more flexible analysis.

A. *Recognition and Reconceptualization of the Two-Prong Test*

1. *"Play Nice in Your Neighborhood"*

Courts should continue to ask whether a contract is the product of procedural unfairness. To use Leff's parlance, courts should ask whether "bargaining naughtiness" has tainted the agreement. This approach allows courts to ask whether contracting parties have abused their bargaining power or taken unfair advantage of other parties. Current courts, however, have unduly restrained their consideration of procedural fairness by only consider-

240. *Id.* at 1390-91 (noting this risk but proposing that courts should police use of forum selection clauses to prevent "a 'race to the bottom' effect whereby parties select jurisdictions with lax regulations in an attempt to avoid more onerous regulations in the home jurisdictions of either the seller or purchaser").

241. Nonetheless, some courts will quash a blatant attempt to evade consumer protection laws. *See* Diana D. Hagopian, *Forum Selection Clause in California*, 4 J. LEGAL ADVOC. & PRAC. 244, 246-47 (2002) (discussing *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001)).

242. *See* Feinman, *supra* note 10, at 16-17 (emphasizing the classical revival's insistence on "clear, rigid rules" over flexible standards, plain meaning interpretation, and "great freedom" to define contractual relationships without a fairness examination); *see also supra* notes 175-242 and accompanying text (discussing criticisms of unconscionability and attacks on flexible contract defenses, especially unconscionability because it allows for flexible fairness review).

ing the issue in consumer and employment cases, and overlooking relational realities in other contexts. Moreover, courts have become increasingly steadfast in their assumptions that individuals have power to negotiate or reject form agreements, especially over the Internet.²⁴³

This Article invites courts to resist these formalist trends and to question bargaining fairness in a more contextual and generalized way. This means they should openly recognize norms of "fair and open dealing," conveyed through colloquialisms such as "'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.'"²⁴⁴ Such norms of nice play, for example, may require parties to disclose material facts during pre-contractual negotiations, despite American courts' current rejection of pre-contract duties to bargain in good faith. Even English law requires certain insurers to disclose material facts regarding risk before asking insureds to sign insurance policies.²⁴⁵ Similarly, risk disclosure may also be proper in other one-sided relationships, depending on reasonable dealing standards in the relevant trade sector.²⁴⁶

Courts should recognize that contracts are true relationships among parties who owe one another different levels of play depending on their histories and circumstances.²⁴⁷ "Playing nice" therefore means different things in different neighborhoods. For example, a higher level of fair play may be proper in international dealings in order to facilitate free trade and prevent inefficient disputes.²⁴⁸ The goal should be to curb "sharp practice and oppression."²⁴⁹ This fosters voluntary compliance with contracts and public trust in the legal system. Free dealing should be fair dealing.²⁵⁰

This also means courts should resist formalist assumptions that form contracts should be enforceable simply because they have become common practice.²⁵¹ Merchant and corporate contract-drafters may successfully

243. See Geist, *supra* note 239, at 1386-90 (discussing courts' inclination to uphold Internet-based "click wrap" contracts unless shown to be unreasonable).

244. See Tetley, *supra* note 29, at 567-68 (quoting *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1988] 1 All E.R. 348, 352 (Civ.)) (internal quotation marks omitted) (explaining how civil law has recognized good faith to require more than refraining from fraud).

245. *Id.* at 580 (noting a disclosure requirement in English legislation that "goes beyond the normal requirement of honesty and fair dealing in common law").

246. This comports with the internationally accepted contract norms embodied in the Unidroit Principles, which prescribe a contextual approach towards good faith. Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 97, 152-54 (1997).

247. See Tetley, *supra* note 29, at 567-69 (explaining the civil law heritage and the meaning of good faith).

248. See *id.* at 610-11, 615 (finding that good faith has gained favor in the common law world in order to comport with civil law, promote uniformity in international trade, and prevent litigation).

249. DEVLIN, *supra* note 19, at 48.

250. See *id.* at 47 (explaining "fair dealing" under English common law as requiring "that the stronger or cleverer party shall not try to subdue or outwit the other in the making of the contract; and that a man shall not exercise arbitrarily the power given him by the contract but treat it as something to be used only to secure fulfilment [sic] of the contractual purpose" and noting that common law lawyers traditionally deemed "free dealing [as] fair dealing").

251. See Schwartz, *supra* note 176, at 107-08 (arguing that courts' case-by-case analyses of arbitration clauses often fail to consider that collective contracting undercuts consent and heavily favors the corporate defendant in the aggregate).

transform oppressive form contracts into accepted practice in their industries.²⁵² They may have monopoly power over contract terms, especially in consumer contexts.²⁵³ Ordinary citizens thus generally lose the contracting battle “on a field of unpunctuated clauses and strewn with legal jargon.”²⁵⁴ Furthermore, it is entirely unclear whether merchants pass on to consumers alleged cost-savings from using these contracts.²⁵⁵

Generalized consideration of fair play, however, should not stymie legitimate business.²⁵⁶ Instead, courts should refrain from making categorical assumptions about businesses’ dealings with consumers and employees. All such dealings do not involve unfair play.²⁵⁷ “Play nice” review should not be overly paternalistic or formulaic.²⁵⁸ It should remain generalized in order to recognize norms and needs of different bargaining neighborhoods. In this way, the analysis this Article proposes revives Llewellyn’s realism and its role in assessing unconscionability.²⁵⁹

2. “No Raw Deals”

Like the prior inquiry, “no raw deals” analysis also incorporates Leffian analysis. It requires courts to consider substantive unconscionability, which involves checking whether contract terms are unduly one-sided or oppressive.²⁶⁰ This Article’s “no raw deals” analysis departs from formalist trends, however, by condoning contextual and flexible contract review.²⁶¹ Modern formalists have pushed courts to secretly police substantive contract fairness under the guise of interpretation, assent, and other contract defenses in much the same manner as classical legal constructs caused courts to use covert tools for policing fairness.²⁶² This Article therefore reminds courts of

252. *See id.*

253. *See id.*

254. *See* DEVLIN, *supra* note 19, at 49 (noting that in the 1960s form contracts became the darling of courts and lawyers as a way of promoting economic efficiency).

255. *See, e.g.,* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 94-98 (2004) (emphasizing the lack of published studies supporting claims that companies pass on to consumers cost-savings from using arbitration clauses to eliminate class actions).

256. *See* DEVLIN, *supra* note 19, at 48.

257. *See* Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 741-42, 746-72 (explaining how arbitration clauses assumed “unfair” to consumers and others with less bargaining power are not necessarily oppressive or harmful to these groups but noting that fully informed parties may agree to such arbitration clauses).

258. *See* DEVLIN, *supra* note 19, at 48 (recognizing in the 1960s that the resurgence of protectionist legislation was becoming a “weapon” that was “more often destruction than reform” because it prohibited the making of certain contracts based on classifications).

259. *See supra* notes 97-101 and accompanying text (discussing Llewellyn’s realism and its role in Llewellyn’s conception of the U.C.C. Article 2).

260. *See* Morant, *supra* note 6, at 265-67 (noting how courts rarely use unconscionability at all and nearly never use it outside consumer contexts).

261. Darr, *supra* note 157, at 1822-24, 1832-35 (emphasizing trends supporting restrictive application of unconscionability based on excessive price); *see also* Eisenberg, *supra* note 29, at 742-46, 751-55 (proposing that contract law should be “open-textured to account for human reality”).

262. *See generally* Feinman, *supra* note 10, at 14-17 (discussing the modern renewal of formalism).

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the U.C.C. drafters' goal of shedding light on judges' concern for fairness, and invites courts to openly acknowledge the fairness review they have been doing secretly.²⁶³

This also means courts should revive Aristotelian equivalency of exchange principles that underlie unconscionability.²⁶⁴ Aristotle assumed there must be some "fairness" of values exchanged, and *laesio enormis* confirmed this principle in civil law voiding overly disproportionate price terms.²⁶⁵ Although such standards of equivalent or fair exchange are imprecise, courts can make these determinations based on the reasonable expectations of the parties to a given deal. This may require a court to ask, for example, whether a seller is imposing an excessive price on a consumer buyer who lacks knowledge or experience to realize that the price is excessive for the purchased goods or services. It also may call a court to consider whether an employer is justified in requiring its employees to become subject to a form arbitration clause that disproportionately benefits the employer. In other words, courts should consider the overall balance of benefits and burdens in light of parties' expectations in a given context.

This suggestion is not revolutionary. Although courts ostensibly denounce findings of unconscionability based on price or equivalency of exchange, they find ways to police price fairness under the guise of other contract defenses or standards of good faith.²⁶⁶ This also coincides with courts' long-standing protection of "ethical price" and "community justice" norms.²⁶⁷ One scholar, for example, found that in a survey of unconscionability cases reported from 1979 to July 1993, forty-four cases involved price,²⁶⁸ and in nineteen of these cases, the courts based findings of unconscionability on outrageous prices.²⁶⁹

Such findings also comport with economic principles to the extent that excessively high prices relative to goods or services purchased often indicate market failures.²⁷⁰ Courts, therefore, may apply unconscionability as a substitute for market correction prevented by sellers' monopoly power and purchasers' high information costs.²⁷¹ In this way, unconscionability provides courts with means for checking whether contracts are truly products of

263. See *supra* note 215 and accompanying text (explaining how drafters of U.C.C. § 2-302 included the unconscionability provision to combat courts' use of such "covert tools" to police contracting fairness).

264. See *supra* notes 31-33 and accompanying text (exploring Aristotle's contract conceptions).

265. See *supra* notes 54-60 and accompanying text (discussing civil law unconscionability notions giving rise to *laesio enormis* doctrine).

266. See Tetley, *supra* note 29, at 583-84 (discussing "reasonable expectations of honest people" as the primary substitute in English common law for more well-defined good faith rules in civil law).

267. Darr, *supra* note 157, at 1830-33, 1835-38 (finding courts continue to police price using unconscionability despite "the large amount of ink spilled in criticism" of such use of unconscionability).

268. *Id.* at 1842-44.

269. *Id.* at 1843-45.

270. *Id.* (explaining that findings of unconscionability in price cases are generally accompanied by overreaching or market failures).

271. *Id.* at 1847-49 (discussing unconscionability's legitimate check on market failures).

contractual liberty.²⁷² It also allows courts to ensure that efficient exchanges are sufficiently equal in value to prevent parties from being unjustly enriched at the others' expense.²⁷³

For example, this may mean that a court should not enforce a contract that requires a consumer to bear the risk of all loss caused by a defective product in a skewed market. As Professor Gordley has suggested, a contract may violate substantive fairness by imposing undue risk on a party with little ability to bear the risk without appropriately compensating that party.²⁷⁴ Accordingly, a waiver of liability may be unconscionable where the seller simply retains all cost savings of that waiver.²⁷⁵ The waiver may pass muster, however, where the seller offers the waiver as an option in exchange for a lower price.²⁷⁶ Courts should not blindly assume, without empirical proof, that merchants pass cost savings of one-sided form contracts on to consumers.²⁷⁷ This is especially true when merchants' monopoly power allows them to pocket these savings.²⁷⁸

This does not mean, however, that all form contracts are raw deals. Ironically, excessive formalism drives courts to make such blanket assumptions in order to avoid any substantive or contextual analysis of contracts. Furthermore, courts should not assume certain provisions, such as limitation of liability clauses, are unconscionable without truly considering the context of a given exchange.²⁷⁹ As other commentators have observed, some courts have made such improper assumptions with respect to arbitration clauses.²⁸⁰

272. *See id.*

273. Eisenberg, *supra* note 29, at 741-47 (highlighting limits of the bargain principle); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1627-37, 1649-56 (1981) (explaining why inequality in exchange is an evil to be corrected); *see also* Darr, *supra* note 157, at 1830-35 (discussing the law and economics criticism of unconscionability and explaining failures of the two-prong test in realistic markets that permit sellers to impose high prices due to information costs).

274. *See supra* note 31 and accompanying text (noting Gordley's proposal regarding who should bear risk).

275. *See* Darr, *supra* note 157, at 1832-39.

276. *See id.*

277. *See id.*

278. *See id.*

279. *See, e.g.,* Arnold v. United Co. Lending Corp., 511 S.E.2d 854, 859-61 (W. Va. 1998) (holding arbitration clause in lending agreement "inescapably" unconscionable based on assumption that arbitration clause "would unfairly defeat the Arnolds' legitimate expectations" because it required them to give up their rights to sue in court); Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co., 413 S.E.2d 670, 674-76 (W. Va. 1991) (holding limitation of liability clause in Yellow Pages' advertising contract unconscionable assuming Art's only real means for getting customers was through the Yellow Pages and citing other state courts that had held such clauses contrary to public policy); Orlett v. Suburban Propane, 561 N.E.2d 1066, 1068-70 (Ohio 1989) (holding limitation of liability clause in propane gas sales agreement and equipment lease was unconscionable in light of state policy that "attempts to excuse liability for negligence by contract are disfavored in the law"); *see also* Carbajal v. H & R Block Tax Servs., Inc., 372 F.3d 903, 906 (7th Cir. 2004) (enforcing an arbitration clause and emphasizing that courts should cease treating arbitration clauses as categorically unconscionable pursuant to a "cry of 'unconscionable!'" which "just repackages the tired assertion that arbitration should be disparaged as second-class adjudication").

280. For example, some criticize constrained application of unconscionability to certain suspect provisions, such as arbitration clauses. *See* Stempel, *supra* note 141, at 796-99.

This has even happened despite the Federal Arbitration Act's mandate that courts enforce arbitration agreements according to their terms.²⁸¹

Courts should apply unconscionability in light of relevant backgrounds and commercial needs of the exchanges at issue.²⁸² This borrows from the realism that gave life to the unconscionability doctrine in the U.C.C. and flows from philosophical and historical underpinnings of unconscionability.²⁸³ The "no raw deals" analysis should be contextual and flexible. It should not become obsolete or formulaic under formalist pressures. Such substantive unconscionability analysis allows courts to consider market limitations and relational realities. This includes consideration of how the parties' experiences and dealings in the applicable area or trade affect outcomes of enforcing the substantive terms at issue. What is reasonable in one context may not be reasonable in another context.

B. Remembering the Safety Net for Emergencies

A chief victim of contract law's rising formalism has been unconscionability's safety net function.²⁸⁴ Courts increasingly overlook the doctrine's ability to catch cases of contractual unfairness that slip through Leff's rigid two-prong analysis. Moreover, some courts use formulaic application of the two-prong test as a crutch to justify their rote denial of unconscionability claims based on classification-centric assumptions about bargaining power.²⁸⁵ Courts also twist contract interpretation and other such tools to clandestinely curb "bad" bargains instead of admitting their application of generalized fairness concerns. This Article counters these trends. It invites courts to revive unconscionability's safety net function and to openly use the doctrine in warranted cases, even where rigid application of Leff's two-prong test would not provide a remedy.²⁸⁶

1. Revival of Historical and Philosophical Functions

Unconscionability's historical and philosophical foundations justify its use as a flexible fairness safety net. The doctrine always has been at the

281. 9 U.S.C. § 2 (2000).

282. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965) (quoting comments to U.C.C. § 2-307); *see also* *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 513-14 (Cal. 1985) (remanding case for a factual hearing in order to determine whether a NSF fee of \$6 was unconscionable in light of "the commercial setting, purpose, and effect of the [bank's] signature card and the NSF charge").

283. *See* Darr, *supra* note 157, at 1847-49 (highlighting unconscionability's purpose).

284. *See id.* at 1832-33, 1840-42 (finding that strict application of the Leff two-prong test would prevent application of unconscionability in many excessive price cases because buyers usually can shop elsewhere or decide not to buy).

285. *See* *Jerry Kravat Entm't Servs., Inc. v. Cobbs*, 459 N.Y.S.2d 993, 995-96 (N.Y. Sup. Ct. 1983) (quickly rejecting music promoter's claim that musicians' union form arbitration contract was unconscionable based on assumed sophistication of commercial parties, despite conceding that the promoter would have to "chang[e] [his] line of business" to avoid the form contract).

286. *See supra* Part I.A. (discussing norms advanced by natural lawyers).

crossroads of contract's confusion between legal and moral ideas.²⁸⁷ Unconscionability has remained the prime tool for preventing enforcement of contracts that defy contractual justice despite scholars' denial of morality in contract law.²⁸⁸ Natural lawyers and U.C.C. drafters shared expectations that the doctrine would provide a safety net for protecting justice even when no formulaic contract defense would provide a remedy.²⁸⁹ Rising formalism should not squelch this safety net function.²⁹⁰ Courts should exercise their discretion to use unconscionability to flexibly police harsh bargaining and oppressive contracts.²⁹¹

This includes consideration of parties' good faith, fidelity, and honesty in negotiating and performing their agreements.²⁹² It also includes consideration of natural inclinations, which H.L.A. Hart has identified as "human vulnerability, approximate equality, limited altruism, and limited understanding and strength of will."²⁹³ Most intuitively recognize that those with power should not be permitted to take unfair advantage of those who are vulnerable due to economic position, lack of information, or other relational factors. Our natural and human inclinations are to promote some level of altruism and not simply private agendas and market proficiencies. These inclinations cannot be over-intellectualized and are not "intended to guide scientific inquiry."²⁹⁴

The safety net analysis this Article proposes celebrates these enduring inclinations. Just as humans are not programmable, their contracting behavior is not always rational or objectively understandable. Contracting is a particularly common and human legal and social activity. It is messy be-

287. Holmes highlighted this confusion in 1897 and courts continually confront it in unconscionability cases. *See supra* note 7 and accompanying text (discussing Holmes's view); *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948) (finding overall unfairness justified application of unconscionability).

288. *See Knapp, supra* note 211, at 771 (describing unconscionability as a "safety valve"); Tetley, *supra* note 29, at 561, 566-67 (emphasizing importance of good faith underpinning unconscionability principles and noting Cicero's declarations of good faith as "the foundation of justice").

289. *See Swanson, supra* note 92, at 386 ("In essence, the unconscionability doctrine provides a safety net, one that voids contracts not quite meeting the more rigid requirements of other policing devices such as duress and misrepresentation.").

290. *See, e.g., White & Mansfield, supra* note 219, at 262-63 (critiquing formalist application of the two-prong test and calling on courts to more closely scrutinize cases under a general "oppressive" or "unreasonable" standard); *see also supra* notes 140-41 and accompanying text (discussing commentators' criticisms regarding courts' narrow application of unconscionability).

291. Swanson, *supra* note 92, at 386-87 (emphasizing that the U.C.C. unconscionability provision's "lack of precision was apparently by design, and some regard it as a great source of strength, allowing for judicial discretion"); Tetley, *supra* note 29, at 566-67 (emphasizing how good faith standards such as unconscionability in Roman law sought to provide judges ample discretion to ensure "trustworthiness, conscientiousness and honourable conduct" in contract law (quoting J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 117 (1991))).

292. *See Nedzel, supra* note 246, at 154 (emphasizing how good faith has become a generally accepted norm under American law, and "civil law traditionally regards fidelity and honesty as a fundamental concept of contract law"); *see also supra* note 19 (discussing how these norms have consistently remained part of contract law).

293. *See supra* note 46 and accompanying text (discussing Hart's proposed natural law "truthisms").

294. *See Nedzel, supra* note 246, at 155 (noting how legal principles depend on abstractions).

cause life is messy.²⁹⁵ Unconscionability therefore should retain its non-formulaic quality.

2. *Utility in Addressing Evolving Market Needs*

The safety net analysis that this Article proposes also is necessary because the rigid two-prong test does not adequately address the needs of the textured and ever-changing contracting market. This task cannot be left to legislation, which has been absent or unsatisfying, since narrow, transaction-specific statutes often are so particularized that they have little value, and broad consumer protection statutes may negatively impact the consumers they seek to protect.²⁹⁶ Categorical legislation may increase prices, decrease quality, and impair overall consumer welfare.²⁹⁷ Such legislation also may reduce efficiency and contractual liberty by dictating blanket protections even where they are unnecessary.²⁹⁸

Furthermore, consumer-focused statutes overlook the bad bargaining conduct and harsh contract terms that exist in non-consumer contexts.²⁹⁹ The same is true for employment rights statutes. These laws overlook, for example, harsh contracting in exchanges between big and small businesses, although small "mom and pop" operations often fall prey to oppressive tactics and terms. Furthermore, judicial restraints on unconscionability have generally prevented courts from using the doctrine to provide relief in those cases.³⁰⁰

295. See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 267 (2000) (discussing Llewellyn's realism and attention to context in commercial law).

296. IAIN RAMSAY, CONSUMER PROTECTION 51 (1989) (questioning whether consumer protection legislation serves its goals in light of business propensities to pass the costs of protection on to consumers or exit the market, thereby denying consumers the desired commodity); Timothy J. Muris, *The Consumer Protection Mission: Guiding Principles and Future Direction*, 51 ANTITRUST L.J. 625, 631 (1982) (asserting that government initiatives in consumer protection may decrease competition and decrease overall consumer welfare); Arthur Gross Schaefer & Beverly Bickel, *Morality in the Marketplace: Consumer Protection, Regulatory Policy, and Jewish Law*, 17 LOY. L.A. INT'L & COMP. L. REV. 85, 91-94 (1994) (discussing how critics feel that current consumer legislation is expensive for consumers because they eventually pay for the additional costs incurred by businesses in complying with this legislation and contending that increased consumer protection legislation equals dangerous intrusion into the free market system).

297. See RAMSAY, *supra* note 296, at 51 (arguing that businesses pass on increased costs of consumer protections to consumers or exit the market and deny consumers desired commodities); Muris, *supra* note 296, at 631 (suggesting that consumer protection statutes may harm consumer welfare).

298. See Schaefer & Bickel, *supra* note 296, at 91-94 (discussing critique of consumer protection legislation deemed inefficient because it increases businesses' costs and intrudes into free market system).

299. See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-05, 1435 (1967) (emphasizing power imbalances and unfair contracting in employment contexts); Sharp, *supra* note 223, at 1405-07 (emphasizing that despite popular assumptions, the law has not adequately provided relief from unfair contracts in family law settings, and proposing that courts should more readily police substantive fairness of separation, divorce, and other family law agreements).

300. See Morant, *supra* note 6, at 239-44, 261-67 (discussing small business disadvantages caused by current contractual formalism).

The flexible safety net analysis this Article proposes also is timely and necessary to curb unjust contracting over the Internet (“e-contracting”).³⁰¹ Strict confinement of unconscionability to cases evidencing both procedural and substantive oppression generally prevents courts from providing relief from electronic “browse-wrap” or “click-wrap” contracts.³⁰² Browse-wrap contracts may be formed simply when a consumer accesses a web-site, whereas click-wrap contracts generally are formed when a consumer accepts terms of an e-contract by clicking a mouse on an icon or electronic button indicating such acceptance. Both types of contracts may be highly adhesive, but usually pass the Leffian two-prong test based on judicial assumptions that consumers enjoy endless choice on the Internet.

For example, the court in *DeJohn v. The .TV Corp. International* quickly concluded that DeJohn assented to .TV’s and Register.com’s domain name registration terms by clicking a box on Register.com’s website.³⁰³ The court found that clicking the box indicated acceptance to Register.com’s terms available through a hyperlink, which also incorporated .TV’s terms by reference.³⁰⁴ This finding also led the court to curtly deny DeJohn’s claims that the agreement was unconscionable based on its conclusion that the contract was not procedurally unconscionable because consumers are free to shop around on the Internet.³⁰⁵ The court therefore bypassed any consideration of the agreement’s substantive unconscionability. It did not even consider the unfairness of the terms requiring DeJohn to litigate his claims based on the same facts on opposite coasts by requiring that he sue Register.com in New York under New York law and .TV in California under California law.³⁰⁶

Most courts agree with this approach. They assume that e-contracts are not adhesive, or procedurally unconscionable, because consumers have access to information and options on the Internet.³⁰⁷ This assumption then prevents courts from going on to consider whether the contract is substantively unconscionable. Courts also have justified their rote denial of unconscionability challenges of e-contracts on popular perceptions that e-contracting promotes economic efficiency.³⁰⁸ They highlight e-contracts’

301. See Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 290-91 (2003) (finding that commercial law must be flexible to accommodate evolving business practices, such as e-contracting); see also Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 493-95 (2002) (concluding courts should supplement any legislation governing electronic contracts with unconscionability).

302. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 485-87 (2002) (explaining why electronic contracts are not adhesion contracts).

303. *DeJohn v. The .TV Corp. Int’l*, 245 F. Supp. 2d 913, 915-19 (N.D. Ill. 2003).

304. *Id.* at 919.

305. *Id.* at 919; see also Casamiquela, *supra* note 301, at 488-89 (highlighting difficulty of proving an online license unconscionable).

306. *DeJohn*, 245 F. Supp. 2d at 915-18.

307. Hillman & Rachlinski, *supra* note 302, at 470-71 (discussing enhanced ability to gather information regarding products on the Internet).

308. See Casamiquela, *supra* note 301, at 488-90 (noting courts’ emphasis on efficient risk alloca-

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assumed propensity for fostering fast and convenient exchanges domestically and internationally.³⁰⁹

This restrained efficiency-focused unconscionability analysis overlooks the importance of contractual justice and unconscionability's role in fostering that justice. In *DeJohn*, for example, a more flexible safety net application of unconscionability may have allowed a court to properly provide DeJohn a remedy and permit him to litigate his claims in one forum. The court should not have dismissed DeJohn's unconscionability claim based solely on a formulaic finding that the contract was not adhesive. Instead, the court could have used unconscionability's safety net to reform the agreement to relieve DeJohn, and the courts, from the burdens of conducting cases in both California and New York against related defendants on the same issues and disputes.

Strict adherence to the two-prong test also may improperly preclude relief in "shrink-wrap" cases, where contract terms are included in the box or shrink-wrap of the product. In *Hill v. Gateway 2000, Inc.*, for example, the Hills challenged an arbitration agreement contained in computer purchase terms that were buried among the papers that came with the computer they bought over the phone.³¹⁰ The United States Court of Appeals for the Seventh Circuit found that the Hills assented to the terms by not returning the computer within thirty days, as the terms required under an "approve-or-return" proviso.³¹¹ The court then quickly rejected the Hills' claim that the arbitration clause was invalid because it precluded class relief, curtailed their Magnuson-Moss Warranty Act remedies, and required them to arbitrate their claims before the ICC, which is headquartered in Paris.³¹² The court based its conclusion on its assumption that such approve-or-return contracting fosters efficiency and the Hills had the option to return the computer if they did not accept the terms in the box.³¹³

The *Hill* court's focus on procedural formality obscured any consideration of shipping costs and other burdens of requiring the Hills to return the computer in order to reject boxed terms. The court also overlooked the chilling effect of requiring the Hills to pay roughly \$2,000 in initial arbitration costs in order to pursue their claims regarding the purchase of a \$4,000 computer.³¹⁴ Furthermore, the court said nothing about the lack of discovery

tion).

309. *Id.*

310. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

311. *Id.* at 1149 (stating that "approve-or-return" provisions such as that in *Hill* make consumers better off "as a group").

312. *Id.* at 1148-50. *But see Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572-75 (N.Y. App. Div. 1998) (enforcing the identical *Gateway* arbitration clause but vacating the portion of the clause requiring arbitration before the ICC).

313. *See Hill*, 105 F.3d at 1148-49.

314. Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MEDIATION REP. 129, 132 (1997) (discussing the case); *see also Kloeck v. Gateway, Inc.* 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (refusing to follow *Hill* regarding enforcement of same clause); *Brower*, 676 N.Y.S.2d at 572 (analyzing identical arbitration clause).

in ICC arbitrations or the difficulties of obtaining information and communicating with the ICC due to its foreign headquarters.³¹⁵

A flexible safety net analysis under this Article's proposed approach could have produced a more equitable result for the Hills and better protected the purposes of unconscionability. The court in *Brower v. Gateway 2000, Inc.*, for example, applied unconscionability flexibly in a case nearly identical to *Hill* in order to provide relief from undue burdens of ICC arbitration.³¹⁶ The court agreed with the *Hill* court that the computer purchasers assented to an arbitration clause in shrink-wrap terms by not returning the computer within thirty days pursuant to the approve-or-return terms in the computer box.³¹⁷ The court also found that strict application of the two-prong unconscionability test would prevent relief because the contract's approve-or-return proviso precluded a finding of procedural unconscionability.³¹⁸ Nonetheless, the court concluded that overall fairness justified striking the portion of the arbitration agreement requiring ICC arbitration.³¹⁹ The court reasoned that the ICC's high fees effectively barred consumers from bringing their claims.³²⁰ It therefore remanded the case to the district court to order arbitration in a more convenient and less expensive forum.³²¹

3. *Preservation of Contractual Liberty and Efficiency*

Most scholars claim that flexible standards, such as those proposed by this Article, invite ambiguity and inefficiency in contract law.³²² There is little empirical verification of this assumption, however, and the reality is that courts generally have not applied unconscionability in a haphazard and unpredictable manner.³²³ Instead, courts have been too formulaic and reserved in their applications of unconscionability.³²⁴ Furthermore, scholars should not be overly fearful that judges will act irrationally.

315. Sternlight, *supra* note 314, at 130-32.

316. *Brower*, 676 N.Y.S.2d at 571-75 (assessing same *Gateway* arbitration clause, but vacating the portion of the clause requiring arbitration before the ICC).

317. *Id.* at 572.

318. *Id.* at 573-74.

319. *Id.* at 575.

320. *Id.*

321. *Id.* at 574-75 (leaving it to the district court to appoint an arbitrator, but indicating that it may be appropriate to appoint the American Arbitration Association).

322. Eisenberg, *supra* note 29, at 1577-84.

323. See M.P. Ellinghaus & E.W. Wright, *The Common Law of Contracts: Are Broad Principles Better Than Detailed Rules? An Empirical Investigation*, 11 TEX. WESLEYAN L. REV. 399, 400-01 (2005) (addressing lack of empirical support for this assumption); Knapp, *supra* note 211, at 771 (discussing how unconscionability has been reserved for rare cases); Stempel, *supra* note 141, at 840-41 (emphasizing how unconscionability has become a "disfavored stepchild" of contract law due to its assumed inefficiency).

324. See Swanson, *supra* note 92, at 386-87 (finding in the wake of the recent revision of U.C.C. § 2-302 that unconscionability has been reserved as a "safety net" that "should apply with caution only in extraordinary circumstances")

Unconscionability, in fact, promotes contractual liberty by increasing bargaining equality and freedom of choice for disadvantaged parties.³²⁵ In addition, it fosters respect for contractual compliance by combating unreasonable contracting practices that create consumer resentment, which may lead to shameless default and even criminal responses.³²⁶ Most consumers respect contract enforcement rules based on the assumption that they will not be held to unreasonable contracts.³²⁷ Society is more likely to comply with law it deems legitimate and just, and expects the law to prevent companies from “going too far” in their contract practices.³²⁸ Accordingly, measured use of unconscionability protects individuals’ freedom from non-negotiable contracts that oppressive bargainers thrust upon them.³²⁹

In addition, at least one empirical study suggests that broad standards actually lead to more predictable and efficient results than detailed or formulaic rules.³³⁰ This is what researchers found when they compared predictability, justice, accessibility, and efficiency of students’ applications of detailed rules of Australian contract case law and the UNIDROIT Principles of International Commercial Contracts (UPICC) with their applications of broad principles of the Australian Contract Code (ACC).³³¹ They reported “that broad principles make it easier to agree on the outcome, while detailed rules have a tendency to complicate even easier cases.”³³² They found that detailed rules expanded grounds for disagreement, while ease and accessibility of broad principles led to fifteen percent faster decisions.³³³

There also is support for unconscionability in economic analysis itself.³³⁴ Even economically-minded scholars such as Judge Posner have acknowledged that “judge-made” law may be “more ‘efficiency-promoting’ than legislative rules.”³³⁵ Furthermore, economic efficiency does not warrant companies’ using their monopoly contracting power to make great

325. See Maxeiner, *supra* note 88, at 134-36 (explaining contextualists’ arguments for the flexibility of unconscionability).

326. Harrison, *supra* note 87, at 565-66 (explaining how laws condoning unreasonable prices in disadvantaged areas reinforce class distinctions and lead to perceptions, and perhaps realities, of higher default and crime rate in these areas).

327. See Bates, *supra* note 178, at 20-24 (discussing consumers’ reliance on sellers’ form contracts and the burdens they encounter when challenging “unfair” contracts).

328. See *infra* notes 330-33 and accompanying text.

329. See Paul Burrows, *Analyzing Legal Paternalism*, 15 INT’L REV. L. & ECON. 489, 502-07 (1995) (also warning that courts’ intervention analysis must be contextual in order to prevent courts from assuming classes of cases will involve interference with freedom of contract); see also Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 389-94 (2002) (proposing in the employment context that procedural unconscionability analysis may promote efficiency).

330. Ellinghaus & Wright, *supra* note 323, at 411-15, 419-20.

331. *Id.* at 400, 411-20.

332. *Id.* at 411-13 (footnote omitted) (finding that users of the broad U.C.C. principles agreed more often on an outcome in easier cases than in harder cases).

333. *Id.* at 411-13, 419.

334. HILLMAN, *supra* note 54, at 136.

335. *Id.* (explaining how Posner’s argument may support unconscionability, but noting that Posner’s premise that judges seek to maximize efficiency is debatable).

profits at consumers' expense.³³⁶ Unconscionability merely promotes commercial good faith and enhances "the underdog's potential to make free choices," which supports contractual liberty at the core of market efficiency.³³⁷

The safety net quality of unconscionability also provides signaling benefits that may increase contracting certainty, and thus exchange efficiency.³³⁸ Constrained application of the Leffian two-prong test allows parties to draft closer to the edge of what is reasonable and to impose substantively unfair terms by manufacturing apparent procedural fairness.³³⁹ For example, current formalism may allow a merchant to escape substantive unconscionability review of its contracts by selling goods only over the Internet.³⁴⁰

In contrast, courts' flexible applications of unconscionability as a safety net may signal to companies that they should more vigilantly police their own bargaining conduct.³⁴¹ This may help curb litigation by transforming companies' "healthy" fear of unconscionability into more reasonable contracting practices. Companies may be wise, for example, to cleanse unreasonably harsh terms from their form contracts in order to benefit from increased certainty regarding the contracts' enforceability.³⁴²

Flexible unconscionability analysis, therefore, is a preferred way of pushing parties to draft their contracts further from the fringes of unfairness. At the same time, the safety net understanding of unconscionability prevents courts from blindly voiding contracts merely because they appear to satisfy the two-prong test. Courts also would continue to reserve unconscionability for cases that do not fit other contract defenses and to determine unconscionability as a matter of law. In this way, unconscionability could continue to serve its function as a flexible device for navigating tensions among competing fairness and efficiency goals of contract law.³⁴³

336. See *id.* at 128-36 (discussing contextualists' arguments for unconscionability).

337. *Id.* at 135-36 (summarizing pro-unconscionability arguments).

338. See Marrow, *supra* note 208, at 40-42 (proposing a procedural unconscionability tort, in part, to provide deterrence benefits that common law unconscionability has failed to provide).

339. Johnson, *supra* note 171, at 59-61 (finding that courts require both prongs of the Leff test and reserve application of unconscionability for cases involving form contracts).

340. See Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1934 (2005) (noting that "procedural factors will not be present in Internet transactions").

341. See Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 517-20 (1977) (proposing that the threat of litigation may create "a vague sense of threat that keeps everyone reasonably reliable").

342. See Hillman & Rachlinski, *supra* note 302, at 435-41 (discussing the efficiency benefits of standard-form contracts and how a functioning market would produce reasonable terms based on best allocation of resources and proven judicial acceptance).

343. See Johnson, *supra* note 171, at 21-22 (emphasizing how criticism has not prevented unconscionability's significance in the federal courts).

4. *Emptiness of Efficiency Without Justice*

Efficiency must be balanced with fairness in contract law. Unconscionability has survived because it boosts the legitimacy of contract law by protecting philosophical and historical virtues of justice and fairness.³⁴⁴ Broad principles promote justice because they generally are more accessible and allow for decisions that are at least perceived as more fair than those based on technical rules.³⁴⁵ Unconscionability is not meant to be formulaic. Even Leff, now hailed as calling for more formulaic application of unconscionability, originally left room for courts to apply unconscionability based on overall "unfairness."³⁴⁶ Despite his development of the two-prong test, Leff acknowledged an overall safety net application of unconscionability.³⁴⁷

Moreover, courts should not allow unconscionability to lose its flexibility due to formalist pressures.³⁴⁸ Cabined focus on contractual liberty should give way to a "corporate conscience" that fosters fundamental fairness in contractual relations.³⁴⁹ This may improve cooperation and productivity in long-term and other relational contracts because it often reduces opportunistic bargaining.³⁵⁰ It also may decrease dispute resolution costs and reliance on administrative hierarchies.³⁵¹

For example, the Washington Supreme Court raised the efficiency flag in justifying enforcement of a consequential damages exclusion in a shrink-wrap license for bid analysis software in *M.A. Mortenson Co. v. Timberline Software Corp.*,³⁵² although a more flexible and contextual analysis may have better promoted productivity. The court denied the plaintiff's claim that the exclusion was unconscionable, based in part on its assumption that such exclusions efficiently allocate risk.³⁵³ The exclusion, however, was

344. Prince, *supra* note 54, at 463 ("Thus, while Professor Leff was quite critical of Section 2-302 as drafted, he correctly predicted the tendency of the courts to restrain its application."); *see also* Maxeiner, *supra* note 88, at 119-25 (noting how drafters of the Revised Article 2 struggled to craft a better standard for unconscionability, even if it does not work perfectly due to its vagaries).

345. Ellinghaus & Wright, *supra* note 323, at 413-19 (reporting results of empirical study of students' use of detailed rules versus broad standards and finding that broad principles made the fair outcome more apparent, thus increasing the likelihood of just outcomes).

346. Leff, *supra* note 14, at 537-41 (noting that equity courts really used "overall" fairness test for unconscionability).

347. *See id.* at 487-88, 558-59 (failing to clarify whether the U.C.C. absolutely requires a showing of both prongs); *see also* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17 (1993) (noting that courts use Leff's article to require both procedural and substantive unconscionability to refuse contract enforcement).

348. Feinman, *supra* note 10, at 1-7 (proposing that courts have returned to formalistic classical contract law's rigid application of strict enforcement rules).

349. *See* Hunter, *supra* note 38, at 169-70 (concluding that courts should "facilitate the creation of an equitable 'corporate conscience'" that rejects legal tradition built on caveat emptor and "absolute 'freedom of contract'").

350. Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 251-52 (2004).

351. *Id.* at 250-52 (proposing these efficiency benefits with respect to application of the impracticability contract defense, which many economists had assumed was inefficient due to its vagueness).

352. *See* 998 P.2d 305, 311-13 (Wash. 2000).

353. *Id.* at 315 (also finding that plaintiff was on notice of the exclusion because it was commercially experienced and had contracted with the defendant in the past).

buried in terms the plaintiff received after purchasing the software, and a bug in the software caused the plaintiff to lose \$1.95 million.³⁵⁴ Finding the exclusion unconscionable in light of the context, however, may have led to a more balanced risk allocation. In addition, this contextual analysis would have considered the longevity of parties' relations, which is particularly important in the construction context.

Furthermore, even a contractarian perspective, embracing contractual liberty and neutrality toward any one conception of "the good," emphasizes a need for relatively equal bargaining power and restrictions on unduly oppressive contract terms.³⁵⁵ True freedom of contract does not exist when contractors lack minimum welfare and bargaining power necessary to freely consent to contract terms.³⁵⁶ This is also true when reciprocity is lacking.³⁵⁷ Fair play and reciprocal deals are key ingredients for contractual liberty and legitimate contract enforcement.

Courts should consider more broadly the overall balance of an exchange in light of context. As Jeffrey Harrison has emphasized in regard to his proposed application of unconscionability, "the sole question would be whether the exchange was fair."³⁵⁸ Formulaic rules fail this test by fostering inequality.³⁵⁹ Furthermore, Harrison proposes that juries should decide fairness questions based on social and communal norms and that findings of unconscionability should be publicized.³⁶⁰ He argues that these legal changes would have an equalizing and therapeutic effect on the community by educating disadvantaged populations regarding their rights.³⁶¹

Indeed, Llewellyn planted respect for realistic commercial ethics and morality in the foundations of the U.C.C.³⁶² Of course, reasonable minds can disagree on what is ethical or moral, and even "neutrality" is biased to the extent it promotes no conception of "good" as good.³⁶³ Efficiency, however, is not the only goal of contract law.³⁶⁴ It must give way to an elastic

354. *Id.* at 308-09.

355. *See* Rosenfeld, *supra* note 183, at 797-98 (noting that equal bargaining power and "certain restrictions" on subject matter of contracts must be present for the contractarian paradigm to work).

356. *See id.* (explaining background fairness limitations on contractarian paradigm).

357. *Id.* (recognizing need for reciprocity in contract).

358. Harrison, *supra* note 87, at 561.

359. *See id.* at 528 (proposing that contract law is "designed to permit and facilitate inequality in exchanges").

360. *Id.* at 561. In Harrison's view, the procedural imbalance test improperly relies on the taxonomy of victims (i.e., it perpetuates generalizations about those that can be categorized as "poor, passive, helpless, or lack[ing] self-esteem"). *Id.* at 560-61. Harrison argues that the focus should be on whether a party has been unduly enriched at the expense of another, rather than on procedural issues. *Id.* at 561.

361. *See id.* at 561-62.

362. *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 439-41 (2004).

363. *See id.* at 477 (emphasizing the contractarian paradigm's neutrality regarding any one ideal of "the good" and its focus on preservation of contractual liberty and autonomy—with public intervention limited to enforcing contracts).

364. *See* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 624-27 (1990) (noting questions of "whether efficiency is at all a proper goal for the legal system"). Even Kant, who ostensibly deemed fairness of exchange as legally irrelevant, denied the primacy of efficiency maximization. Robert Wisner, *Understanding Unconscion-*

notion of fairness that transcends promotion of wealth maximization.³⁶⁵ Contract standards such as unconscionability should continue to reveal human values and inclinations that bind courts “to decide in accordance with what they thought just or best.”³⁶⁶ This is because contract law shapes our social and economic systems.³⁶⁷ Obviously, “fairness” and “justice” are incapable of precise definition,³⁶⁸ and “[e]thical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live.”³⁶⁹ The public employs judges as purveyors of justice to make decisions “informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’”³⁷⁰ Indeed, judges’ humanity and membership in the social community equips them to make these decisions.

CONCLUSION

Courts are called “halls of justice,” not “forums of formalism.” Even if we accept that *life* can be unfair, we expect the *law* to defend fairness. We hope public virtues and values will inform criminal and constitutional jurisprudence, and guide courts’ tort and family law decisions. We generally accept the role of such values in such traditionally “public” spheres of law. Courts and commentators, nonetheless, deny the importance of these values in “private” contract law.

This Article counters that dichotomous treatment of contract law. Instead, it argues that public virtues and values should guide contract determinations. Accordingly, it invites courts to resist the pull of contract formalism and rekindle unconscionability’s flexibility in order to allow the doctrine to serve its safety net function, which flows from its historical and philosophical underpinnings. This does not mean courts should entirely reject Leff’s time-honored two-prong test for unconscionability. Instead, courts should apply this test flexibly and acknowledge an additional safety net basis for using the doctrine. This would allow courts to openly use unconscionability

ability: An Essay on Kant’s Legal Theory, 51 U. TORONTO FAC. L. REV. 396, 409-10 (1993) (further explaining how a Kantian theory of unconscionability would require courts to ignore parties’ motivations for entering an exchange but call them to demand “some notion of equivalence in the exchange that expresses the abstract equality of the parties”).

365. JOHN RAWLS, *A THEORY OF JUSTICE* 395-97 (1971) (highlighting the primacy of justice equal to goodness, while nonetheless emphasizing the role of contractual freedom as a vehicle for justice).

366. HART, *supra* note 46, at 163-76 (also proposing “simple truisms” of fairness that the law should promote).

367. Smythe, *supra* note 350, at 261 (also noting how contract law’s importance in daily transactions elevates the law’s importance to “the moral character of our day-to-day affairs”).

368. *See id.* at 261-62 (also noting the difficulty of defining moral values, especially in light of its situational quality).

369. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921) (quoting John F. Dillon, *Laws and Jurisprudence of England and America: Being a Series of Lectures Delivered Before Yale University* 18 (1894)); *id.* at 140 (indicating the enduring importance of justice, and use of justice as “one of the tests and touchstones in construing or extending law”).

370. *Id.* at 141.

as a safety net to catch contractual unfairness that escapes more formulaic contract defenses and rigid application of the two-prong test alone. This also would allow courts to better adapt the doctrine to evolving exchange practices, especially as practices shift from paper to electronic contracting.