

5-2015

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Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011 (2015).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol66/iss4/8

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Curing the Infirmities of the Unconscionability Doctrine

HAZEL GLENN BEH*

This Article considers the unconscionability doctrine and confronts criticisms that the doctrine is fatally flawed as too vague, flexible, and ill-defined. It argues that unconscionability is a vital contract doctrine that entrusts common law judges with the latitude and discretion to safeguard essential contracting fairness and justice. Unconscionability serves as the line of demarcation between hard bargains and unfair bargains. This Article explores proposals to fortify and invigorate the unconscionability doctrine in order to promote contracting fairness in an era where one-sided, adhesionsary contracts abound.

* Professor of Law and Co-Director Health Policy Center, William S. Richardson School of Law, University of Hawai'i at Mānoa. I extend my deep appreciation to UC Hastings and Professor Harry G. Prince for organizing this Symposium to Honor Professor Charles L. Knapp's 50th Year of Law Teaching and the *Hastings Law Journal* for publishing the articles the symposium generated. Third-year Richardson law student Marissa Agena provided valuable research assistance to me early in my writing process.

Most importantly, Professor Knapp's national influence on law school teaching and to the development of contract law cannot be overstated. Throughout his academic career, his scholarship has been bold, principled, and relevant. Students and teachers appreciate the clarity, methodology, and rigor of the widely adopted Knapp, Crystal, and Prince, *Problems in Contract Law*. I am grateful for this opportunity to express my gratitude to him for his many contributions to legal academy.

TABLE OF CONTENTS

INTRODUCTION.....	1012
I. UNCONSCIONABILITY’S INFIRMITIES	1016
A. UNCONSCIONABILITY AS A FAINT CLARION CALL.....	1017
B. UNCONSCIONABILITY’S WITHERED NORMATIVE INFLUENCE....	1021
1. <i>Meager Remedies</i>	1022
2. <i>It Is Not Unethical for Lawyers to Assist Clients in</i> <i>Imposing an Unconscionable Term</i>	1025
3. <i>Judicial Reluctance to Employ Unconscionability to</i> <i>Influence Bad Actors</i>	1028
II. RESUSCITATING UNCONSCIONABILITY	1032
A. EVIDENCE THAT UNCONSCIONABILITY IS NOT DEAD.....	1032
B. FINE-TUNING UNCONSCIONABILITY	1034
1. <i>Expanding Remedies</i>	1034
2. <i>A Judicial Attitudinal Adjustment</i>	1039
3. <i>The Conscience of a Lawyer</i>	1042
CONCLUSION	1044

INTRODUCTION

Chuck Knapp has been a staunch defender of unconscionability as a judicial tool to guard against contracting unfairness, particularly in contracts of adhesion between unequal parties.¹ He and others have identified the doctrine’s many useful judicial functions. Knapp has observed that unconscionability serves as a signaling device by which courts identify instances where lawmakers should take corrective action.² Unconscionability also serves as a “safety net,” allowing courts discretion to refuse enforcement of contracts that exact unfair terms as a result of gross disproportionate economic power on a case-by-case basis.³ Unconscionability reveals the demarcation line between hard bargaining and unfair bargaining, aiding in the development of ethical norms within the marketplace and in transactions facilitated by lawyers.⁴ Beyond party

1. See generally Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First-Century Survey*, in *COMMERCIAL CONTRACT LAW: A TRANSATLANTIC PERSPECTIVE* 309 (Larry A. DiMatteo et al. eds., 2013) [hereinafter Knapp, *Twenty-First-Century Survey*]; Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 *SAN DIEGO L. REV.* 609 (2009) [hereinafter Knapp, *Blowing the Whistle*].

2. Knapp, *Blowing the Whistle*, *supra* note 1, at 613–14.

3. *Id.*; see also Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 *ALA. L. REV.* 73, 74 (2006) (arguing that accepting flexibility within the unconscionability doctrine allows courts to protect contracting fairness).

4. Paul D. Carrington, *Unconscionable Lawyers*, 19 *GA. ST. U. L. REV.* 361, 371–72 (2002) (describing how a discussion of ethics and law with a client can promote morally informed business decisions);

disputes, unconscionability has revealed itself as a galvanizing⁵ “judicial counterweight” to arbitration laws that favor the economically powerful and so might be emblematic of a new common law era.⁶

However, for all its promise, the limitations of the unconscionability doctrine are widely acknowledged, and these modulate its policing power.⁷ First, the hammer of unconscionability rarely changes bargaining behaviors, particularly among institutional repeat players.⁸ Statutory regimes that regulate and sanction notorious industries or practices are better suited to wipe out industry-wide predatory behavior.⁹ Arthur Leff, whose early writings had a strong influence on the development of the unconscionability doctrine, once characterized the doctrine’s capacity to impact mass business practices as nothing more than trivial, calling it simply “case-by-case sniping.”¹⁰

Second, when unconscionability is raised, it rarely succeeds because of countervailing values that favor contract enforcement.¹¹ Contract law’s infatuation with formalism, freedom of contract, and the burden of proof necessary to prove unconscionability are so formidable that the doctrine might be characterized as ineffective.¹²

Gregory M. Duhl, *The Ethics of Contract Drafting*, 14 LEWIS & CLARK L. REV. 989, 1030 (2010) (“[C]ontract law . . . should help define the ethical rules for attorneys in the contract-drafting context.”).

5. Summarizing lower court decisions to work around the Supreme Court’s pro-arbitration decisions that diminish the role of the courts in contract disputes, Knapp describes this galvanization:

By invoking the rhetoric of unconscionability, these judges are not merely acting tactically in a game of legal chess—although they may be doing that as well—they are sending a message, not just to the U.S. Supreme Court, but to the other officials and institutions that collectively make up our legal system.

Knapp, *Blowing the Whistle*, *supra* note 1, at 628.

6. 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, 763–64 (2004).

7. E. Allan Farnsworth, *Developments in Contract Law during the 1980’s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222–23 (1990) (characterizing unconscionability as a weak doctrine suffering “arrested development”).

8. See *infra* notes 15–18 and accompanying text.

9. In critiquing unconscionability, Leff pointed out that case-by-case litigation would do little to change a business practice. Instead, at best, businesses might alter contracts to get around court pronouncements. In an even more vitriolic attack on unconscionability than in *The Emperor’s New Clause*, discussed *infra* note 13, he wrote, “[w]ouldn’t more be changed by explicit positive law, administratively interpreted and enforced, than . . . feed-back from easily distinguishable, easily strollable, exceedingly expensive cases?” Arthur A. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 357 (1970).

10. *Id.* at 358 (“One does not cure any serious breakdown in a theoretically competitive market system by case-to-case sniping, but one doesn’t do much harm either.”).

11. See Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1098–99 (2006) (finding empirical support for the hypothesis that unconscionability claims seldom succeed).

12. See Stempel, *supra* note 6, at 840–41 (describing the current status of unconscionability as “a disfavored stepchild of contract law” that judges should apply “only in the most extreme cases”).

Third, even when an unconscionability defense prevails, the remedies are meager. Although unconscionability is aimed at ferreting out, in Leff's words, "naughty" bargaining and its "resulting evil,"¹³ there are no attending sanctions that fortify the doctrine. Still worse, although the doctrine is aimed at bad behavior wreaking evil consequences, the legal profession itself implicitly condones such behavior, stopping short of prohibiting the insertion of unconscionable provisions in contracts, under the laws governing the legal profession.¹⁴

Judicial timidity also plagues unconscionability; in fact, that may be the root of the doctrine's infirmities. Aside from its use in recent arbitration cases, judges historically have not favored the doctrine, even in an era where consumer-targeted adhesionary standard form contracts abound. E. Allan Farnsworth described unconscionability's "arrested development" and short-lived promise as one of the "top ten" developments of contract law in the 1980s.¹⁵ Farnsworth observed that statutory regimes displaced the common law conception of unconscionability in the consumer arena and it proved an unremarkable doctrine to govern commercial transactions.¹⁶ Lamentably, unconscionability apparently did not even have an effect on an errant litigant in *Williams v. Walker-Thomas Furniture*.¹⁷ In the wake of that case, student author Eben Colby found that the furniture store continued to "'push[] the envelope' of legal contracts, repeatedly making slight changes to their contracts so as to stay one step ahead of the courts."¹⁸

Even so weakened, unconscionability's detractors still regard it as a dangerous and destructive force in contract law.¹⁹ As Jeff Stempel observed, "many scholars have suggested that unconscionability is simply too plastic a concept that permits too much post-hoc judicial meddling with contracts."²⁰ In the eyes of critics, unconscionability, in the guise of fairness, allows judges too much latitude to substitute the ends they desire for the free will of the parties. After its promising beginning, Stempel attributed unconscionability's now diminished state to a confluence of five factors

13. In his seminal article, Leff described the dual aspects of unconscionability—procedural and substantive—as two "legitimate" interests of contract law, "bargaining naughtiness as 'procedural unconscionability,' and . . . the resulting contract as 'substantive unconscionability.'" Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

14. See Part I.A.2.

15. Farnsworth, *supra* note 7, at 222–23.

16. *Id.*

17. Student author Eben Colby examined the aftermath of the landmark *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). He pessimistically concluded that the case had little effect on the business practices of the furniture store. Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 656–60 (2002). He noted that Walker-Thomas continued to relentlessly pursue writs of replevin against defaulting customers as a lesson to other customers. *Id.*

18. Colby, *supra* note 17, at 660.

19. See Stempel, *supra* note 6, at 763.

20. *Id.*

within law, politics, and society. Stempel asserted that unconscionability's disfavor can be blamed on "an academic assault" on the doctrine that characterized it as amorphous and standardless, together with a return to a "textualist, formalist version of classical contract interpretation," the ascendancy of the law and economics movement, a political and societal tide of distrust of law and litigation, and a particular revulsion for excessive judicial discretion and activism.²¹

The unconscionability doctrine nevertheless "survives to protect . . . fairness norms"²² and to serve as a last-ditch judicial "safety net to catch cases of contractual injustice."²³ Part I of this Article discusses unconscionability's functions and exposes several of the doctrine's weaknesses in the service of contracting fairness. Part II explores suggestions advanced by several contract scholars to judicially fine-tune the unconscionability doctrine to better enable it to fulfill its purpose. Most of these are within the grasp of a determined common law judge. For example, to make unconscionability more vital and robust, more courts might follow those few courts that entertain unconscionability as an affirmative claim that can be brought by a victim, as well as an affirmative defense. At the very least, in appropriate cases, courts might consider a broader range of equitable remedies in addition to nonenforcement, and particularly, allow declaratory relief and restitution. Expanding the range of remedies afforded to victims recognizes that unconscionability can cause financial harm that cannot be adequately compensated by mere nonenforcement. The exposure to an award of damages, even simple restitution, or attorneys' fees may be needed when the unconscionable term has caused the victim to incur loss. Moreover, the threat of real damages may also deter unconscionable actors.

Next, courts should acknowledge that unconscionability is close kin to illegality. Like other forms of illegality, unconscionable contracts, particularly adhesionary form contracts, have negative impacts beyond

21. *Id.* at 813. Leff's seminal critique of unconscionability provided a persuasive cautionary narrative that any strong form of unconscionability threatened freedom of contract and amounted to unwelcome judicial meddling in private agreements. *See generally* Leff, *supra* note 13. Stempel observed that Leff's article has been widely cited in law review articles, judicial opinions, and law school texts. He surmised, "Although Leff did not eradicate the unconscionability norm, he clearly cut it down to size, both in the academy and, I posit, the courts." Stempel, *supra* note 6, at 818. Stempel also observed that unconscionability withered under a "resurgence of classical contract law, textualism, and formalism" at work in the law of contracts by the 1970s and '80s that were "inhospitable to unconscionability." *Id.* at 821-22. The dominating influence of "law and economics" in contract law contributed to unconscionability's fall as well. Adherents assert that the quest for efficiency means that marketplace actors left to their own devices will create mutually beneficial contracts, without judicial intermeddling. *Id.* at 823-24. Finally, political animosity toward both "judicial activism" and against litigation more generally all contributed to unconscionability's decline. *Id.* at 827-29.

22. Schmitz, *supra* note 3, at 74.

23. *Id.*

the parties. Pervasive unconscionability undermines basic principles of contract law and exacts social harm by “undermin[ing] our system of contract enforcement.”²⁴ Therefore, in appropriate cases, courts might liberally fashion remedies to deter future unconscionability. To further strengthen the doctrine, courts must acknowledge that they hold an inherent power to raise unconscionability *sua sponte*.²⁵

Most importantly, courts must embrace unconscionability for the flexible standard that it was intended to be, and recognize it as a doctrine intended to police and define the essence of bargaining fairness. Recent arbitration cases reveal that unconscionability can be a robust common law doctrine that insists upon contracting fairness and justice. Unconscionability’s vagueness and flexibility do not endanger contract law; instead, like good faith and fair dealing, unconscionability is a standard of essential contracting fairness that has been entrusted to the common law.

I. UNCONSCIONABILITY’S INFIRMITIES

This Part considers aspects of unconscionability as now constructed that diminish it as a policing doctrine in disputes between weaker and stronger parties, where the advantaged party may have exacted unfair terms by heavy-handed means. As a preliminary matter, because it is a common law device for deciding single cases, the unconscionability doctrine cannot be expected to be as effective as legislation to eradicate unfair business practices that permeate specific industries. However, unconscionability can serve as a sentry to call lawmakers to action to legislate and regulate against systemic abuses. Additionally, unconscionability remains vital even when regulatory schemes are implemented. First, regulations will never be able to fully account for evolving contracting practices. In addition, statutes often utilize the concept of unconscionability to define prohibited conduct.²⁶ But, unconscionability misses its normative potential even as a common law doctrine because it is a weak signaling device, both to the legislature and to players in the marketplace.

24. Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 14 (2003).

25. See *infra* notes 155–158 and accompanying text.

26. Unconscionability, as a standard of fairness, has a life beyond its common law roots. For all the criticism of unconscionability as a vague common law doctrine, it has developed as a statutory standard as well. For example, consumer protection statutes often prohibit “unconscionable” behavior or contracting. See, e.g., FLA. STAT. § 501.204 (2015) (Florida’s Unfair and Deceptive Trade Practices Act prohibits unconscionable practices or acts); see also Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1928–49 (2013) (providing a 50 state survey which notes that Idaho, Michigan, Nebraska, New Mexico, Ohio, and Oklahoma each prohibit unconscionable practices under the state’s deceptive trade practice acts).

A. UNCONSCIONABILITY AS A FAINT CLARION CALL

The adjudication of unconscionability claims (whether successful or not) can serve as a signaling device—an expression by litigants and judges that legislation is needed to correct bargaining abuses. The saga of franchising illustrates how common law courts refereeing claims of unconscionability might signal to lawmakers that a legislative “fix” is in order. Franchises proliferated as a contractual business relationship after World War II.²⁷ Disputes have abounded because of the great disparity in economic power and information between franchisees and franchisors. Early cases, litigated under the common law, revealed that the common law judge could do little to police this business relationship; nevertheless, the volume of cases filed and judicial decisions issued were part of the stimulus for a legislative response.²⁸

Four general observations about franchising and unconscionability are noteworthy. First, the franchisor-franchisee relationship is typically grossly unequal. The franchisor is often a mega-corporation that markets ubiquitous products such as fast food, clothing, or gasoline, and typically possesses vastly more economic power, information, and sophistication than the aspiring franchisee. The powerful franchisor drafts a one-sided, nonnegotiable agreement and presents it to the prospective franchisee.²⁹ The franchisees, on the other hand, “typically, but not always, are small businessmen or businesswomen . . . seeking to make the transition from being wage earners and for whom the franchise is their very first business.”³⁰ As a result, franchisees have little bargaining power or inside information.³¹ Second, franchises sprang up largely unregulated, and these enterprises continue in a lightly regulated milieu, where disclosure requirements are

27. Franchises today represent 3.5% of the gross domestic product. IHS GLOBAL INSIGHT, INT’L FRANCHISE ASS’N, FRANCHISE BUSINESS ECONOMIC OUTLOOK FOR 2014, at 19 (2014), available at http://franchiseeconomy.com/wp-content/uploads/2014/01/Franchise_Business_Outlook_January_2014-1-13-13.pdf.

28. Franchising arose as an innovative, dynamic marketing and distribution model in the post-World War II era. See Boyd Allan Byers, Note, *Making a Case for Federal Regulation of Franchise Terminations—A Return-of-Equity Approach*, 19 J. CORP. L. 607, 614–15 (1994) (describing rise of franchising as a dominant business retail distribution model). Franchising is a poster child for Ian Macneil’s “relational contract.” See generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law* 72 NW. U. L. REV. 854 (1978); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483. In simple terms, a franchisor, by contract, grants a franchisee a right to distribute its product and/or to use its business format for their mutual profit and benefit. Product distribution franchises authorize the franchisee to distribute the franchisor’s product, while a business format franchise allows the franchisee to “replicate the franchisor’s successful business formula at the franchised location.” Byers, *supra*, at 613–14.

29. See Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 125–27 (2004) (describing inequalities generally).

30. *Id.* at 107 (quoting *Postal Instant Press, Inc. v. Sue Sealy*, 51 Cal. Rptr. 2d 365, 373 (Ct. App. 1996)).

31. *Id.*

more common than more heavy-handed regulations.³² Third, the history of franchises is checkered at best. As one commentator described its unregulated roots, “[f]ranchising became a jungle, where jungle law ruled” and “fraud prevailed.”³³ Finally, although franchisors and franchisees each benefit from their mutual success, their interests are imperfectly aligned throughout the life of the contract.³⁴

In the largely lawless era of the 1960s and 1970s, contract law provided the playbook by which to resolve disputes arising out of this economically complex, conflicted, and unequal relationship. Even today, despite an increase in state and federal regulation, contract law remains important to moderate franchise disputes.³⁵ At first blush, one might conclude that normative principles of contract law embodied in standards such as unconscionability and good faith and fair dealing, are well suited to police abusive franchisors. But contract doctrines available to judges sloggong case-by-case, clause-by-clause, and industry-by-industry, have proven inadequate, either to right injustice in individual cases or to correct widespread fairness issues that afflict these far reaching enterprises.

The early case of *Division of the Triple T Service, Inc. v. Mobil Oil Corporation*³⁶ illustrates the twin failings of contract law—both to fix industry-wide oppressive dealings and to achieve justice in a single case. In the end, it shows how courts can surrender with a plea to lawmakers to take over. *Triple T* involved Mobil Oil’s unilateral termination of a gas station franchise agreement pursuant to the franchise agreement, despite the franchisee’s successful operation of the station without breach of contract.³⁷

Triple T, the franchisee, had operated a Mobil Oil station for six years under a “standard form” lease and franchise agreement that was “common to the industry.”³⁸ Mobil Oil unilaterally invoked the termination provisions that allowed it to terminate the franchise, with ninety-days notice, without

32. Byers, *supra* note 28, at 623–24 (describing Federal Trade Commission (“FTC”) disclosure regime and patchwork of industry-specific or general state franchise laws that provide some substantive regulation during the franchise).

33. Howard Yale Lederman, *Franchising and Franchise Law*, 92 MICH. B.J. 34, 35 (2013).

34. Interests are not aligned during the formation stage. An imbalance of information, economic power, and sophistication provide a fertile field for fraud, misrepresentation, and the inclusion of one-sided terms. Steinberg & Lescatre, *supra* note 29, at 125, 174 (describing pre-sale conflicts). During the life of the franchise, interests are not aligned, for example, regarding the scope of the franchisee’s territory. A franchisor may benefit from encroaching into the franchisees territory in order to maximize its own profits at the expense of the franchisee. See Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. 779, 782–83 (2010). Franchise disputes arise at termination over the grounds for terminating and methodology of untangling the business interests. See generally Steinberg, & Lescatre, *supra* note 29 (describing disputes from the start to conclusion of the franchise relationship).

35. See generally Steinberg & Lescatre, *supra* note 29 (describing friction points in relationship in the pre-sale negotiations, post-sales relationship, and termination process).

36. 304 N.Y.S.2d 191 (App. Div. 1969).

37. *Id.* at 194.

38. *Id.*

cause. For its six-year efforts operating the Mobil franchise, all Triple T was to receive at termination was the return of its security deposit under the lease.³⁹ Mobil purportedly had a desire to upgrade the property's use to a diagnostic and repair service center, as opposed to the franchisee's more basic service station.⁴⁰ Among other claims, the franchisee asserted that the termination provision was unconscionable and that terminating without cause violated the implied obligation of good faith and fair dealing found in every contract. The court, with some acknowledged regret, rejected both claims. As to invoking the one-sided termination provision, the court honored freedom of contract principles over fairness, explaining that "[e]very man is presumed to be capable of managing his own affairs, and whether his bargains are wise or unwise, is not ordinarily a legitimate subject of inquiry."⁴¹ It thus refused to inject good faith into an expressly at-will termination clause because doing so would contradict the agreement. As to the alleged unconscionability of the agreement, the court explained that the termination provision was not so inherently unfair as to be unconscionable, in part because it conformed to commercial reasonableness at least under some circumstances.⁴²

Taking note of the failure of federal and state legislative efforts to regulate these agreements, the court concluded with a plea to lawmakers:

The Court is not unsympathetic to plaintiff's plight but '(s)tability of contract obligations must not be undermined by judicial sympathy.' It has been the sacredness of contractual obligations which has prevented courts of equity from imposing justice in many circumstances. Nevertheless, it is anticipated that ameliorative legislation covering business distributorships will shortly be a reality and perhaps this very case may provide the stimulus necessary [for] enactment. Copies of the opinion shall be sent the appropriate legislative committees. The Court cannot legislate and is constrained to grant defendant's motion and deny plaintiff's motion despite the apparent inequities.⁴³

Bowing at the altar of freedom of contract, the court sacrificed unconscionability and good faith and fair dealing. In doing so, the court surrendered, conceding itself not up to the task of refereeing contracts between grossly unequal parties.

39. *Id.*

40. *Id.*

41. *Id.* at 198.

42. *Id.* The court's construction of unconscionability required a showing of substantive unconscionability prior to any inquiry into procedural unfairness. *Id.* at 201.

43. *Id.* at 204 (citations omitted). Not all courts followed this view; some demanded good faith even in an at-will termination case. *See, e.g.*, *B.E. deTreville v. Outboard Marine Corp.*, 439 F.2d 1099, 1100 (4th Cir. 1971) (applying South Carolina law and holding an at-will termination of a franchise may not be for an "unconscionable reason" or "contrary to equity and good conscience"); *Tele-Controls, Inc. v. Ford Indus., Inc.*, 388 F.2d 48, 51 (7th Cir. 1967) (applying Oregon law and holding a termination of franchise must be in good faith).

Congress and state legislatures received the message from the courts and the victims of unfair franchise agreements and began to impose some regulations aimed at fairness, yet these efforts have proved inadequate as well. Today, franchising is regulated through federal regulation⁴⁴ and a patchwork of state regulation.⁴⁵ The regulation of franchises remains spotty; laws are typically directed at mandatory disclosures or targeted at particular industries.⁴⁶ Only a few states have specific laws that regulate the ongoing relationship and termination.⁴⁷ Therefore, franchisees continue to rely upon the common law doctrines of unconscionability and good faith and fair dealing to fill gaps and referee disputes.⁴⁸ Although franchise agreements typically heavily favor the franchisor, in tallying the outcomes of unconscionability claims, one commentator noted how inadequate the unconscionability doctrine has been:

Provisions of the franchise agreement are rarely truly unconscionable. Courts are unlikely to find express termination provisions unconscionable—even when they permit termination without cause—because the franchise is between business persons and because the parties enter the agreement on their own volition. Unconscionability doctrine is therefore ill-suited to deal with fairness issues in the ongoing franchise relationship.⁴⁹

As commentators have complained, unfairness continues to plague the franchise industry and “there is regulatory inaction and constraints on the ability to rectify the abuses permitted under contracts of adhesion.”⁵⁰ Because contract litigation has proven so ineffective to police franchises, there remains a push by franchisees to strengthen regulatory oversight of franchise agreements, and a resignation to the inadequacy of contract law’s policing doctrines.⁵¹ The franchise saga reveals that neither legislation nor

44. See FTC Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436 (2015).

45. See Byers, *supra* note 28, at 622–33 (describing federal and state franchise laws).

46. See *id.* at 626–37 (discussing federal laws targeting automobile and petroleum franchises, and state laws targeting the same, as well as “an array of industries”).

47. *Id.* at 624–26.

48. See, e.g., Emerson, *supra* note 34, at 820–21.

49. Byers, *supra* note 28, at 635. The commentator’s views on the effectiveness of good faith and fair dealing are similar, although he notes some success under state constructions of good faith. However, reviewing the doctrine’s overall effectiveness in overseeing termination disputes, the author comments, “[t]he franchisor may thus by careful drafting circumvent this implied covenant by explicitly setting forth in the franchise agreement the right to terminate without cause.” *Id.* at 633; see also Steinberg & Lescatre, *supra* note 29, at 112–14 (arguing for stronger federal regulation of franchises, complaining that the American judicial conceptualization of good faith is “too narrow” and “judicial or arbitral application of equitable principles” as “insufficient” to account for “the consequences of opportunistic behavior”).

50. Steinberg & Lescatre, *supra* note 29, at 107.

51. See generally Byers, *supra* note 28 (calling for federal regulation in franchise terminations); Steinberg & Lescatre, *supra* note 29, at 314 (calling for strengthened federal regulation of franchises).

Good faith and fair dealing does not adequately oversee the franchise relationship, as shown in *Triple T*, where the court showed reluctance to override the express terms of the contract with an implied term of good faith. See Byers, *supra* note 28, at 632–33. Unconscionability is ineffective because, although a provision may have an unfair result, there is a presumption of assent to the term. *Id.* at 635.

the common law alone can tame sharp business practices; and even together they may prove ineffective.⁵²

B. UNCONSCIONABILITY'S WITHERED NORMATIVE INFLUENCE

This Subpart discusses some impediments to unconscionability as a normative device to affect future behavior. First, unconscionability is widely construed as an affirmative defense only; and its remedy limited to nonenforcement. Second, the Model Code of Professional Responsibility does not preclude or even discourage a lawyer's inclusion of unconscionable clauses in contracts as a matter of basic professional conduct. Third, unlike the illegality doctrine, where courts often consider the effect on other parties and future contracting behavior in fashioning a remedy, this deterrent concept appears less developed in unconscionability.

To the extent that unconscionability is aimed at identifying and correcting bad bargaining behavior that achieves undesirable ends, this Subpart asks why unconscionability has lacked the might to eradicate Leff's "naughtiness" and resulting "evil." One must remember that contract transactions are largely self-regulated, so any normative effect unconscionability has in the marketplace must be as a deterrent. As the Knapp, Crystal, and Prince first year contracts text reminds us:

On any given day, the number of individual contracts entered into in even one of the United States must number in the millions. Of that huge total, a tiny fraction—but still a large number, in absolute terms—will eventually give rise to a dispute between the parties. Of these relatively few disputes, the overwhelming majority will be resolved without even coming to the threshold of a court, much less to judgment or a decision on appeal.⁵³

52. Grant Gilmore observed a rise of statutory regimes in the 1950s and warned of the difficulties this trend brings, commenting:

We are just beginning to face up to the consequences of this orgy of statute making. One of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in light of changed conditions.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 86 (1977). He continued, explaining that once statutes take over a subject, courts take on a limited role. *Id.* at 97 ("Once the legislature has taken over a field, only the legislature can effect any further change."). Even when the statute fails, the assumption is that "a court must bow to the legislative command, however absurd, however unjust, however wicked." *Id.*

Newer consumer issues, such as subprime mortgages, see Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 *LEWIS & CLARK L. REV.* 1035 (2010), and payday lending, see Sarah Howard Jenkins, *Fringe Economy Lending and Other Aberrant Contracts: Introduction*, 89 *CHI.-KENT L. REV.* 3 (2014), demonstrate that, as with franchise agreements, there will always be a role for both legislation and judicial oversight where there is a gross imbalance of contracting power.

53. CHARLES L. KNAPP, NATHAN M. CRYSTAL, & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 16–17 (7th ed. 2012).

Since judicial oversight of contracting is the exception, rather than the rule, whatever normative pressure the judicial construction of unconscionability can infuse into the contracting process must derive from the possibility that an adverse judicial decision or other sanction is not worth the risk, even knowing that few contracts are subjected to litigation. Yet unconscionability poses only a small threat to the more powerful contracting party because, as a rule, its remedies are feeble and there are few consequences to unconscionable actors and their lawyers.

I. *Meager Remedies*

The Uniform Commercial Code (“U.C.C.”) and the Restatement (Second) of Contracts each provide for some form of nonenforcement when a contract or term is unconscionable, but are not clear that nonenforcement represents an expansion or a limitation on remedial action. Under U.C.C. section 2-302 and Restatement (Second) section 208, when a court determines that a contract or a clause within a contract is unconscionable, the court is empowered to “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 term as to avoid any unconscionable result.”⁵⁴ Nothing explicitly precludes other remedies.

Because the U.C.C. and the Restatement affirmatively grant courts these nonenforcement powers, most courts interpret these powers narrowly,⁵⁵ taking the view that unconscionability is only defensive and equitable, and that the only remedy available to those harmed by an unconscionable provision or contract is nonenforcement of the contract, in whole or in part.⁵⁶ Agreeing with this restrictive reading, Farnsworth

54. U.C.C. § 2-302 (2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

55. This is considered the majority position. *See* 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-302:5 (2013) (“[M]ost courts have found that Section 2-302 does not provide authority to award damages for use of an unconscionable contract or clause.”).

56. Courts, for the most part, have accepted that unconscionability is purely defensive and cannot be used as an action for damages. *See, e.g.,* Cowin Equip. Co., Inc. v. General Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984) (holding that unconscionability is defensive and equitable, and “the cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision, citing the language of § 2-302 and its common law precursor to demonstrate that § 2-302 was not intended to provide a basis for damage recovery”); *Hunter v. Sterling Bank, Inc.*, No. 09-172 (FLW), 2011 WL 5921388 (D.N.J. Nov. 28, 2011) (dismissing unconscionability claim where plaintiffs sought damages against mortgage broker); *see also* *Givens v. Rent-A-Center*, 720 F. Supp. 160, 163 (S.D. Ala. 1988) (“[D]amages are not recoverable under a theory of unconscionability.”); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16 (2006) (holding that on a finding of unconscionability courts do not grant restitution or money damages but are limited to refusing enforcement). *Langemeier v. Nat’l Oats, Inc.*, 775 F.2d 975 (8th Cir. 1985), is a noteworthy exception. There, the lower court raised the unconscionability doctrine sua sponte in a commercial sales contract for the purchase of popcorn. *Id.* at 976. The lower court then found a clause that allowed the buyer to reject the popcorn unilaterally unconscionable and refused its enforcement. *Id.* As a result of refusing enforcement, the court awarded expectation damages to the seller that amounted

explained, “[b]ecause the remedies for unconscionability are cast in terms of withholding relief instead of avoidance, there is no inherent requirement that the claimant make restitution, as the claimant must in the case of avoidance for misrepresentation or duress.”⁵⁷

The judicial view that equitable remedies other than nonenforcement are precluded weakens the doctrine immeasurably.⁵⁸ Many courts that steadfastly hold that nonenforcement is the only remedy for unconscionability allow illogical results,⁵⁹ and this view renders unconscionability worthless against dominant parties who have already obtained their ill-gotten benefits.⁶⁰

However, Harry G. Prince called this narrow reading a “fallacious view”⁶¹ based upon a “simplistic reading”⁶² of U.C.C. section 2-302 that produces illogical results. He pointed out that the actual language of section 2-302 does not insist that unconscionability be merely defensive. He explained:

The distinction between defensive and offensive use is illogical and should be discarded because it may well result in only one of two similarly situated parties being unable to make use of the unconscionability doctrine. For example, if two parties purchase appliances from door-to-door salespersons for outrageously and indefensibly exorbitant prices

to “the difference between the contract price and the amount received.” *Id.* Thus, by striking the clause, the court awarded damages for breach of contract.

57. E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 4.28, at 596 (3d ed. 2004); *see also* JOSEPH M. PERILLO, CALAMARI & PERILLO *ON CONTRACTS* § 9.39, at 338 (6th ed. 2009) (stating that although an increasing judicial willingness to reform unconscionable contracts, unequivocally stating, “unconscionability does not create a cause of action for damages”). *But see* JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 5-8, at 237–38 (6th ed. 2010). James White and Robert Summers asserted that 2-302 does not limit courts to nonenforcement merely by expressly providing for nonenforcement remedies. *Id.* White and Summers also alluded to “as yet undeveloped possibilities for other remedies such as injunction and punitive damages.” *Id.* § 5-3, at 221.

58. *Compare* Camp v. Telco Ala. Credit Union, No. 2:12-cv-2237-LSC, 2013 WL 2106727 (N.D. Ala. May 13, 2013) (refusing to recognize a cause of action for declaratory relief “because unconscionability is merely an affirmative defense, there is no actual controversy between the parties, and a declaratory judgment would not be appropriate”); *Bennett v. Behring Corp.*, 466 F. Supp. 689 (S.D. Fla. 1979) (unconscionability does not allow affirmative recovery of money damages or restitution); *Alboyacian v. BP Prods. N. Am.*, Civ. No. 9–5143, 2011 WL 5873039 (D.N.J. Nov. 22, 2011) (dismissing unconscionability count where plaintiffs sought injunction to prevent termination of an allegedly unconscionable franchise termination provision); *Best v. U.S. Nat’l Bank of Or.*, 714 P.2d 1049 (Or. Ct. App. 1986) (unconscionability is not a basis for affirmative relief), *with In re Checking Overdraft Litigation*, 694 F. Supp. 2d 1302, 1318 (S.D. Fla. 2010) (allowing the claim for declaratory relief and return of funds on a claim of unconscionability in a case where the bank retained (rather than sued for collection) the customer’s money as an overdraft penalty so that without a declaratory action “the customer never has the opportunity to raise unconscionability as a defense for nonpayment”).

59. *See* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 *HASTINGS L.J.* 459, 548 (1995) (“The ‘defensive use only’ rule is artificial, is based on a simplistic reading of Section 2-302, and does not effectively administer the policy underlying the unconscionability concept.”).

60. *See Best*, 714 P.2d at 1055–56 (citing cases and denying restitution on the grounds that the contract terms allowing excessive charges to bank’s customers was unconscionable).

61. Prince, *supra* note 59, at 545.

62. *Id.* at 548.

as a result of sharp dealing, the party who purchases on credit can refuse to pay and then use the unconscionability doctrine defensively to fend off a claim by the seller for payment. The party who has cash and is able to pay on delivery cannot use unconscionability to obtain a partial refund of the price or to rescind the transaction altogether under the approach that blindly denies affirmative relief on a claim of unconscionability.⁶³

When U.C.C. section 2-302 and the Restatement (Second) of Contracts section 208 are interpreted to limit the outcome of unconscionability to nonenforcement and to preclude other remedies, particularly restitution, unconscionability packs little punch.

Some courts have adopted a less constrained position, following the general rubric that affirmative defenses, including unconscionability, can be raised through declaratory relief and that restitution might be sought.⁶⁴ As one court explained in a case involving an unconscionable home loan, if declaratory relief, restitution, and reformation are unavailable, the result could constitute its own form of unconscionability:

Thus, the Court finds that unconscionability may be an affirmative claim if pleaded correctly. To find otherwise would be to hold that a party who has entered into an unconscionable contract would have to breach it, get sued, and raise unconscionability as a defense before the Court may examine the enforceability of the contract. Moreover, in the event that the defense of unconscionability is unsuccessful, then the losing party is left to deal with the consequences of the breach which, in this case, may be a monetary judgment in addition to the loss of the home to foreclosure. The ability of the party suspecting unconscionability to raise that issue in a declaratory judgment action or in an action for reformation permits the party to both comply with the contract as written, thus avoiding the consequences of a breach, and still obtain a declaration as to the enforceability of the contract. In this Court's opinion, the law favors the latter.⁶⁵

63. *Id.* at 485–86.

64. *In re Checking Overdraft Litigation*, 694 F. Supp. 2d 1302 (S.D. Fla. 2010), recognized that it was defying traditional limitations in its holding that would allow it to declare a term unconscionable and then to award restitution:

Finally, Defendants appear to be correct in their assertion that, ordinarily, unconscionability is properly asserted as a defense to a contract rather than an affirmative cause of action. But this is not the ordinary case. An ordinary case in this factual context would be one in which the customer allegedly overdraws his or her account, the bank provides the overdraft service, and then the bank demands payment of the overdraft fee from the customer. Then, when the customer refuses to pay, the bank sues the customer for breach of contract, and the customer at that time can raise an unconscionability defense to the enforcement of the contract. In the instant case, however, the bank is never required to file suit because it is already in possession of the customer's money, and simply collects the fee by debiting the customer's account. Thus, the customer never has the opportunity to raise unconscionability as a defense for nonpayment. The only opportunity to do so is through a lawsuit filed by the customer, after payment has been made. Hence, the facts of the instant case weigh in favor of permitting Plaintiffs to pursue an unconscionability claim.

Id. at 1318–19.

65. *Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862, 896–97 (N.D. Ohio 2001).

If a court construes unconscionability to allow only prospective nonenforcement, victims may lose, even if they establish unconscionability. For example, without a broad range of equitable remedies, a victim who overpays under an unconscionable term has no means to get the overpayment returned.⁶⁶ If the victim is not sued affirmatively for default, she may not be able to reform the contract or obtain declaratory relief to avoid an unconscionable provision.⁶⁷

Notably, neither the Restatement nor the U.C.C. expressly limits unconscionability's remedy to nonenforcement. Courts simplistically infer this limitation from the fact that the U.C.C. and the Restatement specifically allow judicial discretion to choose among nonenforcement remedies.⁶⁸ The Restatement does not state that unconscionability is exclusively defensive. The Restatement commentary notes that a defensive remedial role for unconscionability is the "simplest application" and the "appropriate remedy . . . ordinarily."⁶⁹ This language is not necessarily restrictive and instead might be viewed as expanding a judge's discretionary authority to include nonenforcement. The implication of the commentary is most certainly that nonenforcement may be the "simplest application" but leaves open the possibility of other remedies in appropriate circumstances.

2. *It Is Not Unethical for Lawyers to Assist Clients in Imposing an Unconscionable Term*

One might hope that as a society we believe that the fairness values that undergird unconscionability *ought* to be present in every contract. However, the law governing attorney conduct undermines that premise by narrowly fixating on the lawyer's obligation to avoid affirmative fraud

66. Consider *Jones v. Star Credit*, 298 N.Y.S.2d 264 (Sup. Ct. 1969), in which a price term was held to be unconscionable. Although the court allowed reformation of the contract on a suit brought by the buyer, by the time the buyers filed suit for reformation, they had paid \$619.88 and had a balance of \$819.81 for the purchase of a freezer with a retail value of about \$300. *Id.* at 265. Without an order for restitution, Star Credit could retain its ill-gotten gain.

67. The *Walker-Thomas Furniture* lawsuit, 350 F.2d 445 (D.C. Cir. 1965), reveals the problem with an exclusive nonenforcement remedy. At the end of the lawsuit, Williams and Thorne, the debtors, could only achieve the damages they deserved by way of court-approved settlement. The lawsuit was filed in 1963 and finally concluded in 1967. Had the suit concluded without settlement, nonenforcement of the unconscionable clause and the resulting replevin might only have allowed the defendants to reclaim their purchased items. As one of the attorneys explained in 1968:

[t]he idea of compromise and settlement inevitably arose before the cases came to trial. Ora Lee Williams and the Thornes had gradually been able to replace the items seized from them in 1963 and were not interested in having them returned. In both cases the defendants were paid what was considered the reasonable value of the seized items after being used by the defendants prior to the replevin by plaintiff.

Pierre E. Dostert, *Appellate Restatement of Unconscionability: Civil Legal Aid at Work*, 54 A.B.A. J. 1183, 1186 (1968).

68. Another way to interpret this positive grant of discretion not to enforce the provision is that without it, courts would not have discretion to cherry pick what they would strike within a contract.

69. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981).

and deceit rather than providing a code of conduct that challenges lawyers not to be instruments of unconscionable contracting. The American Bar Association's ("ABA") Model Rules of Professional Conduct largely guide the conduct of lawyers in the United States.⁷⁰ The Model Rules are highly protective of the ideal of zealous advocacy and the adversary system. As one commentator observed, "[t]hese Rules assume the primacy of the adversarial system for reaching the truth and rendering justice, and merely set an essentially amoral floor for attorney professionalism."⁷¹ "Myopically" "client-centered"⁷² in regulating transactional practice, the Rules prohibit a lawyer's participation in affirmative fraud and some conduct that borders on fraud.⁷³ Model Rule 1.2(d) provides that a lawyer may not counsel or assist a client to engage in fraudulent or criminal conduct.⁷⁴ Rule 4.1 demands that lawyers be truthful to others when acting on behalf of clients,⁷⁵ but limits disclosure responsibilities unless it is "necessary to avoid a criminal or fraudulent act by a client."⁷⁶ And finally, Rule 8.4(c) broadly prohibits conduct involving "dishonesty, fraud, deceit or misrepresentation."⁷⁷

There is little within the professional code to prohibit lawyers from participating in the drafting of unfair, oppressive, and one-sided contract provisions without more.⁷⁸ In fact, the Hazard and Hodes treatise, *The*

70. The American Bar Association tallies state adoptions of the Model Rules. California is the only state that has not adopted "the format" of the Model Rules. AM. BAR ASSOC. CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS 6 n.1 (2011), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>. However, many states have customized either the rules or the commentary within their jurisdiction. See Christopher M. Fairman, *Protecting Consumers: Attorney Ethics and the Law Governing Lawyers*, 60 CONSUMER FIN. L.Q. REP. 529, 529-30 (2006); Amy J. Schmitz, *Ethical Considerations in Drafting and Enforcing Consumer Arbitration Clauses*, 49 S. TEX. L. REV. 841, 847 (2008).

71. Schmitz, *supra* note 70, at 847.

72. *Id.* at 849.

73. The Rules provide that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Rules further prohibit counseling or assisting a client to engage in fraudulent or criminal conduct. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013). Rule 4.1 requires lawyers to be truthful to others when acting on behalf of a client, but stops short of demanding disclosure, unless it is "necessary to avoid criminal or fraudulent act by a client." See generally Christina L. Kunz, *The Ethics of Invalid and "Iffy" Contract Clauses*, 40 LOY. L.A. L. REV. 487 (2006).

74. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013).

75. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2013).

76. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2013).

77. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

78. See Kunz, *supra* note 73, at 488 (observing that ethical guidance for lawyers with regard to transactions is "thin"). Notably, some state statutes prohibit the inclusion of unconscionable terms, in some contexts. For example, California's Consumer's Legal Remedies Act prohibits inclusion of unconscionable provisions in consumer contracts. Cal. Civ. Code § 1770(a)(19) (West 2014). See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 663 (2010) (explaining that Florida and California consumer statutes provide for affirmative remedies against unconscionable provisions).

Law of Lawyering, discussing Model Rule 1.2(d), poses this specific hypothetical:

The highest court of State recently held that a certain clause in a consumer goods contract is unconscionable and therefore unenforceable. A retail store in State nevertheless insists its lawyer, L, continue to include the clause in its contracts, on the grounds that the great majority of consumers will not know it is unenforceable and thus will comply with its terms anyway.⁷⁹

Hazard and Hodes concluded that this conduct is permissible under the Model Rules, even when the clause is clearly unenforceable due to a precedential ruling in the jurisdiction. They infer this from the drafting history of the current Model Rule 1.2(d). In 1982, the Kutak Commission⁸⁰ proposed that Rule 1.2(d) provide:

A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁸¹

The ABA House of Delegates rejected the portion of Rule 1.2(d) that would have prohibited drafting a clearly unconscionable clause in a contract, such as that described in a hypothetical posed by Hazard and Hodes.⁸² Hazard and Hodes noted that in the 1983 Midyear Meeting, the portion of the proposed rule prohibiting lawyers from preparing an instrument “containing terms the lawyer knows or reasonably should know are legally prohibited” was cut from the final rule.⁸³ From its elimination, Hazard and Hodes concluded that Lawyer L “could not now be disciplined merely for including the unconscionable clause in the contract.”⁸⁴ Hazard and Hodes equivocated somewhat where the clause “is likely to mislead customers as to their rights,” cautioning that “use of the clause might be held to constitute fraud.”⁸⁵

As to the inclusion of clauses that have questionable validity rather than clearly established invalidity, the professional rules are lacking even

79. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.12, at 5-39, illus. 5-13 (3d ed. 2001).

80. The ABA charged the Kutak Commission in 1977 to update the laws governing lawyers. The ABA House of Delegates debated, revised, and eventually adopted the Model Rules in August 1983. See *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982–2013*, at vii (Art Garwin ed., 2013).

81. *Id.* at 48.

82. *Id.* at 48–50.

83. 1 HAZARD & HODES, *supra* note 79.

84. *Id.* § 5.12, at 5-40, illus. 5-13.

85. *Id.* Others concur that a clearly invalid clause may reach the “dishonesty” definition articulated in Model Rule 8.4. See, e.g., Duhl, *supra* note 4, at 1016–17.

more.⁸⁶ In the interest of one's client, it is permissible to include provisions that test the limits of the law.⁸⁷ Paul Carrington, in his provocative essay *Unconscionable Lawyers*, suggested that lawyers for the more powerful party in a transaction have responsibilities to consider fairness to the other party.⁸⁸ He warned, "Lawyers who write the forms are not justified in zeal" that is "blind to consequences, and they are in serious danger of becoming parties to the overreaching of their clients."⁸⁹ Carrington constructed an argument, in the context of overreaching arbitration clauses, that including invalid, oppressive clauses may constitute fraud and lawyer misconduct.⁹⁰ At the same time, he acknowledged that the existing Model Code is not clear on this.⁹¹ He observed that codes of conduct for lawyers from bygone eras, while more generally "scant" on guidance, prohibited lawyers from engaging in "fraud or chicanery."⁹² Carrington suggested that the term "chicanery" might well have included drafting "unconscionable provisions that disable parties from enforcing their substantive rights."⁹³ In the modern era, on the other hand, he conceded that under the current Model Rules only a "remote possibility" exists that anyone might be disciplined.⁹⁴ Carrington lamented the role lawyers play in the drafting of unconscionable clauses in form contracts that "disgrace our profession."⁹⁵

3. *Judicial Reluctance to Employ Unconscionability to Influence Bad Actors*

The unconscionability doctrine recognizes that some contracting behaviors and resulting oppressive terms are so undesirable that they cross the line of enforceability. It should then follow that courts should (1) not be a party to enforcement; (2) not protect the offending party; and (3) not encourage such contracting in the future. Yet, unlike the contract illegality doctrine, unconscionability is not typically applied to punish wrongdoers or deter future behavior.

Courts typically regard unconscionability purely as an affirmative defense, which places the burden on the defendant to plead and prove it. On the other hand, whether a contract is void as against public policy⁹⁶

86. See Duhl, *supra* note 4, at 1016–17.

87. Kunz, *supra* note 73, at 494–95.

88. Carrington, *supra* note 4, at 361.

89. *Id.* at 371.

90. *Id.* at 371–73.

91. *Id.* at 379–80.

92. *Id.* at 380.cal

93. *Id.* (discussing ABA CANONS OF PROF'L ETHICS Canon 15 (1908)).

94. *Id.* at 384.

95. *Id.* at 361.

96. For simplification, this will be called "the illegality doctrine" in this Article.

may be raised *sua sponte* by the court.⁹⁷ The court's power to raise unenforceability on the grounds of public policy is based on the principle that courts are guardians of the integrity of the judicial system and must not become instruments of illegal contracts.⁹⁸

James White and Robert Summers' treatise on the U.C.C. opined that the U.C.C. similarly grants discretionary power to courts to raise unconscionability *sua sponte*. White and Summers asserted, "Although it would be useful for the defendant to plead unconscionability as an affirmative defense, the words of 2-302(1) also seem to permit a court to raise the issue *sua sponte*."⁹⁹ The U.C.C. Official Comments support this position as well: "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable."¹⁰⁰

Although a few courts recognize their own discretionary authority to raise unconscionability,¹⁰¹ many others disagree.¹⁰² "Although unconscionability can be decided as a matter of law by the court when it is raised, when the issue is neither raised nor briefed . . . a trial court should not rule on unconscionability *sua sponte*."¹⁰³ Those courts that regard unconscionability merely as an affirmative defense reject the

97. See RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 1, intro. note (1981) ("Even if neither party's pleading or proof reveals the contravention, the court may ordinarily inquire into it and decide the case on the basis of it . . ."); FARNSWORTH, *supra* note 57, § 5.1, at 8 ("Indeed, even if neither party raises the issue, the court will do so on its own initiative and refuse enforcement if justified by the record, at least if the contravention is serious.")

98. FARNSWORTH, *supra* note 57, § 5.1, at 3 n.4 (citing cases).

99. WHITE & SUMMERS, *supra* note 57, § 5-3, at 220.

100. U.C.C. § 2-302 cmt. 1 (2002). Section 2-302 gives the court a leading, rather than supportive, role determining unconscionability. It begins, "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable . . ." *Id.* Section 2 adds further support to the prerogative of the court to raise it "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable." *Id.*

101. In *Langemeier v. Nat'l Oats Co., Inc.*, 775 F.2d 975, 977 (8th Cir. 1985), the court explained, "The plain language of subsection (1) permits the court to raise this issue *sua sponte*. Moreover, subsection (2) is written in the disjunctive: '[w]hen it is claimed or appears to the court.'" (emphasis omitted) (citing and quoting U.C.C. § 2-302)). See also *In re Knepp*, 229 B.R. 821, 837 (Bankr. N.D. Ala. 1999) (recognizing that Alabama law gives courts discretion to raise unconscionability *sua sponte*).

102. See *Neiman v. Galloway*, 704 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1998) (holding that unconscionability is an affirmative defense that must be pleaded and proved and that trial court should not raise it *sua sponte*); see also *Creighton Univ. v. Gen. Elec. Co.*, No. 4:08CV460, 2009 WL 756206, at *3 (D. Neb. Mar. 18, 2009) (refusing to consider unconscionability where it has not been pleaded); *Southworth & McGill, P.A. v. S. Bell Tel. & Tel. Co.*, 580 So. 2d 628, 631 (Fla. Dist. Ct. App. 1991) ("If appellants wished to avoid the plain provisions of the clause limiting liability, it was incumbent upon them to plead and prove 'unconscionability' . . ."); *State Farm Mut. Auto. Ins. Co. v. Atl. Indem. Co.*, 468 S.E.2d 570, 573 (N.C. Ct. App. 1996) ("[F]ailure to plead the affirmative defense of unconscionability . . . operates to bar its raising of this issue on appeal."); *Guaranteed Foods of Neb., Inc. v. Rison*, 299 N.W.2d 507, 512 (Neb. 1980) (holding that under Nebraska law, "the issue of unconscionability must be pleaded in order to be considered by the court"); *Rozeboom v. Nw. Bell Tel. Co.*, 358 N.W.2d 241, 246 (S.D. 1984) (holding unconscionability must be asserted, pleaded, and proved).

103. *Schlaefter v. Fin. Mgmt. Serv., Inc.*, 996 P.2d 745, 748 (Ariz. Ct. App. 2000) (citation omitted).

premise that it is within judicial discretion to raise unconscionability on their own initiative in the same manner as they might illegality. This rejection of judicial authority diminishes unconscionability as the court's own "policing" doctrine.

The application of unconscionability differs from illegality in yet another way. How courts sever an unconscionable term also limits unconscionability's influence on future bargaining behavior, unlike the broader discretion courts exercise under illegality. Remedies for illegality are permeated with deterrence concerns.¹⁰⁴ For example, in the context of overly broad employee noncompete clauses analyzed under the illegality doctrine, some courts resist reforming or severing offending clauses but instead strike the illegal clause in order to discourage overreaching by dominant parties going forward.¹⁰⁵ When contract clauses offend public policy, the Restatement (Second) of Contracts section 184 comments suggest that courts should not exercise discretion to partially enforce a provision "unless it appears that [the offending party] made the agreement in good faith and in accordance with reasonable standards of fair dealing."¹⁰⁶ The Restatement continues: "[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy."¹⁰⁷ Harlan Blake's influential article in the 1960s, *Employee Agreements Not to Compete*,¹⁰⁸ articulated a logic that has appealed to courts over the years. Courts now often refuse to sever unreasonable parts of noncompete clauses in the employment context specifically to avoid a perverse incentive. "If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too."¹⁰⁹

104. The Restatement's Reporter's Notes specifically caution that partial enforcement is not available to those who act in bad faith because of "the potential incentives it will give employers to bargain in bad faith in the future." RESTATEMENT (SECOND) OF CONTRACTS § 184 reporter's note (1981). Likewise, the comment to section 182 advises: "In close cases, a court will consider whether denial of recovery will deter the improper conduct or, on the contrary, encourage persons engaging in such conduct to enter into transactions knowing that their promises are unenforceable." RESTATEMENT (SECOND) OF CONTRACTS § 182 cmt. b (1981).

105. Farnsworth explained that a bedrock principle of "unenforceability on grounds of public policy" is as a "sanction to discourage undesirable conduct, either by the parties or by others." FARNSWORTH, *supra* note 57, § 5.1, at 2.

106. RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b (1981).

107. RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b (1981).

108. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 683 (1960). The Restatement rejects a blue-lining approach, particularly when the stronger party overreaches in order to take advantage of the weaker party and in the case of standard form contracts. RESTATEMENT (SECOND) OF CONTRACTS § 184 cmt. b (1981).

109. Blake, *supra* note 108, at 683. Citing Blake's article, the court in *Valley Med. Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1999), struck down an overly broad noncompete clause as against public policy and refused to rewrite it as a signal to other employers. *Id.* at 1286. The court opined that had it simply rewritten the noncompete to make it reasonable: "Employers may therefore create ominous

Deterrence goals do not guide the construction of unconscionability remedies to the same extent that they do in illegality cases. Courts tend to favor benign forms of severance of unconscionable terms, rather than utilizing severance remedies to serve broader public policies beyond the case at issue.¹¹⁰ The Restatement appears to support lesser remedial applications, explaining, “the policy is not penal: unless the parties can be restored to their precontract positions, the offending party will ordinarily be awarded at least the reasonable value of performance rendered by him.”¹¹¹ However, while this comment may support protecting the offending party in “ordinary” cases, it does not preclude a judge from refusing to protect repeat players who might otherwise habitually offend. If a stronger party usually suffers no loss beyond the effect of the misconduct, any potential for deterrence of future misconduct is lost.

covenants, knowing that if the words are challenged, courts will modify the agreement to make it enforceable.” *Id.*; see also *Richard P. Rita Pers. Services Int’l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972); *Ceramic & Metal Coatings Corp. v. Hizer*, 529 S.E.2d 160 (Ga. Ct. App. 2000); *Woodward v. Cadillac Overall Supply Co.*, 240 N.W.2d 710, 719 (Mich. 1976).

110. As to the remedies for unconscionability, the Restatement (Second) of Contracts comments, “[w]here a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term” and its comments do not make reference to affecting future behavior. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981); see also FARNSWORTH, *supra* note 57, § 4.28, at 594 (noting that courts generally reserve the option to strike the clause in its entirety rather than sever it when unconscionability “infects” or “permeates” the entire clause or contract).

111. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981). In *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1098–99 (Alaska 2009), the court considered but rejected an employee’s argument that if a threshold provision in an arbitration agreement were held unconscionable the court should not enforce any part of the arbitration clause. The court acknowledged that the effect of the ruling had implications for the conduct of employers drafting contract provisions in the future, but stated:

We have no reason to think that Nye and other employers will ignore the precedent created by this opinion. If in future cases similar unconscionable clauses are sought to be enforced despite our ruling in this case, severance might not be appropriate. For the present, however, the strong public policy favoring arbitration points to imposing a severance remedy so that arbitration may take place.

Id. On the other hand, at least in dicta, the California Supreme Court likened unconscionability to illegality and took note that merely severing an offending unconscionable provision has the same effect on future behavior as an illegal one:

This reasoning applies with equal force to arbitration agreements that limit damages to be obtained from challenging the violation of unwaivable statutory rights. An employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice.

Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 697 n.13 (Cal. 2000).

II. RESUSCITATING UNCONSCIONABILITY

This Part envisions a more robust and relevant unconscionability doctrine. First, it reminds the reader that this stronger version of unconscionability does exist, as common law judges have shown in arbitration cases. It then considers a variety of suggestions to invigorate unconscionability as a safeguard against unfair bargaining.

A. EVIDENCE THAT UNCONSCIONABILITY IS NOT DEAD

Unconscionability reveals its stronger side in the back and forth judicial conversation about arbitration between the U.S. Supreme Court and lower courts.¹¹² Unconscionability's resilience in arbitration cases is in part attributed to a judicial awakening that the "unconscionability doctrine may be one of the judiciary's only remaining tools for protection of individuals and small businesses"¹¹³ against "escalating aggressiveness in the drafting of arbitration agreements."¹¹⁴ Susan Randall observed that in the arbitration context, unconscionability was uncharacteristically fortified.¹¹⁵ Randall found that the application of unconscionability to arbitration cases in the current era departs from the norm in three ways: First, judges find unconscionability more often in the arbitration cases. Second, judges find specific provisions within arbitration clauses, such as choice of law, forum selection, and damage limitations, unconscionable more often than when these same provisions are found within non-arbitration provisions of the contract. Finally, some judges express open hostility toward arbitration in their judicial opinions,¹¹⁶ perhaps as a signaling device to lawmakers.

112. See generally Knapp, *Blowing the Whistle*, *supra* note 1, at 613; Stempel, *supra* note 6, at 765–66; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *BUFF. L. REV.* 185, 188 (2004). Arbitration, perceived as a lower cost, more expedient, more flexible, and generally superior dispute resolution regime compared to litigation, has long been favored by merchants. However, courts have approached arbitration agreements with suspicion, perceived by some as overt hostility, because of the litigation safeguards surrendered in arbitration. See Stempel, *supra* note 6, at 771. The Federal Arbitration Act, enacted in 1925, intended to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place [them] on the same footing as other contracts." Randall, *supra* note 112, at 185 (citing *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 89 (2000)). Since then, the Supreme Court has advanced an increasingly pro-arbitration stance that has allowed wide swaths of the marketplace to essentially opt out of the public legal system to one of private adjudication.

113. Randall, *supra* note 112, at 189.

114. *Id.* at 196; see also Knapp, *Twenty-First-Century Survey*, *supra* note 1, at 319–20, 337–38; Stempel, *supra* note 6, at 776–800 (chronicling the "pro-arbitration regime" advanced in Supreme Court decisions over the past twenty-plus years and the energized reaction of lower court judges).

115. Randall, *supra* note 112, at 185–86.

116. *Id.* Knapp has observed similarly:

[T]he burgeoning application of the FAA triggered a corresponding expansion in the attention paid by state courts (and lower federal courts as well) to the doctrine of unconscionability. Unable to challenge directly the Supreme Court's insistence on a strong preference for arbitration, parties desiring to avoid being forced to submit to arbitration increasingly mounted unconscionability attacks on arbitration clauses, and with increasing success.

Mandatory arbitration provisions in consumer contracts raise formation, fairness, and substance issues that are the bread and butter of contract law; issues that we have long entrusted to common law judges. Perhaps this perceived encroachment by federal lawmakers on common law courts explains the groundswell of pushback against the “slanted pro-arbitration doctrinal straightjacket fashioned by Supreme Court.”¹¹⁷ Perhaps, too, the resurgence of unconscionability reveals that, at least with regard to arbitration, judges have reached a tipping point.

It remains to be seen whether unconscionability will be a formidable rear guard action in the developing law of arbitration. The Supreme Court’s pro-arbitration decisions continue unabated.¹¹⁸ Nevertheless, California courts have doggedly preserved at least some of unconscionability’s viability in arbitration cases.¹¹⁹ Knapp has applauded the judicial pushback:

Our survey of the courts at work in the unconscionability decisions reveals to me neither a lawless mob armed with pitchforks and torches, storming the castle of federal supremacy, nor a cabal of crafty and conniving functionaries, out to subvert established authority. Rather I see merely a loose collection of public servants, united only by their zeal to preserve, protect, and defend the rights of those who appear before them. By invoking the rhetoric of unconscionability, these judges are not merely acting tactically in a game of legal chess—although they may be doing that as well—they are sending a message, not just to the U.S. Supreme Court, but to the other officials and institutions that collectively make up our legal system.¹²⁰

Even if unconscionability ultimately fails to survive as a consumer defense in arbitration cases, some believe that the lower court decisions herald a new era for a reinvigorated unconscionability doctrine generally. Knapp, reviewing unconscionability cases outside of arbitration, optimistically reported “a possibly wider and more significant role for the concept of unconscionability as the new century unfolds.”¹²¹ Stempel drew a similarly optimistic conclusion from the arbitration cases:

Knapp, *Twenty-First-Century Survey*, *supra* note 1, at 317 (citations omitted).

117. Stempel, *supra* note 6, at 802.

118. *See, e.g.*, *Amer. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (holding that arbitration provision waiving class actions was not invalid under a judicially created “effective vindication” doctrine); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2010) (holding that FAA preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contract).

119. *See* Cynthia Galvez, *Fancy Footwork: California Narrowly Applies U.S. Supreme Court FAA Precedent; Upholds State Law Unconscionability as a Ground for Refusing to Enforce Arbitration Agreement*, *ALTERNATIVES TO HIGH COST LITIG.* (Int’l Institute for Conflict Prevention & Resolution, New York, N.Y.), Jan. 2014, at 10 (reporting on *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), in which the California Supreme Court allowed a narrowly crafted unconscionability defense against compelled arbitration in the employment context to proceed).

120. Knapp, *Blowing the Whistle*, *supra* note 1, at 628.

121. Knapp, *Twenty-First-Century Survey*, *supra* note 1, at 326 (reviewing cases in sales and leases, service contracts, domestic relations, real estate, and consumer credit and lending).

[T]he answer of many courts to the new twenty-first century problem of arbitrability has been the rediscovery and reinvigoration of a venerable doctrine that deserves greater respect and more frequent use across the board. . . . The arbitration-unconscionability experience suggests that a relatively less constrained version of the unconscionability norm should continue to play a role in contract construction, for both arbitration terms and other contract provisions.¹²²

The stronger form of unconscionability revealed in the arbitration cases suggests that unconscionability can serve as a useful judicial policing mechanism in the consumer context.¹²³

B. FINE-TUNING UNCONSCIONABILITY

This Subpart discusses suggestions that would give unconscionability a more meaningful policing role in the sphere of consumer contracts. While some proposals to strengthen unconscionability have urged radical overhaul, others involve only judicial “fine-tuning” of unconscionability in ways that do not do violence to the U.C.C.’s or Restatement’s construction of unconscionability. The suggestions considered here share the dual objectives of being more useful in individual cases and deterring unconscionability in future contracts. Moreover, most of these suggestions offer ways to reconceive the unconscionability doctrine that are within the grasp of judges.

I. *Expanding Remedies*

A number of scholars have argued that unconscionability should have an affirmative application, and not be viewed as merely defensive. Their suggestions widely range from recognizing unconscionability as a tort to simply recognizing it as a basis in contract to affirmatively seek restitution.

The boldest suggestion to reinvigorate unconscionability is to establish a parallel tort-based claim.¹²⁴ Proponents of unconscionability as a tort regard tort-based compensatory and punitive damages as more apt given the nature of unconscionability.¹²⁵ Furthermore, proponents of recognizing a tort of unconscionability assert that it is appropriate to impose tort remedies in order to influence public policy and promote

122. Stempel, *supra* note 6, at 860.

123. See Smith, *supra* note 52, at 1110–11 (calling for judicially revised constructions of the objective theory of assent and the duty to read rule in the analysis of adhesionary contracts).

124. Establishing new torts is within the domain of the common law. See Donald B. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U. L.J. 97, 97 (1979).

125. See Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 14 (2003) (urging recognition of a new tort focused on procedural unconscionability); King, *supra* note 124, at 113 (arguing that unconscionability represents a legal wrong that courts should recognize in tort); Gaddy Wells, Note, *The Doctrine of Unconscionability: A Sword As Well As a Shield*, 29 BAYLOR L. REV. 309, 313 (1977) (recognizing a new tort).

“consumer justice.”¹²⁶ They perceive the wrongfulness of unconscionable behavior as a larger social harm that extends beyond the two parties to the contract. In the view of one scholar, procedural unconscionability in particular should be treated as a tort because it threatens our collective buy-in to principles of contract generally: “Unconscionable contract formation is an affront to the logic of a legal system that assumes rationality in the contract-formation process and potentially undermines our system of contract enforcement as a whole.”¹²⁷ A desire to prevent these wider harms to the foundation of contract law therefore justifies unconscionability as a tort:

A remedy at law is needed, in addition to the equitable remedies currently available, to deter the repeat offender and to preserve the sanctity of the contracting process. . . .

. . . Treating procedural unconscionability as potentially actionable [in tort] recognizes that overreaching can sometimes do more than disturb the balance of the relationship between the parties. A legal cause of action for procedural unconscionability would recognize that overreaching can inflict actual damage on the victim and on society’s interest in the contracting process.¹²⁸

Unconscionability as tort heightens attention on the social harm that unconscionable contractors cause beyond the damage inflicted upon the other party.

Stopping short of tort-like conceptualizations, others have urged that courts should recognize an affirmative, as well as defensive, posture for unconscionability claims, thus providing litigants with a wider range of contract remedies. Prince pointed out that the “artificial” distinction courts make between a defensive and offensive use of unconscionability illogically fails to compensate for losses caused by the fulfillment of an unconscionable contract.¹²⁹ Prince’s position has been adopted by a few

126. See King, *supra* note 124, at 124–25.

127. Marrow, *supra* note 125, at 15. Paul Bennett Marrow explained:

Unconscionable conduct in the negotiation process should be deterred. Current statutory attempts to curb unconscionable activity fall short of providing the deterrence that is needed. Remedies at law, not equity, accomplish deterrence. The tort that this article proposes, Consequential Procedural Unconscionability, provides an instrument for deterrence. Without this tort, the tortfeasor has no reason to refrain from exploiting the benefits available through the use of procedurally unconscionable strategies and tactics.

Id. In a subsequent article, Marrow argued that unconscionability in the consumer context should be focused solely on the impact the contracting behavior has on public policy implications beyond the contracting parties. See Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 189 (2005).

128. Marrow, *supra* note 125, at 16. White and Summers also explored the desirability of awarding punitive damages for the sake of deterrence when a pattern of unconscionability exists. They concluded, “At least one of us is hesitant to turn loose the punitive damage dogs. After all, this is a commercial, not a consumer, code.” WHITE & SUMMERS, *supra* note 57, § 5–8, at 239.

129. Prince, *supra* note 59, at 548. Prince wrote:

courts that allow affirmative and offensive uses of unconscionability under the existing doctrine.¹³⁰ At the very least, equitable remedies including restitution are warranted.¹³¹

Expanding remedies by allowing prevailing defendants to recover attorney's fees also has appeal because it serves multiple desirable goals.¹³² Granting courts discretion to award attorney's fees to victims of unconscionability who successfully defend a lawsuit acknowledges: (1) the injury victim suffered in defending and vindicating her rights against a wrongdoer; (2) the benefits bestowed on nonparties as a result of having a court declare a contractual term in a standard contract unconscionable; and (3) the deterrence effects an award might have on future unconscionable contracting. Attorney's fees are already common in many consumer protection statutes, where unconscionable contracting is often regulated for precisely these reasons.¹³³ However, absent a statute authorizing an award of fees, judicial adherence to the American Rule makes it unlikely a court will award attorney's fees in a contractual unconscionability case.¹³⁴

Stephen Friedman complained that the lesser nonenforcement remedy is inadequate because it fails to adequately capture actual losses suffered by defendants as a result of unconscionability and because the want of remedies creates perverse incentives for repeat actors. Friedman justified departure from the American Rule¹³⁵ because a finding of

An affirmative recovery should be allowed, however, in at least two situations: when the operation of the unconscionable clause has already caused a loss to the offended party at the time of trial and justifies restitution and when striking an unconscionable provision gives the party an avenue for recovery based on the remainder of the contract.

Id.

130. See, e.g., *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1318 (S.D. Fla. 2010); *Eva v. Midwest Nat'l Mortg. Banc, Inc.*, 143 F. Supp. 2d 862, 895-96 (N.D. Ohio 2001).

131. See WHITE & SUMMERS, *supra* note 57, § 5-8, at 237-38.

132. Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 319 (2010).

133. For example, state statutes addressing unfair and deceptive trade practices typically, but not always, allow for recovery of attorney's fees. See CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (Feb. 2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

134. Under the so-called English Rule, a prevailing party is awarded attorney's fees, while under the American Rule, fee shifting is not the norm. See generally John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993) (tracing the history of both rules). The American Rule has well-established exceptions. If a contract provides for attorney fees, it will be enforced. *Id.* at 1578. Other well-established exceptions include the common fund exception and the substantial benefit doctrines, which focus on the benefits the litigation has bestowed on nonlitigants; and the contempt and bad faith exceptions, which each focus on the conduct of the losing party in the course of the litigation. *Id.* at 1579-87. Statutory exceptions to the American Rule abound: "The major purpose of state fee-shifting legislation is to compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system." *Id.* at 1588.

135. Historical and comparative accounts of the so-called American Rule and English Rule suggest that numerous judicial and statutory exceptions blur the distinctions in large part. See *id.* at 1570-90;

unconscionability reveals “that the overreaching party has abused a privileged position” and that awarding attorney’s fees to the victim of unconscionability “would . . . respect unconscionability’s particular nature and heritage.”¹³⁶ Friedman argued that litigation involving standardized contracting justifies an attorney’s fees award because the award accurately captures the real damage inflicted upon the victim of the unconscionable contract. He explained that challenging provisions within standardized forms come with unique litigation burdens and constitute a tort-like wrong against consumers.¹³⁷ He noted that allowing courts discretion to award attorney’s fees to consumers has an added benefit as a sanction “sufficient to focus the attention of sellers and their lawyers” on the fairness of standardized forms so as to avoid unconscionability.¹³⁸ Friedman therefore proposed that a few bold state legislatures might stimulate other states to amend their versions of U.C.C. section 2-302 to expressly provide for such an award.¹³⁹

Others scholars have proposed altering the burdens of proof required to establish unconscionability, particularly in the standard consumer contract context. As an affirmative defense, courts typically place the burden to plead and prove unconscionability on the defendant.¹⁴⁰ Yet, many scholars have observed that standard form contracts, although extraordinarily common, defy contract law’s fundamental assumption that contracts are based on mutual bargaining and assent. This assumption justifies the powerful freedom of contract principles that make unconscionability difficult to prove.¹⁴¹ Some scholars suggest that a more principled approach to unconscionability in standard form contracting

John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 27–31 (1984). Alaska has rejected the American Rule in favor of “a variation of the ‘English Rule.’” See Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska’s English Rule on Federal Civil Case Filings*, 29 *ALASKA L. REV.* 1, 1–2 (2012).

136. Friedman, *supra* note 132, at 319.

137. Friedman explained that consumers who establish unconscionability expended attorney fees directly and discretely caused by the unconscionability. He likened the unconscionable provision to a breach of warranty and the expense to establish unconscionability as a direct damage. *Id.* at 361–63. He characterized unconscionability as “wrong against that consumer,” for which a direct remedy is warranted. *Id.* at 363.

138. *Id.* at 365–66.

139. *Id.* at 371 (“All that is necessary is for a few state legislatures to authorize attorney’s fees to get the ball rolling.”). Arizona and Hawaii allow the prevailing party in contract actions to recover attorney’s fees. *ARIZ. REV. STAT. § 12-341.01* (LexisNexis 2014) (“In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.”); *HAW. REV. STAT. § 607-14* (2014) (“In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney’s fee, there shall be taxed as attorney’s fees, to be paid by the losing party . . .”).

140. See, e.g., *Southworth & McGill, P.A., v. S. Bell Tel. and Tel. Co.*, 580 So. 2d 628, 630–31 (Fla. Dist. Ct. App. 1991) (citing cases for proposition that unconscionability is an affirmative defense that must be pleaded and proved).

141. See generally I FARNSWORTH, *supra* note 57, at 556–72 (discussing the judicial difficulties in utilizing traditional contract doctrines to respond to the issues raised by standardized contract).

would place a burden on a dominant party to defend boilerplate provisions when attacked as unconscionable.

Refining the burdens of proof and production within the existing doctrine of unconscionability recognizes that standard boilerplate terms are not the product of traditional bargaining and equality.¹⁴² In the context of adhesionary standardized contracts, Russell Korobkin observed that market pressure will not produce efficiency as to nonsalient terms.¹⁴³ Efficient terms are beneficial, however. Korobkin explained that sellers have an incentive to insert nonsalient terms in form contracts that are not efficient, but that instead favor themselves over the buyers.¹⁴⁴ James Gibson, building on Korobkin's contributions, suggested the following refinement to courts' methodology for finding unconscionability:

First, as always, the consumer must prove procedural unconscionability by showing that the disputed term was not salient—but this inquiry should take into account emerging empirical evidence and the full context of the overall transaction. Second, if the consumer satisfies this burden, then the burden on the issue of substantive unconscionability shifts to the seller, who must show that the term was efficient. Failure to do so means the term is unenforceable.¹⁴⁵

Notably, neither the Restatement nor the U.C.C. assigns any particular evidentiary burdens to either party, instead placing an equal responsibility on each party to make its case. The U.C.C. provides merely that “[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the court in making the determination.”¹⁴⁶ The Restatement leaves the court squarely in charge of how evidence about unconscionability should emerge, speaking only

142. Russell Korobkin, although favoring a “market and government institutions” approach to designing the nonsalient, boilerplate terms, has suggested that to the extent unconscionability remains the domain of judges, the inquiry and burdens of establishing unconscionability should be refined to promote efficiency principles. He proposed that courts analyze unconscionability in the standard form contract area as follows:

(1) “procedural unconscionability” analysis should be motivated by an inquiry into a term’s salience, (2) “substantive unconscionability” determinations should depend on whether terms are more costly to buyers than they are beneficial to sellers *ex ante*, (3) courts should require buyers to meet an exacting burden of proof before finding a term unconscionable under this criterion, and (4) courts should liberally refuse to enforce terms found unconscionable under this standard, and even refuse to enforce entire contracts on some occasions, in order to provide an incentive to sellers to draft efficient form contract terms *ex ante* when the market fails to provide such an incentive.

Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1208 (2003).

143. Korobkin explained that these are the terms within standard contracts that do not capture a buyer’s limited attention or concern because they are regarded as of low probability or significance to the transaction. *Id.* at 1234–36.

144. *Id.* at 1243–44.

145. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 223–24 (2013).

146. U.C.C. § 2-302(2) (2002).

of the court's prerogative to "refuse" enforcement in some form or another.¹⁴⁷ Thus, the unconscionability doctrine grants a court the authority to construct a framework to consider unconscionability in the context of the case before it. Because adhesionary contracts challenge common notions of contractual assent, courts might justifiably demand that the drafter of a problematic standardized term first show that it was a commercially reasonable term.¹⁴⁸

2. *A Judicial Attitudinal Adjustment*

Others scholars have boldly called for a judicial attitudinal adjustment toward the unconscionability doctrine. This attitude adjustment derives from an acknowledgment that unconscionability is not a rigid rule-based doctrine but a standards-based doctrine vested in the discretion of the court. Rather than evoking fear of unconscionability as a rule devoid of principle, judges should embrace unconscionability's flexibility as a necessary counterweight to mindless formalism and rigidity.¹⁴⁹ Unconscionability is a judicial means to drill deep into the soul of a contract and test its realness rather than its form.

An early voice in unconscionability scholarship, M.P. Ellinghaus, responded to Leff's critique of unconscionability's vagaries in *In Defense of Unconscionability*, where he celebrated unconscionability's "wooliness."¹⁵⁰ Ellinghaus characterized Leff and other critics as mistaken with respect to unconscionability's fundamental function in contract law. In his view, Leff's problem was that he was characterizing unconscionability as a meaningless and unprincipled rule, when in fact, unconscionability existed as one of contract law's "residual categories," occupying that stage with doctrines of necessary vagueness such as "reasonableness," 'due care,' and 'good faith.'"¹⁵¹ Ellinghaus argued that unconscionability was not a rule that was "abstract" to the point of "meaninglessness" as critics complained, but instead was not a rule at all.¹⁵² Rather, it was a "standard" that was "essential to the well-being" of contract law itself.¹⁵³ He placed his faith in courts to employ unconscionability prudently. To Leff, he responded: "Most important of all, such an overemphasis [on definitional failure] is calculated to discourage the courts from discharging the function of reasoned and *creative* exegesis and implementation which Section 2-302 so obviously (because necessarily) entrusts to them."¹⁵⁴

147. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

148. See Smith, *supra* note 52, at 1110–11.

149. See Stempel, *supra* note 6, at 859.

150. M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 795 (1969).

151. *Id.* at 759.

152. *Id.* at 757.

153. *Id.* at 757, 759.

154. *Id.* at 761.

Ellinghaus placed extraordinary confidence in the common law to recognize an evolving standard: “[U]nconscionability is a ‘standard’ which awaits, and is designed to encourage, organic development by the courts.”¹⁵⁵ He concluded, “[W]e cannot do without such regrettably vague standards.”¹⁵⁶

Amy Schmitz, like Ellinghaus some forty years before, also defended unconscionability as encapsulating a norm that succeeds precisely because of its flexibility. She argued that unconscionability defies rigid formalism in order to ensure contract law remains true to “core human values.”¹⁵⁷ In defense of unconscionability, she writes:

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.¹⁵⁸

She urged judges to further unleash the doctrine and “resist formalist trends and use unconscionability as a safety net to catch cases of contractual unfairness that slip through more formulaic contract defenses.”¹⁵⁹

One way to implement this attitudinal adjustment is to recognize that unconscionability shares the objectives of illegality in contract law and judges possess a similar guardian function. These adjustments require only a willing judge. The language of the Restatement and the U.C.C. already entrusts unconscionability to the judge in the first instance, along the lines of illegality. U.C.C. Section 2-302(1) begins not with a requirement that a party raise unconscionability, but with the judge finding it: “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.”¹⁶⁰ Section 2-302(2) provides further support to the assertion that the oversight of unconscionability is a judicial responsibility. “When it is claimed or *appears to the court* that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to

^{155.} *Id.* at 795.

^{156.} *Id.* at 815.

^{157.} Schmitz, *supra* note 3, at 73. Schmitz explains that the doctrine’s flexibility enables judges to test the core principle of consent to contract, which formulaic rules of formation might otherwise miss:

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

Id. at 84.

^{158.} *Id.* at 102.

^{159.} *Id.*

^{160.} U.C.C. § 2-302(1) (2012).

present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”¹⁶¹ Thus, if unconscionability appears to the court, it may raise the issue, and then the litigants have the supporting role of *aiding* the court in its decision. As a doctrine steeped in public policy and intended as a judicial tool to root out the evil results of naughty bargaining, unconscionability naturally seems a close relative to illegality. As a result, judges should view raising unconscionability as a judicial *responsibility*, rather than limiting it to an affirmative defense that must be raised by a party. Judges can and should raise it *sua sponte*, lest the judiciary become complicit in allowing unconscionable results.

Judges might also draw other lessons from illegality and, when appropriate, fashion a remedy that sanctions dominant actors to deter unconscionable contracting. As Korobkin explained, once courts determine that a seller imposed an unconscionable term, mere “reformation remedy . . . provides no incentive for sellers to resist the market pressure to provide low-quality non-salient form terms even when low-quality terms are inefficient.”¹⁶² Since “[m]ost buyers will abide by the form term rather than challenge it, giving the seller a windfall,”¹⁶³

[i]n the unusual case that the term is challenged and found unconscionable by a court, the seller is no worse off than it would have been if it had provided an efficient term initially. . . . [U]nconscionable terms will be avoided only when courts intercede in private contracting arrangements and invalidate terms. . . .

. . .

The severability doctrine does not require deference to parties who knowingly include illegal terms in their contracts, however. As one court has observed, to do so would only encourage overreaching by drafting parties. This reasoning applies with even greater force to unconscionability, because courts are much more poorly suited to determine whether or not a term is efficient than they are to determine whether a term is illegal. In light of this, and especially if deference is given to seller-drafted terms that are not clearly inefficient, it is important for courts to provide sellers with the maximum incentive not only to attempt to draft efficient non-salient form terms, but also to invest time and resources in doing so.

Providing such an incentive requires courts, on a finding of unconscionability, to severely limit enforcement of the contract in question to deter other sellers from similar bad faith or carelessness. Put in different terms, courts should recognize a right of buyers to be free of unconscionable contracting behavior, and this right should be protected with a “property rule” rather than a “liability rule.”¹⁶⁴

161. *Id.* § 2-302(2) (emphasis added).

162. Korobkin, *supra* note 142, at 1286.

163. *Id.* at 1286.

164. *Id.* at 1286–89.

Courts may not be able to legislate unconscionability into oblivion, but at the least, they can exercise their discretion to promote conscionable contracting in the marketplace.

3. *The Conscience of a Lawyer*

As contracts teachers, we prepare students to know and embrace the normative conventions of contract law in practice. Even if one concedes that contract law's unconscionability doctrine has little heft and adds little to contract litigation, it would still deserve its enduring place in first-year contracts because it forces students to think about bargaining disparity and fairness. Unconscionability allows students, who one day will represent the powerful, to consider their ethical and moral responsibility to weaker parties. Yet, after the first-year class, in the real world of lawyering, unconscionability currently misses its hortatory potential as well.

Transactional practitioners will find little in the Model Rules of Professional Responsibility to guide them as they navigate issues of fairness and power. Christina Kunz called the current Model Rules "thin" in their guidance to transactional lawyers who are considering limits of using a client's power to exact favorable terms from weaker or unsophisticated parties.

[She] invites practicing lawyers, judges, and ethics scholars to look more closely at transactional ethics, in order to (1) enhance the legal profession's awareness of ethical pitfalls in "too-sharp" drafting practices, (2) bring ethics rules to bear on existing drafting practices that violate the rules, and (3) further develop transactional ethics into a more robust field that is better able to curb the ethical abuses in drafting and negotiation.¹⁶⁵

At the very least, lawyers asked to draft unconscionable or possibly unconscionable terms owe duties of wise counsel to their clients.¹⁶⁶ Some scholars observe that client counseling must go beyond simplistically informing clients that they can likely "get away with it." They urge that counseling about unconscionability be "textured," in order to provide clients with a fuller understanding of the possible negative ramifications of expedient overreaching on them and on justice more generally.¹⁶⁷ Going one step further than client counseling, some scholars have called for strengthening the disclosure obligations that lawyers have to the other party, at least as to the inclusion of unquestionably unconscionable terms.¹⁶⁸

Some who wrestle with the ethical issues related to the imbalance of power in transactional practice urge lawyers to develop a more complex ethical dimension to their own professional identity that transcends their

165. Kunz, *supra* note 73, at 511.

166. *Id.* at 502–04.

167. Carrington, *supra* note 4, at 372; Kunz, *supra* note 73, 502–04; Schmitz, *supra* note 70, at 875–76.

168. Duhl, *supra* note 4, at 1012 (calling for conspicuous disclosure of invalid provisions).

representation of one client in one transaction. For example, Schmitz, critiquing arbitration clauses in consumer contracts, encourages lawyers to consider power imbalance as part of their ethical responsibilities:

Attorneys representing companies in drafting or enforcing consumer arbitration clauses should therefore remain committed to justice and ethical considerations that transcend stark professional conduct rules. This means that they should go beyond rote assumptions of arbitration's benefits to consider the real risks and impacts of onerous arbitration provisions. It also means that they should refuse to draft provisions that, upon reflection, appear likely to conceal companies' illegal conduct or squelch consumers' procedural and substantive rights.¹⁶⁹

She explains that this “fairness of means and objectives” should be part of the transactional lawyer’s professional responsibility because, unlike litigation, there is no third-party referee to curb contracting abuses.¹⁷⁰

Deborah Rhode, an outspoken critic of current ethical training of lawyers, labeled our current approach as teaching “legal ethics without the ethics.”¹⁷¹ The narrow focus law schools place on the rules concerning lawyer discipline “leave future practitioners without the foundations for reflective judgment.”¹⁷² Indeed, the current Model Rules of Professional Responsibility have been criticized as fixating on the floor of minimum rule compliance and ignoring “the broadly moral altogether.”¹⁷³ Defining professionalism only as conformance to the Model Rules of Professional Responsibility lowers ethical conduct to the minimum expectations of conduct to avoid discipline rather than embracing professionalism as embodiment of a richly complex and nuanced professional identity.

The Carnegie Foundation’s heralded study, *Educating Lawyers*, articulated legal education’s responsibility to invest in cultivating in student character, integrity, and a broader view of ethics than mere rule compliance.¹⁷⁴ *Educating Lawyers* called on law schools to go beyond merely “the law of lawyering” and to allow students to consider “the substantive ends of law, the identity and role of lawyers, and questions of equity and purpose” and to explore “questions of both competence and responsibility to the client and to the legal system.”¹⁷⁵ Therefore, even if unconscionability proved itself only a withered, atrophied appendage of contract law, it still deserves its place in first-year contracts. Unconscionability has proven itself a useful springboard in a first-year

169. Schmitz, *supra* note 70, at 877.

170. *Id.* at 850.

171. Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 *FORDHAM L. REV.* 333, 340 (2003).

172. *Id.*

173. Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 *N.C. L. REV.* 411, 421 (2005).

174. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS* 145–61 (2007).

175. *Id.* at 147.

contracts class for discussing that rich sense of integrity and professional identity teachers aim to cultivate.

CONCLUSION

“‘[U]nconscionability’ is a residual category of shifting content and expansible nature.”¹⁷⁶ Rather than shrink from its flexible nature, its champions, Knapp among them, have urged judges to accept and use the latitude it provides them wisely, to promote fairness and justice in contracting.¹⁷⁷ This Article explores suggestions advanced by several contract scholars to judicially fine-tune the unconscionability doctrine in order to enable the doctrine to fulfill its purpose. Most of these are within the grasp of a common law judge. For example, to make unconscionability more vital and robust, more courts might follow those few courts that entertain unconscionability as an affirmative claim that can be brought by a victim, as well as an affirmative defense. At the very least, in appropriate cases, courts should consider a broader range of equitable remedies in addition to nonenforcement, and particularly allow declaratory relief and restitution. Expanding the range of remedies afforded to victims recognizes that unconscionability can cause financial harm that cannot be adequately compensated by mere nonenforcement. The exposure to an award of damages, even simple restitution or attorney’s fees, may be needed when the unconscionable term has caused the victim to incur loss. Moreover, the threat of real damages may also deter unconscionable actors.

Next, courts should acknowledge that unconscionability is close kin to illegality. Like other forms of illegality, unconscionable contracts, particularly adhesionary form contracts, have negative impacts beyond the parties. Pervasive unconscionability undermines basic principles of contract law and threatens social order. Therefore, courts should fashion remedies in order to deter future unconscionability. And courts should accept that the U.C.C. and the Restatement expressly empower a court to raise unconscionability *sua sponte*, precisely so that the court does not become an instrument of unconscionability.

The legal profession might well consider how to dissuade lawyers from participating in unconscionable contracting. Unconscionability doctrine is intended to identify and remedy bargaining abuse that results in grossly unfair contracts, and it does not serve the reputation of the legal profession to allow lawyers to be an instrument of unconscionability.

¹⁷⁶ Ellinghaus, *supra* note 150, at 814.

¹⁷⁷ Knapp, *Twenty-First-Century Survey*, *supra* note 1, at 338 (calling unconscionability “a means of tempering economic efficiency with social justice, and moral decency”); Stempel, *supra* note 6, at 860 (approving the usefulness of a “a relatively less constrained version of the unconscionability norm”); Schmitz, *supra* note 3, at 117 (urging 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”).

At the very least, when a contract has the stench of unconscionability, lawyers owe their own clients wise, cautious, and considered counsel. Law schools are charged with helping students to cultivate a worthy professional identity rather than teaching them to reside at the ethical bottom of the profession. Professional identity is not defined by minimal ethical rules, but by a richly nuanced and animated sense of integrity. Lawyers of integrity understand the larger responsibilities of their profession both to society and to others.

Most importantly, courts must embrace unconscionability for the flexible standard that it was intended to be, and to recognize it as a doctrine intended to police and define the essence of bargaining fairness. The arbitration cases reveal that unconscionability can be a robust common law doctrine that insists upon contracting fairness and justice. The unconscionability doctrine should not be perceived as so vague and plastic that it endangers contract law; instead, unconscionability should be recognized as a standard of essential contracting fairness that has been entrusted to the common law of contracts.
