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The Unconscionability Doctrine in U.S. Contract Law

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Contents

Summary

Unconscionability is a contract defense typically advanced in cases in which there is a combination of unfair contract terms and deficient bargaining. Its origin is primarily in equity as practiced in England, where the doctrine can be traced back to at least the fifteenth century. Unconscionability entered American contract law through the adoption of English law in the former colonies. The concept received its greatest impetus from the promulgation of the Uniform Commercial Code (UCC) and section 2-302. The merger of equity and common law as well as the codification led to the general recognition of unconscionability in contract law.

There exists no clear definition of unconscionability in either the UCC or the Restatement. The official comment for UCC section 2-302 suggests that the purpose is to prevent oppression and unfair surprise. This has been interpreted to entail procedural as well as substantive factors. Procedural unconscionability involves deficiencies in how the contract came to be, especially exploitation of discrepancies in status and sophistication of the parties, deceptive appearance or language of the contract and questionable bargaining. Substantive unconscionability refers to the contract terms per se; it is often a matter of an excessively one-sided contract or a particularly offensive term. There are differing opinions on whether both procedural and substantive unconscionability is required for an unconscionability ruling; a commonly adopted approach is the idea of a sliding scale: where there have been extensive procedural shenanigans less is required in terms of contractual imbalance and vice versa.

Criticism of the unconscionability doctrine is often ideological and suggestions range from uninhibited expansion to demands of complete abolition. Scholars within law and economics argue that the current or expanded use of unconscionability hurts both parties ex ante, although behavioral economics seems to suggest that this may not always be true. Professor Arthur Allen Leff has offered a potent critique of unconscionability focusing on the lack of clarity and guidance in the rule. My analysis considers the economics of unconscionability and whether an abstract rule against unfair contracts is appropriate. I conclude that, given certain conditions, the doctrine might be defensible from an economic perspective and that an abstract rule is likely necessary to handle cases involving numerous minor contract offenses only together reaching a level warranting judicial interference.

Sammanfattning

Unconscionability är en grund för jämkning eller ogiltigförklaring av avtal som typiskt sett används vid en kombination av oskäliga avtalsvillkor och brister i själva avtalssituationen. Regeln har sitt ursprung huvudsakligen i den engelska rättens equity och kan där spåras till åtminstone 1400-talet. Unconscionability blev en del av amerikansk avtalsrätt genom införandet av engelsk rätt i de nybildade delstaterna. Dess nuvarande användning och innebörd är i stor utsträckning resultatet av lagstiftningsprojektet Uniform Commercial Code (UCC). Sammanslagningen av equity och common law samt kodifieringen har föranlett ett allmänt erkännande av unconscionability i den amerikanska avtalsrätten.

Det finns ingen tydlig definition av unconscionability vare sig i UCC eller i det s.k. Restatement. Den officiella kommentaren till UCC antyder att syftet är att förhindra förtryck och överrumpling. Detta har tolkats till att innefatta såväl procedurella som substantiva faktorer. Procedurella faktorer innebär brister i avtalssituationen, speciellt utnyttjande av en part med jämförelsevis begränsad erfarenhet och avtalsvana, bedräglig utformning av avtalshandlingen och tveksamma försäljningsmetoder. Substantiva faktorer avser avtalsvillkor i och för sig; det rör sig ofta om ett extremt ensidigt avtal eller en synnerligen stötande klausul. Det finns olika åsikter om huruvida både procedurella och substantiva faktorer krävs för att ett avtal ska jämkas eller ogiltigförklaras; ett vanligt synsätt är att när proceduren varit behäftad med avsevärda brister krävs mindre i form av substantiva faktorer och vice versa.

Kritik av unconscionability är inte sällan ideologisk och slutsatserna spänner från obegränsad expansion till fullständigt avskaffande. Forskare med ett nationalekonomiskt perspektiv menar att den nuvarande utformningen liksom en expansion är ex ante negativt även för de som skyddas av doktrinen; forskning inom beteendeekonomi tyder dock på att detta inte alltid stämmer. Arthur Allen Leff har framfört en erkänt kraftfull kritik av unconscionability fokuserad på bristen på klarhet och vägledning i regeln. Min analys undersöker dels vissa nationalekonomiska implikationer av unconscionability och dels huruvida den abstrakta utformningen av regeln är ändamålsenlig. Slutsatsen är att doktrinen under vissa förutsättningar kan vara nationalekonomiskt försvarbar och att en abstrakt regel sannolikt är ofrånkomlig i fall som involverar ett flertal mindre stötande element som endast i kombination når en nivå där ett domstolsingripande är rättfärdigat.

1 Introduction

Unconscionability is a contract defense. It is typically advanced where there is a combination of unfair contract terms and deficient bargaining. The origin of the concept is primarily in equity, and it has been adopted in common law partly through the merger of equity and common law and partly through the enactment of the Uniform Commercial Code and its section 2-302.

The purpose of this thesis is to offer a comprehensive overview of the unconscionability doctrine, as well as an analysis rooted in the critique of the doctrine. It does not cover other instruments used by courts to minimize the impact of unfair contracts, such as interpretation and contract defenses other than unconscionability. The vast amount of protective legislation enacted by Congress and in many states is also left aside. The thesis is written from an American perspective; a basic understanding of United States contract law is presumed.

The research is based on law review articles and treatises, including the cases referenced in those materials. Unless specified or otherwise apparent, law review articles and treatises are used where they are descriptive rather than prescriptive. The original research is limited to finding and analyzing case law and is primarily used to either exemplify or verify particular aspects of unconscionability. Citations loosely follow the rules of the Bluebook.

Particularly for Swedish lawyers, it is worth noting that unconscionability bears significant similarities to Section 36 of the Swedish Contracts Act (36 § avtalslagen): both are abstract rules aimed at limiting the impact of unfair contracts. They were each codified to encourage courts to be more open in their reasoning about unfair contracts.[1] Similar to unconscionability, Section 36 was primarily intended to afford a layer of protection for consumers and other vulnerable parties who are subject to burdensome clauses in form contracts.[2] The interpretation of both rules requires a balancing of different interests and part of the debate is necessarily rooted in ethics.[3] Thus, while this thesis is about unconscionability, some of the reasoning and considerations expressed may be relevant to the study of Section 36.

[1] Cf. prop 1975/76:81, p. 31. (Swed.) (suggesting that an open control of oppressive clauses is preferable to, for example, interpretation) and Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 527 (1967) (noting that it was the tendency to skew legal doctrines that section 2-302 was designed to prevent).
[2] Prop 1975/76:81, p. 25. (Swed.)
[3] See, e.g., Andreas Norlén, Oskälighet och 36 § avtalslagen, p. 11 (2004).

2 Historical development

Unconscionability lacks the clear definition that is essential to properly trace a concept to its origins. It is therefore necessary to create a definition, or at least draw some boundaries, to serve as limitations for an historical inquiry. For the purpose of this chapter, unconscionability is defined as a contract where enforcement is refused due to misbalance of obligations together with other factors concerning the procedure, yet is not decided using inadequacy of consideration, usury or other related but different rules.[4] A boundary has also been drawn limiting the inquiry to English and American law.[5]

2.1 Origins in English law

In equity,[6] there is evidence of unconscionability as far back as the fifteenth century.[7] As for common law, some argue that the case of James v. Morgan, decided in 1663, is an early example of unconscionability. [8] The defendant had agreed to purchase a horse from the plaintiff and pay a barley corn a nail, doubling the price with each nail in the horse's shoes. There were 32 nails and the judge calculated the price to 500 quarters of barley, equal to more than £100, while the value of the horse was just £8.[9] The jury was directed to award only the value of the horse. Even though there is no mention of the word unconscionability in the short opinion, the case has often been cited as evidence of unconscionability's recognition in common law (and not just in equity).[10]

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[4] Hints of usury or inadequacy of consideration are not rare in cases where the unconscionability defense is raised. Behavior by one party that is just short of undue influence is also quite often present.

[5] Many scholars link unconscionability to the Roman law principle of *laesio enormis* whereby a seller could rescind a contract if the agreed price was less than half the market value. For a further historic background, see Dando B. Cellini & Barry Wertz, Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC, 42 Tul. L. Rev. 193 (1967).

[6] Equity has been described as follows. "In its technical sense, equity may [...] be defined as a portion of natural justice which, although of a nature more suitable for judicial enforcement, was for historical reasons not enforced by the Common Law Courts, an omission which was supplied by the Court of Chancery." Black's Law Dictionary (9th ed. 2009) (quoting R.E. Megarry, Snell's Principles of Equity 2 (23d ed. 1947)).

[7] Kevin M. Teeven, A History of the Anglo-American Common Law of Contract (1st ed. 1990) at 314.

[8] James v. Morgan, 1 Lev. 111 (1663).

[9] How the judge came to the contracted amount is puzzling. It seems the correct figure would be 2^{31}, or 2 147 483 648, grains. Perhaps the bargain was not accurately described in the opinion.

[10] See, e.g., William B. Davenport, Unconscionability and the Uniform Commercial Code, 22 U. Miami L. Rev 121, 124-125 (1967) and Kevin M. Teeven, A History of the Anglo-American Common Law of Contract (1st ed. 1990) at 316. In order to subsume this case under the unconscionability doctrine, one might have to infer facts about the procedure, e.g., that the seller was arithmetically challenged and taken advantage of by the buyer.

In an often cited opinion in Earl of Chesterfield v. Janssen, Lord Chancellor Hardwicke gives an overview of different kinds of fraud in equity; he includes unconscionability, defined as follows:

> It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other [...].[11]

Hardwicke references James v. Morgan noting that the common law, too, has taken notice of such contracts. Unconscionability thus seems to have existed in equity as well as in common law quite some time ago, though to a very limited degree in the latter.[12]

2.2 Adoption in American law

When the British colonies and territories in America gained independence and became states, they adopted the English common law: most issued a reception statute either recognizing the common law of England or the common law as practiced in the colony or territory before independence, while some tacitly accepted the common law.[13] However, if a rule in English law was found to be against public policy, a state court was permitted to set it aside.[14] All states except Louisiana were thus applying English law so far as it did not conflict with the state's own legal development or public policy, and unconscionability appears to have been readily accepted by courts sitting in equity, though it was usually referred to as a form of fraud.[15]

A telling example of a state court case is King v. Cohorn,[16] decided in 1834 by the Supreme Court of Errors and Appeals of Tennessee. The court was asked to set aside an agreement for the sale of a lot of land. In analyzing the case, the court first takes note of "the condition and character of the

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[11] Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155 (1750).

[12] But see 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 551 (1963) ("The courts of common law did not create a rule against unconscionability and did not purport to refuse to sustain a common law action to enforce an unconscionable agreement."). See also 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 577 (3rd ed. 2004) ("The development of a general standard of fairness for law as well as equity had to await the advent of the Uniform Commercial Code.").

[13] Ford W. Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791, 822-823 (1951). See also the discussion in Wilson v. Arkansas, 514 U.S. 927, 933 (1995), with examples of state constitutions explicitly incorporating English common law.

[14] Id. at 822. A rule could be deemed "inapplicable."

[15] See, e.g., Conant v. Jackson, 16 Vt. 335 (1844), Hall v. Perkins, 3 Wend. 626 (1829) and King v. Cohorn, 14 Tenn. 75 (1834). The U.S. Supreme Court can be said to have endorsed unconscionability in Hume v. United States, even if that particular case appears to have been a matter of mistake rather than unconscionability. Hume v. United States, 132 U.S. 406 (1889).

[16] King v. Cohorn, 14 Tenn. 75 (1834).

parties."[17] The buyer is described as an "artful, intelligent, keen, speculating man"[18] and the seller as a "negro woman, ignorant, old, addicted to drunkenness, then in bad health, and necessarily imbecile, and possessing no other property than the lot in question."[19] The seller was illiterate, without representation and the contract was made in secret; she had to rely on what she could gather from hearing the terms read to her.

Looking at the "nature and subject of the bargain",[20] the court notes that the lot was her only property and that it was worth around $400. Her husband was a slave worth roughly the same amount and owned by the buyer of the land. She had previously mentioned to her neighbors that she was considering selling the lot to free her husband. The property was then conveyed for a "heavy wagon and less than half a team of inferior horses"[21] for which, according to the court, she had no use and which could only lead to expenditures and trouble for her. The evidence in favor of the buyer was a witness – the son-in-law of the buyer – who said he had read the terms to her, that she was present during valuation of the property, spoke of running the wagon to pay her debts and appeared to be satisfied with the trade.

The court quoted Lord Chancellor Hardwicke's opinion in Earl of Chesterfield v. Janssen[22] as it set aside the contract. The analysis includes consideration of virtually all the known circumstances surrounding the contract: procedural aspects such as the situation and the condition of the parties as well as the substance of the bargain. As for the substance, there seems to be no objective comparison of the obligations; instead, the court attributed value based on the position of a party by stating that the seller would have "no use for [the wagon and the horses]"[23] and that they would be "an expense and cumbersome [to her]."[24]

As the above case illustrates, unconscionability was early on being applied by American courts sitting in equity. The law courts, on the other hand, generally did not refer to a contract as being unconscionable but still might set an unfair contract aside for lack or failure of consideration, duress or fraud, lack of mutual assent etc.[25]

2.3 The Uniform Commercial Code

Prior to the Uniform Commercial Code (UCC), a number of statutes had been promulgated by the National Conference of Commissioners on

[17] King v. Cohorn, 14 Tenn. 75, 1834 WL 992 at 1 (1834).
[18] Id. at 1.
[19] Id. at 1.
[20] Id. at 2.
[21] Id. at 2.
[22] Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125 (1750).
[23] King v. Cohorn, 14 Tenn. 75, 1834 WL 992 at 2 (1834).
[24] Id. at 2.
[25] John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-38, p. 401 note 18 (3rd ed. 1987).

Uniform State Laws, the first being the Negotiable Instruments Law from 1896 which was adopted by 48 states.[26] During the annual meeting of the conference in 1940, the then president of the organization, William A. Schnader, proposed what was to become the UCC.[27] The American Law Institute later agreed to participate and Professor Karl N. Llewellyn became the chief reporter for the project.[28][29] As the name suggests, the purpose of the UCC was to create a body of law governing commercial transactions which would be adopted by as many states as possible. It is divided into articles, with the first article containing general provisions and each subsequent article covering a different kind of transaction.

Article 2, which applies to transactions in goods, arguably became the most important of the articles. As part of it, a section concerning unconscionability appeared for the first time in a draft from 1941 but was subject to a number of revisions before it took its final form[30]:

> § 2-302. Unconscionable contract or Clause.
>
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This section represented something quite novel in American contract law: an explicit rule on unconscionability not limited to equity, allowing courts to police bargains without make believe reasoning about consideration, fraud, duress or mutual assent.[31]

After the UCC reached its final form in 1957, it was adopted by all 50 states and the District of Columbia, though not always in its entirety; the most note-worthy example of partial adoption is perhaps Louisiana which has opted not to include article 2.[32] As for unconscionability, it has been said

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[26] Robert Braucher, The Legislative History of the Uniform Commercial Code, 58 Colum. L. Rev. 798, 799 (1958).
[27] Id. at 799.
[28] Id. at 800.
[29] As the chief reporter, Llewellyn's views on contract law played an important role in the development of the UCC, including the provision on unconscionability in article 2. Many scholars refer to his views as they discuss the drafting history of UCC 2-302, see, e.g., 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 577-578 (3rd ed. 2004).
[30] For more on the legislative history, see Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).
[31] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 777 (3rd ed. 2004).
[32] California did not include unconscionability as part of article 2, though the same language was later adopted and can be found in § 1670.5 of the California Code. For more

that the adoption of the UCC gave the doctrine its greatest impetus.[33] The UCC has from early on been applied by analogy to decide cases in other areas of contract law.[34] In particular, section 2-302 has been extended far beyond the scope of article 2 and eventually entered general contract law.[35] To some extent, section 2-302 can also be said to have merged with the equitable doctrine of unconscionability.

Minor changes were made in the wording of section 2-302 in 2003: "clause" was replaced with "term" and "[w]hen" in subsection 2 was replaced with "[i]f."[36]

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about California and unconscionability, see Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459 (1994). For a good overview of current UCC legislation in states and territories, see http://www.law.cornell.edu/uniform/ucc.html.

[33] Wille v. Southwestern Bell Tel. Co., 549 P. 2d 903 (1976).

[34] Richard J. Hunter, Jr., Unconscionability Revisited: A Comparative Approach, 68 N.D. L. Rev. 145, 146 (1992). For an example, see Williams v. Walker-Thomas Furniture Co. described below under 4.1.

[35] Id. at 150. See also the Restatement (Second) of Contracts § 208:

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

[36] See UCC Text Appendix T § 2-302 (2010).

3 Theoretical framework

This chapter is intended to sketch a framework for analyzing unconscionability problems. It draws primarily on the wealth of law review articles and treatises dealing with the concept but also on illuminating case law. The goal is to foremost be descriptive, but the inclusion of some prescriptive statements seems unavoidable.

Unconscionability is not defined in either the UCC or the Restatement[37]: both describe unconscionability as an unconscionable term or contract, which is essentially circular.[38] Some authors have investigated the linguistic meaning of unconscionability to no avail: it is a general, pejorative term.[39] It has been suggested that the lack of a definition serves a purpose in that the doctrine cannot be avoided simply by drafting a contract in a certain way or using particular words.[40] In the end, the primary source for finding out what unconscionability actually means is case law. There is also a wealth of informative law review articles about the concept and many tend to also give suggestions on how the rule should be analyzed and interpreted.[41]

In the official comment to UCC section 2-302, it is said that the principle is one of "the prevention of oppression and unfair surprise."[42] Oppression has been interpreted to mean substantive factors, namely contract clauses per se, even though such a meaning hardly can be derived from the word alone.[43] [44]

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[37] "[The Restatement is] [o]ne of several influential treatises published by the American Law Institute describing the law in a given area and guiding its development." Black's Law Dictionary (9th ed. 2009). In this thesis, Restatement refers to Restatement (Second) of Contracts.

[38] UCC § 2-302 (quoted on page 9 above) and Restatement (Second) of Contracts § 208 (quoted in note 35 above).

[39] See Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 487 note 10 (1967) and William B. Davenport, Unconscionability and the Uniform Commercial Code, 22 U. Miami L. Rev 121, 130 note 32 (1967).

[40] Clinton A. Stuntebeck, The Doctrine of Unconscionability, 19 Me. L. Rev. 81, 85 (1967).

[41] A search in HeinOnline's U.S. law journal library for articles mentioning "unconscionability" in the title yields 169 matches, which likely is only a subset of all the articles written. Professor Leff found more than 130 essays when he counted in 1967. Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 486 note 2 (1967). – A list of authors who has tried to establish a framework for unconscionability can be found in Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 Cornell L. Rev. 1, 2 note 10 (1981). See also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-37, p. 401 (3rd ed. 1987).

[42] UCC § 2-302 Official Comment (2010).

[43] John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 406 (3rd ed. 1987). For an extensive, critical discussion, see Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 499-501 (1967). Professor Leff suggests that this ambiguity comes from the combination of the drafters' unwillingness to engage in the difficult task of defining a level of bargaining power enough to insulate a contract and the, for important stakeholders, unacceptable solution of prohibiting certain clauses. Id at 501.

Unfair surprise has in turn become a symbol for any procedural factors, though what can rightly be understood from the word are questions of deception possibly combined with ignorance or carelessness.[45] The leading case on unconscionability, Williams v. Walker-Thomas Furniture Co., contain an often quoted description of unconscionability, which fits quite well with the division into substantive and procedural factors: "[A]n absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[46]

The categorization of different aspects using procedural and substantive unconscionability originally comes from Professor Arthur Allen Leff's influential article "Unconscionability and the Code – The Emperor's New Clause."[47] Professor Leff uses the categories to distinguish between two different interests in contract law, where "bargaining naughtiness"[48] is called procedural unconscionability and "evil in the resulting contract" [49] is called substantive unconscionability.[50] Both the terminology and the idea of the categories as a methodological framework for analyzing unconscionability problems are now widespread.[51] [52]

There are differing opinions on whether both procedural and substantive unconscionability is required for an unconscionability defense to be

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[44] But see 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583 note 25 (3rd ed. 2004).
[45] John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 406 (3rd ed. 1987). See also Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 499-500 (1967).
[46] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). See also 4.1 below.
[47] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).
[48] Id at 487.
[49] Id at 487.
[50] But see Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 Cornell L. Rev. 1 (1981) who challenges the usability of a categorization in procedural and substantive aspects.
[51] See, e.g., Wisconsin Auto Title Loans, Inc. v. Jones, 290 Wis.2d 514, 533-534 (2006), Acosta v. Fair Isaac Corp., 669 F.Supp.2d 716, 720 (N.D. Texas 2009) or Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616, 620 (3d Cir. 2009). It should be noted that Leff himself never suggested the categories as a methodological framework; it is used in his article primarily to formulate his critique of section 2-302 of the UCC.
[52] Professor Alan Schwartz has proposed that "procedural" be replaced with "nonsubstantive" because the former focuses "too narrowly upon the negotiating process." Alan Schwartz, Reexamination of Nonsubstantive Unconscionability, 63 Va. L. Rev. 1053, 1054 note 4 (1977). This critique appears to be to some extent justified: questions of education or status of the parties can hardly be subsumed under procedure. See John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-37, p. 399 (3rd ed. 1987). However, over 30 years has passed since Professor Schwartz article was published with the suggestion of a new terminology, and I have been unable to locate a single decision using it and virtually no law review articles. (The exception being Howard C. Ellis, Employment At-will and Contract Principles: The Paradigm of Pennsylvania, 96 Dick. L. Rev. 595 (1992).) With that in mind, I believe it better to use the recognized term ("procedural") despite its more narrow meaning in other contexts.

successful,[53] and in case both are not required, if either is enough or if the presence of only one of these has the ability to make a contract or clause unconscionable.[54] One of the reasons for this confusion might be that the categories are tools for analysis, and the rule itself is a composite of substantive and procedural aspects. The better view, and one which has been adopted by many courts, seems to be the idea of a sliding scale: where there have been extensive procedural shenanigans less is required in terms of contractual imbalance and vice versa.[55]

It is evident from the wording of UCC section 2-302 that the time to determine whether a contract or clause is unconscionable is at the contract's making.[56] Any events subsequent to contract formation are thus irrelevant and will not affect the decision on unconscionability. This is in line with the expressed intention of not disturbing the allocation of risks.[57]

The question of unconscionability is one for the court to decide and not the jury. UCC section 2-302 is formulated in a way that makes this clear, and the comment for the section explicitly states that the decision is to be made by the court.[58] There have been attempts at invoking the right to a jury trial found in the Seventh Amendment of the U.S. Constitution, but such attempts have been futile.[59] It is conceivable that certain facts related to the question of unconscionability can be submitted to the jury, but it can

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[53] Compare the following two statements from different jurisdictions. "[P]rocedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability […]." Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83 (2000). "[T]here have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1 (1988).

[54] It seems most courts which reject the notion that both procedural and substantive unconscionability is required would consider substantive unconscionability alone to be enough in certain cases, while being more skeptical about holding a contract unconscionable purely on procedural grounds. See, e.g., Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985). See also 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 585 (3rd ed. 2004). But see Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law, p. 79 (7th ed. 2001).

[55] See, e.g., State v. Wolowitz, 468 N.Y.S.2d 131 (2d Dep't 1983). Farnsworth appear to support this position: "[I]t is generally agreed that if more of one [of procedural or substantive unconscionability] is present, then less of the other is required." 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 585 (3rd ed. 2004).

[56] "If the court as a matter of law finds the contract or any term of the contract to have been unconscionable it at the time was made […]" UCC § 2-302(1) (2010).

[57] UCC § 2-302 Official Comment 1 (2010). See also H. C. C., Jr., Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302, 45 Va. L. Rev. 583, 587 note 19 (1959).

[58] "If the court as a matter of law finds […]." UCC § 2-302 (2010) (quoted on page 9 above). "The present section is addressed to the court, and the decision is to be made by it." UCC § 2-302 Official Comment 3 (2010).

[59] See, e.g., County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 444 F.2d 372, 379 (2nd Cir. 1971). See also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-39, p. 404-405 (3rd ed. 1987).

become complicated to separate such facts from the decision regarding unconscionability.[60]

3.1 Procedural unconscionability

To determine whether a contract is procedurally unconscionable courts examine factors related to how the contract came to be. In particular, the courts look to the bargaining process and to the parties; it is essentially an assessment of whether one party went to far in his effort to secure a favorable deal.[61]

3.1.1 Status, sophistication and bargaining power of the parties

A reasonable starting point is to ask who the parties are, especially with regard to education, experience and other factors related to sophistication; Corbin refers to "the relative position of the parties in the bargaining process,"[62] meaning that it is the differences between the parties which are most important and not each party's position per se.[63] It is therefore precarious to try to describe characteristics which might (in part) support a finding of procedural unconscionability without taking into account the other party. However, if one assumes that there is a relatively experienced businessman (or a company) on the other side of the bargain, it might be possible to identify certain traits which courts have considered important.

Lack of education is a factor which many courts consider.[64] Illiteracy or an inability to understand the language of the contract is also taken into account.[65] The fact that one party is impoverished may work as a proxy for lack of commercial sophistication: it is generally harder for poor people (lacking education and experience) to negotiate and understand a contract.[66]

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[60] For a short discussion concerning this, see W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 564-565 (1971).
[61] *Cf.* 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583-584 (3rd ed. 2004) who mentions employment of sharp bargaining practices, the use of fine print and convoluted language, a lack of understanding and inequality of bargaining power.
[62] 1 Arthur L. Corbin, Corbin on Contracts § 128 p. 554 (1964).
[63] This is often referred to as inequality of bargaining power; see, e.g., the leading cases Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960). However, it has been argued that it is not relative bargaining power per se which is important, but whether there has been a voluntary and knowing assent to the terms (often a transfer of risk). See Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 807 (1977).
[64] In Williams v. Walker-Thomas Furniture Co. the court mentions "obvious education or lack of it" when posing the question whether someone had a meaningful choice. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).
[65] See King v. Cohorn, 14 Tenn. 75 (1834) and Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26 (Dist. Ct., Nassau Co. 1966). See also Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 788 (1977).
[66] M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 771 (1969). See also Alan Schwartz, Reexamination of Nonsubstantive Unconscionability, 63 Va. L. Rev.

Poverty by itself does not appear to be a factor which affects a finding of procedural unconscionability, though some courts have noted one party's knowledge of the other's lack of money, which perhaps implies that poverty is not completely irrelevant.[67]

It is often consumers who are using unconscionability to defend themselves against companies, but the doctrine is not limited to consumers.[68] Franchisees and gas station operators who are often in the hands of relatively large corporations have successfully invoked unconscionability.[69] A relative lack of sophistication and education may not be a requirement for a finding of unconscionability[70]: at least one court has found unconscionability despite the parties being, in this respect, roughly on the same level.[71] Many courts have been skeptical about finding unconscionability when dealing with two sophisticated parties, and such skepticism, at least prima facie, appears to be the prevailing view.[72]

3.1.2 Bargaining procedure and adhesion contracts

Bargaining procedure involves the process leading up to contract formation. When the parties are on equal footing, it is often a matter of fair haggling with each party understanding the agreement, and agreeing after adequate reflection and with due care.[73] But it can also be a matter of one party performing a cunning sales pitch, then offering a form contract to a surprised consumer. In the context of procedural unconscionability, it is the latter – the employment of sharp bargaining practice – which work for a finding of unconscionability.[74] One part of this is whether harsh and unusual

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1053, 1056 (1977). Professor Schwartz lists three other factors which works against enforcement of a contract: 1) poor people may not be able to pay for clauses insuring against risks, 2) poverty may mean less access to information necessary to make an educated evaluation of a contract and 3) poverty might mean the consequences of a certain clauses are exacerbated (Schwartz takes the example of acceleration clauses). *Id* at 1056-1057. The first and third factor are not necessarily procedural (nonsubstantive): that poor people are unable to pay for clauses insuring against risks could be a substantive issue (the clause per se); it seems plausible that a court would refuse an argument that poverty itself leads to the inability to insure and therefore is a question of procedural unconscionability.

[67] M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 770-771 (1969).

[68] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 588-589 (3rd ed. 2004). See also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 404 (3rd ed. 1987).

[69] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 588-589 (3rd ed. 2004). See also Weaver v. American Oil Co., 257 Ind. 458 (1971).

[70] John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 408 (3rd ed. 1987).

[71] Id at 408 citing Miller v. Coffeen, 365 Mo. 204 (1955).

[72] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 589-590 (3rd ed. 2004) with extensive citations.

[73] See, e.g., Kerr-McGee Corp. v. Northern Utilities, Inc., 673 F. 2d 323 (10th Cir. 1982), which involved "experienced negotiators for both parties [entering] into an agreement after several months of give-and-take" (and where the court therefore found the contract not to be unconscionable).

[74] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583 (3rd ed. 2004).

clauses were called to the attention of the signer, so that he could make an informed decision.[75]

Transactions which take place in someone's home, especially using high-pressure sales tactics, are often frowned upon and have resulted in a number of states and the Federal Trade Commission adopting so called "cooling off" periods where a person may change his mind and rescind the contract during a short period after the purchase.[76] This has likely diminished the use of unconscionability in cases covered by a "cooling off" period. There are however other situations where deceptive sales technique or high-pressure sales tactics might be used, which can induce procedural unconscionability.[77]

Adhesion contracts[78] are commonly identified as being particularly scrutinized by courts, not least within the realm of unconscionability.[79] The reason is that such contracts, designed by one party and offered on a take it or leave it basis, are especially prone to one-sidedness.[80] On the other hand, virtually everyone seems to recognize that form contracts serve an important purpose in today's society.[81] An adhesion contract per se does therefore not precipitate an unconscionability ruling, but it will usually work in that direction; and it can support such a ruling if the contract is substantively unconscionable.[82]

[75] 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 554 (1964) ("[The court] should carefully consider [...] the manner in which [provisions] were (or were not) called to the attention of the signer […].").
[76] Byron D. Sher, The Cooling-Off Period in Door-to-Door Sales, 15 UCLA L. Rev. 717, 720-721 (1968). See also Thomas D. Crandall & Douglas J. Whaley, Cases, Problems, and Materials on Contracts, p. 608-609 (4th ed. 2004).
[77] For a few examples of such practices, see Byron D. Sher, The Cooling-Off Period in Door-to-Door Sales, 15 UCLA L. Rev. 717, 723-724 (1968). For an illustrative case, see Frostifresh Corp. v. Reynoso, 52 Misc.2d 26 (Dist. Ct., Nassau Co. 1966).
[78] An adhesion contract is a "standard-form contract prepared by one party, to be signed by another party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms." Black's Law Dictionary (9th ed. 2009). For a further history of the term, see Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 504 note 67 (1967). See also regarding adhesion contracts 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 578 note 5 (3rd ed. 2004).
[79] See Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 502 (1967).
[80] Richard A. Posner, Economic Analysis of Law, p. 116 (7th ed. 2007).
[81] See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991). If each contract had to be negotiated and no standard-form contracts could be used, transaction costs would become significantly higher. Richard A. Posner, Economic Analysis of Law, p. 115 (7th ed. 2007). Professor Leff even suggests that form contracts are designed not to be read or pondered. Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 504 (1967).
[82] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 585-586 (3rd ed. 2004).

3.1.3 The appearance and language of the contract

The physical appearance of the contract as well as the language used plays a role in determining whether it is procedurally unconscionable.[83] It is often a question of the appearance of principal terms, e.g., has an important term been "hidden in a maze of fine print."[84] Some agreements appear to be designed to suppress attempts to read them by using fine print and other tactics that discourage reading, practices which courts tend to shun.[85] There are also attempts to deceive using unnecessarily complex or confusing language as well as misleading headings.[86] Courts usually consider what the reasonable expectations of a party are; if an unusual and tough clause has been effectively hidden, there will be a good case for procedural unconscionability.[87]

3.2 Substantive unconscionability

Substantive unconscionability involves the contract viewed in isolation from surrounding circumstances (such circumstances would fall under procedural unconscionability). It is generally a matter of a contract which is excessively one-sided, but it can also be a particular term considered to be offensive.[88]

3.2.1 Price

Courts are generally reluctant to meddle in pricing, but there have nonetheless been cases where a price has been so far from the value[89] of the good or service that it has been considered substantively unconscionable.[90] Usually these cases involve some kind of credit arrangement, commonly with payment in installments at a high interest.[91] Courts tend to emphasize procedural aspects together with the price term but have on occasion

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[83] Corbin writes that courts should carefully consider "the form in which the provisions appear on the document" (among other factors). 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 554 (1964).
[84] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).
[85] William B. Davenport, Unconscionability and the Uniform Commercial Code, 22 U. Miami L. Rev 121, 140 (1967). See also 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583 note 26 (3rd ed. 2004).
[86] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 583 (3rd ed. 2004). See also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 407 (3rd ed. 1987).
[87] Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 789 (1977).
[88] John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 407 (3rd ed. 1987).
[89] Value is perhaps not a sensible term to use; generally, courts seem to refer to the prevailing market value, but they have also used the price of the good excluding surcharges for credit costs.
[90] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 596 (3rd ed. 2004).
[91] See, e.g., American Home Improvement Inc. v. MacIver, 105 N.H. 435 (1964) and Maxwell v. Fidelity Financial Services, Inc., 184 Ariz. 82 (1995).

deemed the total price alone to be enough for an unconscionability decision.[92] It appears reasonable to assume that cases with great price disparity will also contain either an element of surprise in how the price is revealed (e.g., requiring complex calculation) or other procedural deficiencies.[93]

3.2.2 Limitations of remedies and disclaimers of warranties

Limitations of remedies are regulated in section 2-719 of the UCC and are by implication generally permissible.[94] Nonetheless, if a clause which provides for an exclusive or limited remedy is considered unconscionable, or if (later) circumstances make it fail of its essential purpose, it may be set aside.[95] According to the official comment, a failure of essential purpose occurs when a party is deprived of the "substantial value of the bargain."[96] Disclaimers of warranties are regulated in section 2-316 of the UCC and thus also generally permissible.[97] Section 2-316 outlines in a relatively detailed way what a seller has to do in order to disclaim a warranty. Regardless, it seems that most courts agree that section 2-302 is still applicable to disclaimers of warranties.[98] Thus, despite the regulation of limitations of remedies and disclaimers of warranties in the UCC, such clauses might be held unconscionable in accordance with section 2-302.

Limitations of remedies and disclaimers of warranties have in the past been prone to invalidation based on unconscionability,[99] and they continue to give rise to a vast amount of litigation.[100] The clauses are of a kind which is highly scrutinized by courts.[101] The complication of a risk analysis

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[92] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 597-598 (3rd ed. 2004).
[93] See John A. Spangle, Jr., Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931, 967 (1969).
[94] UCC § 2-719 (2010). See also M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 793 (1969).
[95] See UCC § 2-719 Official Comment 1 (2010) and UCC § 2-719(2) (2010) respectively. Courts have used section 2-719(2) to invalidate clauses that were oppressive already when the contract was formed, which seems counter to the language of the section. 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28a (3rd ed. 2004).
[96] UCC § 2-719 Official Comment 1 (2010).
[97] UCC § 2-316 (2010).
[98] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28a (3rd ed. 2004). See Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 523 (1967). Professor Leff himself disagrees and calls the assumption that section 2-302 can be applied to warranty disclaimers (which fulfill the requirements of 2-316) "incredible." *Id.* at 523. See also M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 793-803 (1969).
[99] 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 554 (1964). Corbin thinks that "[p]rovisions against liability should be brief, reasonable in extent, and appear prominently on the face of the contract to be signed." Id. at 555.
[100] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28a, p. 599 (3rd ed. 2004).
[101] Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability, 33 Fla. St. U. L. Rev. 1067, 1115 (2006). The authors also found, in a quantitative study of unconscionability cases, that limitation of liability and remedy clauses as well as disclaimers of warranty clauses both gave rise to a (slightly) higher success rate than

(necessitating, for all practical purposes, ignorance of the risk) that some clauses require might be one reason. A relevant question which some scholars have advanced, and which courts might consider, is whether there is a risk of one party being deprived of the core of the bargain.[102]

3.2.3 Arbitration

As arbitration agreements have grown more and more common,[103] so have the challenges of them based on unconscionability.[104] In fact, arbitration clauses have lately been the most common kind in unconscionability cases, and the number of challenges appears to be increasing.[105] The courts of California have a lead role in this development, but they are not alone in striking down arbitration clauses for being unconscionable.[106] Related to arbitration is submission to a foreign jurisdiction, which, while normally addressed using the forum non conveniens doctrine, may also be declared unconscionable unless there is a bona fide reason for the foreign jurisdiction.[107]

Attacks on arbitration clauses by consumers and employees have often been successful.[108] The rationales include lack of mutuality, lack of consent to the clause, the prohibitive expense of arbitration and preclusion of class representation.[109] One prominent case is Armendariz v. Foundation Health Psychcare Services[110] where the Supreme Court of California refused to enforce an arbitration agreement in an employment contract. The court emphasized that it was a contract of adhesion since employees generally cannot decline an employment because of an arbitration agreement,[111] that it lacked a "modicum of bilaterality" because it required only employees to arbitrate their wrongful termination claims against the employer but not the employer's potential claims against the employee, and that the employer showed no "business reality" that could justify this lack of mutuality.[112]

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unconscionability challenges in general. Id. at 1113. See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960). "The rigid scrutiny which courts give to attempted limitations of warranties and of the liability […]." Id. at 396.

[102] M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 797-799 (1969). This question seems to be line with Corbin's idea of clauses being "reasonable in extent" (note 99 above).

[103] See, e.g., Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 41 (2006).

[104] See, e.g., 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 591 (3rd ed. 2004) noting that "[a]t the close of the twentieth century, courts began to be confronted with myriad attacks on arbitration clauses on the ground of unconscionability."

[105] Charles L. Knapp, Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device, 46 San Diego L. Rev. 609, 622 (2009).

[106] Id. at 623-625.

[107] M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 803-805 (1969).

[108] 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 591-592 (3rd ed. 2004).

[109] Id. at 592-593.

[110] Armendariz v. Foundation Health Psychcare, 99 Cal.Rptr.2d 745 (2000).

[111] Id. at 768. See also above under 3.1.2.

[112] Id. at 770.

3.2.4 Other clauses

Any attempt to make a definite list of clauses suspect to unconscionability inquiries would be bootless. Similarly, it is hardly possible to describe in detail the kind of clauses that would fit such a list. Corbin's description that it is a matter of terms "so extreme as to appear unconscionable according to the mores and business practices of the time and place"[113] might be the most accurate available. Aside from the clauses mentioned above, the following have been identified as typical for substantive unconscionability: add-on clauses, such as the one present in Williams v. Walker-Thomas Furniture Co.[114]; waiver-of-defense clauses, usually used to be able to sell a contract's payment rights free of liability; clauses for exclusion of liability for consequential damages; due-on-sale clauses, used by banks to call in the outstanding balance in the event of a sale or if the owner takes out a second mortgage; and termination-at-will clauses.[115]

[113] 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 551 (1964).
[114] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). For a description of the clause and the case, see 4.1 below.
[115] Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 306-315 (1975). See also M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757, 803-808 (1969).

4 Applications

This chapter contains short reports of a few unconscionability cases that are either leading or illustrative of some aspect of the doctrine. The purpose is to convey examples of situations deemed unconscionable, as well as of the kind of reasoning that can lead to an unconscionability decision. Each opinion is described rather than quoted and important aspects have been emphasized while unimportant ones have been omitted.

4.1 Williams v. Walker-Thomas Furniture Co.

The most famous case dealing with unconscionability is probably Williams v. Walker-Thomas Furniture Company, decided in 1965.[116] Williams had between 1957 and 1962 made a number of purchases from Walker-Thomas where payment was to be made in installments. The printed form contract used by Walker-Thomas contained provisions stipulating that Walker-Thomas retained ownership until an item was fully paid, that any payment made should be credited towards each outstanding debt in proportion to its size and that, in the event of default of any monthly installment the item could be repossessed. A new purchase would thus be secured by all the items previously purchased and not paid in full.

Williams' last purchased item was a stereo for $514, bought in 1962. Her balance at that time was $164; the total amount she had bought goods for was $1,800, and the total of her payments was $1,400. Williams never completely paid off her debt before purchasing a new item, meaning that her last item was secured in all purchases that she had made over the years. Shortly after she had bought the stereo, she defaulted and Walker-Thomas sought to replevy all items in accordance with the terms of the contracts. Williams asserted that the contracts, or at least some of them, were unconscionable. Both the Court of General Sessions and the District of Columbia Court of Appeals ruled against Williams, though the latter noted that it "cannot condemn too strongly appellee's conduct" [117] and encouraged Congress to consider corrective legislation.

In the trial court, some further facts were mentioned which did not appear in the Court of Appeals' judgment: Williams was a person of limited education; the contract used by Walker-Thomas was approximately six inches in length and contained a long paragraph in extremely fine print; the purchases were made at Williams' home; Williams did not read the

[116] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). See also Williams v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. 1964).
[117] Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. 1964).

contracts and was not provided with copies, though neither did she ask anyone to read or explain the contract to her.[118]

The United States Court of Appeals considered the contract provisions mentioned above, particularly the pro-rata clause, "rather obscure"[119] and quoted the lower appeals court, noting Williams' financial position: she was a single mother who supported herself and seven children through welfare, her monthly government stipend of $218 and the name of her social worker was listed on the reverse side of the stereo contract. But whereas the lower courts considered there to be no ground to hold the contract unconscionable or against public policy, the United States Court of Appeals noted that "[i]n other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable,"[120] and since the court had not previously decided on a rule, the case was one of first impression.

The court then noted the adoption of the UCC and considered its section 2-302 on unconscionability to be "persuasive authority for following the rationale of the cases from which the section is explicitly derived."[121] The court described unconscionability with the following words:

> [A]n absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.[122]

Continuing, the court writes that the question of whether there has been a meaningful choice can only be answered in light of all the circumstances surrounding the transaction. It then explains that a meaningful choice can be negated by a gross inequality of bargaining power and rhetorically asks: "Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?"[123] The conclusion by the court is that, while someone ordinarily assumes the risk and is bound by a contract he or she signs without full knowledge of its terms, there are instances where that rule should be set aside due to procedural misconduct or naughtiness. In such cases, the court should consider the terms of the contract and whether those are so unfair that enforcement should be withheld.

As for the fairness of the terms, the court recognizes that the test is not a simple one and should, similar to the test of meaningful choice, be considered with respect to all the circumstances existing when the contract was made. The court quotes the official comment for section 2-302 saying

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[118] Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964).
[119] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965).
[120] Id. at 448. The court here references Campbell Soup Co. v. Wentz, discussed below under 4.3.
[121] Id. at 449.
[122] Id. at 449. This quote is by Farnsworth considered to be the "most durable answer" to the question of what courts have taken unconscionability to mean (in absence of a definition). 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 582 (3rd ed. 2004).
[123] Id. at 449.

that the terms should be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."[124] The opinion also quotes Corbin, agreeing with a test of whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."[125] Because the lower courts did not consider a rule regarding unconscionability to exist, and thus made no relevant findings, the United States Court of Appeals remanded the case to the trial court.[126]

4.2 Henningsen v. Bloomfield Motors, Inc.

A landmark[127] decision originating in the time before the widespread adoption of the UCC is Henningsen v. Bloomfield Motors, Inc.,[128] decided in 1960 by the Supreme Court of New Jersey. The opinion contains no discussion of unconscionability and the rationale concentrates on public policy, but the case nonetheless helped shape the unconscionability doctrine.[129] It is a lengthy decision written with clarity and many citations, and it coheres with the theoretical framework sketched above. The case features both procedural and substantive elements, but the spotlight is on the warranty disclaimer and liability limitation.

On May 7, 1955, Claus H. Henningsen purchased a car manufactured by Chrysler from Bloomfield Motors, Inc. Just 10 days after the car was delivered, on May 19, his wife was seriously injured while driving the car and sued Bloomfield as well as Chrysler to recover damages related to her injuries. Claus H. Henningsen joined, seeking compensation for his consequential damages. The basis for the suit was negligence and breach of express and implied warranties. The negligence counts were dismissed by the trial court and only the question of an implied warranty of merchantability was submitted to the jury.

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[124] Id. at 450. See also Comment, Uniform Commercial Code, § 2-302.

[125] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965). See also 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 551 (1964). It is worth noting that Corbin's test is suggested for "[a]greements for the exchange of different currencies or for the loan of a sum of money at a high rate of interest", and not, as the court opinion might imply, as a general rule in cases where there has been a lack of meaningful choice for one party. Id.

[126] One judge dissented noting that the lower court had made no finding of sharp practice, that "what is a luxury to some may seem an outright necessity to others," that many of those on welfare require credit which certain businesses will accept by compensating with pricing policies, and that a cautious approach should be taken when faced with questions of public policy, particularly with regard to the principle of freedom of contract. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

[127] See, e.g., 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.26, p. 572 (3rd ed. 2004) and John E. Murray, Jr., Unconscionability: Unconscionability, 31 U. Pitt. L. Rev. 1, 37 note 109 (1969).

[128] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960).

[129] See, e.g., John E. Murray, Jr., Unconscionability: Unconscionability, 31 U. Pitt. L. Rev. 1, 50 (1969). The court does refer to Corbin regarding unconscionable bargains. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 388 (1960).

The circumstances of the purchase were as follows. Mr. Henningsen together with his wife visited Bloomfield to purchase a car. The contract was a form consisting of one page, with blanks to fill in details about the purchase. The font size varied on the page and became smaller towards the bottom where an integration clause was located. While most of the contract had a font size of 12 points and a font face that was easy to read, the two paragraphs containing the integration clause were in 6 points with a script font face and the lines very close together. The court stated that "[d]e-emphasis seems the motif rather than emphasis."[130]

On the back of the form contract were ten paragraphs of further terms under the heading "Conditions." There were no subheadings indicating what each paragraph incorporated. The seventh paragraph contained a warranty disclaimer and a limited warranty providing that the purchaser had a right to replacement parts in case of defects in material or workmanship.[131] The limited warranty required the purchaser to send the part to the factory and prepay shipping costs, while leaving the question of whether the part was defective in the hands of the manufacturer.

The New Jersey Supreme Court first decided on the issue of whether there was an implied warranty of merchantability in the relation between Henningsen and Chrysler.[132] While conceding that the traditional rule was a requirement of privity, the court noted that the current trend was in the direction of ignoring the rule in favor of a more pragmatic approach, recognizing that goods are not used exclusively by the purchaser.[133] The court proceeded to hold that "when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied

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[130] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 366 (1960).

[131] The paragraph read as follows:

> It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows:
>
> The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

Id. at 367.

[132] Chrysler maintained that their relation with the car had ended with the sale of it to Bloomfield.

[133] Chrysler also claimed that lack of privity prevented Mrs. Henningsen from asserting the warranty. The court dismissed this argument and held that "an implied warranty of merchantability chargeable to either an automobile manufacturer or dealer extends to the purchaser of the car, members of his family, and to other persons occupying it with his consent." Id. at 415.

warranty that it is reasonable suitable for use as such accompanies it into the hands of the ultimate purchaser."[134]

The question became what effect the disclaimer should be given. The court initially considered the principle that a person is bound by a contract even if he chooses not to read it, but concluded that the principle "cannot be applied on a strict, doctrinal basis."[135] The court then remarked that an automobile for many was a necessity while being potentially dangerous, if defective, and that this gives rise to a special obligation for manufacturers in marketing their cars; therefore, a court must consider whether consumer and public interests are treated fairly. The opinion quotes Corbin's position that judges may act as chancellors and refuse enforcement of unconscionable bargains.[136]

After opening the door to judicial scrutiny, the court turned to the use of form contracts and the bargaining power of the parties: form contracts have in certain situations replaced the classical contract bargaining between roughly equal parties, and are offered on a take it or leave it basis by parties with much bargaining power. The consumer in this case had little choice since the contract's warranty was standardized by the Automobile Manufacturers Association where all of the three largest car manufacturers (GM, Ford and Chrysler) were members. In 1958, these three represented 93.5% of the passenger-car production and 86.72% of the passenger vehicle registrations. The court reasoned that the lack of competition meant that there was little to compel manufacturers to offer the clause. It argued that the situation was similar to previous decisions where the buyer had no realistic alternative to purchasing from the seller.

Returning to the facts concerning the procedure, the court pointed out that Bloomfield easily could have brought the clause to the attention of Henningsen but chose not to do so; and Chrysler could have made sure that Henningsen received the information had it not chosen to leave the decision of how to communicate the warranty with the dealers. In addition, the font face, font size and arrangement of the contract made it questionable if the consumer had adequately given up his rights. The court also questioned whether an ordinary layman of reasonable intelligence would understand that the legalese in the clause meant relinquishing rights to damages for personal injuries.

While contemplating public policy, the court looked to the legislation, through which the implied warranty of merchantability had come, and argued that the intention of the legislator when making it possible for a party to give up the warranty was parties of roughly equal bargaining power agreeing freely. It was not, the court contended, an authorization for car manufacturers to use their superior bargaining power to relieve themselves

[134] Id. at 384.
[135] Id. at 386.
[136] This case is cited with approval in later editions of Corbin on Contracts. See 1 Arthur L. Corbin, Corbin on Contracts § 128, p. 555 (1963).

from liability. In conclusion, the court held the clause invalid. The reasoning, in summary, appears to have been a combination of 1) the character of the clause (working against the public good); 2) the bargaining power of the seller and manufacturer, resulting in a lack of choice on part of the buyer; and, 3) the procedure through which the clause remained hidden in fine print rather than brought to the attention of the buyer.

4.3 Campbell Soup Co. v. Wentz

One of the cases which, according to the comments to UCC section 2-302, are supposed give guidance as to the meaning of unconscionability is Campbell Soup Co. v. Wentz.[137] Whether equity cases such as Campbell Soup actually gives any guidance is disputed: Farnsworth writes that it "sheds little light on the standards for unconscionability"[138] and Leff, discussing the case at length, concludes that hopes of clarity through early equity cases are "bootless."[139] Nevertheless, the case is often cited when unconscionability is discussed, and despite the dim views of Farnsworth and Leff, it might be possible to derive some information from the court's reasoning.[140] If nothing else, it serves as an example of unconscionability in equity.

George B. Wentz and Harry T. Wentz were farmers who in 1947 entered into a contract with Campbell Soup Company where they agreed to supply Campbell with all the carrots grown on fifteen acres of their farm during the 1947 season. The price was set to $23 to $30 per ton depending on when the carrots were delivered. Approximately 100 tons of carrots were harvested during the season on the designated land, but the Wentzes refused to deliver to Campbell because the market price for carrots had gone up to at least $90 per ton. They instead decided to sell 62 tons to their neighbor who in turn resold the carrots on the open market, about half of it to Campbell. When Campbell learnt of this, they sued the Wentzes and their neighbor and sought specific performance.

The District Court denied Campbell relief because it thought the company had not shown that it had no adequate remedy at law. The Court of Appeals disagreed and held that specific performance was proper. The court then proceeded to look at the contract which the Wentzes had signed with Campbell, and which the Wentzes claimed was unconscionable, concluding

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[137] Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). Farnsworth considers it the "most noted" of the cases decided before the promulgation of the UCC. 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.28, p. 581 (3rd ed. 2004).
[138] Id. at § 4.28, p. 581-582.
[139] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 538 (1967).
[140] The draftsmen of UCC 2-302 apparently considered the case illustrative. See also Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 771-772 (1977), suggesting that the case is an example of where substantive unconscionability (without procedural unconscionability) was enough for a declaration of unconscionability.

that it was "too hard a bargain and too one-sided an agreement" [141] for an equity court to enforce.

A number of factors appeared to have played a role in the court's determination: The contract was a print form contract that the buyer provided where name, quantity and price was filled in for each grower. (This seems to be the only mention concerning the procedure.[142]) One paragraph provided for liquidated damages at $50 per acre for any breach by the Wentzes, but there was no corresponding provision for any kind of damages for breaches by Campbell. The paragraph which the court found to be the most one-sided prescribed that Campbell could refuse carrots under certain circumstances and that that the Wentzes were not allowed to resell such carrots unless Campbell's written permission was obtained.[143] The court famously wrote: "This is the kind of provision which the late Francis H. Bohlen would call 'carrying a good joke too far.'"[144]

In its decision, the court writes that it does not suggest that the contract is illegal or that there was any excuse for the Wentzes to breach it, but that an equity court should not be asked to assist in enforcing a contract as one-sided as the one in question. It concludes by saying that "equity does not enforce unconscionable bargains."[145]

4.4 Weaver v. American Oil Co.

Weaver v. American Oil[146] is a case which does not involve a consumer but a small business owner dealing with a large corporation. Unlike the other

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[141] Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948).

[142] But see Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 771-772 (1977), mentioned in note 140 above, where this case is mentioned as an example of substantive unconscionability without procedural unconscionability leading to an unconscionability judgment. I disagree with Fort's conclusion based on the court's mention of how the contract was made and it being a form contract, which seems to imply that the court did consider procedural aspects.

[143] The provision in question was quoted in the decision and reads as follows.

> Grower shall not be obligated to deliver any Carrots which he is unable to harvest or deliver, nor shall Campbell be obligated to receive or pay for any Carrots which it is unable to inspect, grade, receive, handle, use or pack at or ship in processed form from its plants in Camden (1) because of any circumstance beyond the control of Grower or Campbell, as the case may be, or (2) because of any labor disturbance, work stoppage, slow-down, or strike involving any of Campbell's employees. Campbell shall not be liable for any delay in receiving Carrots due to any of the above contingencies. During periods when Campbell is unable to receive Grower's Carrots, Grower may with Campbell's written consent, dispose of his Carrots elsewhere. Grower may not, however, sell or otherwise dispose of any Carrots which he is unable to deliver to Campbell.

[144] Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948). For an anecdotal background of this quote, see Stewart Macaulay, Klein and the Contradictions of Corporations Law, 2 Berkeley Bus. L.J. 119, 124 note 32 (2005).

[145] Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948).

[146] Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971).

cases in this chapter, it is not considered to be a leading case.[147] However, it is cited in numerous law review articles and it illustrates well both procedural and substantive unconscionability.[148] It is an example of the application of unconscionability outside the UCC as well as the doctrine's usage where there is a commercial relation between the parties.[149]

Weaver had a lease agreement with American Oil for a gas station, which included a provision[150] designed to hold Weaver liable for any incidents related to the lease. The event that led up to the lawsuit involved an employee of American Oil spraying gasoline over Weaver and his assistant, which then ignited causing injuries to both men. Weaver and his employee later filed a suit against American Oil to recover damages for their injuries. American Oil[151] in turn sued Weaver to obtain a declaratory judgment determining the liability of Weaver under the contract. American Oil's claim was based on the provision in the contract designed to hold Weaver liable for any incidents relating to the lease.

The court started out by explaining Weaver's background: he had left high school after one and a half years and then worked at various labor oriented jobs before leasing the gasoline station. The court did not think he was "one who should be expected to know the law or understand the meaning of technical terms."[152] The bargaining procedure involved an agent of American Oil placing the lease, a form contract prepared by American Oil, in front of Weaver and saying "sign." During the procedure, nothing was

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[147] Cf. John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-40, p. 407 (3rd ed. 1987) suggesting that it "may prove to be a leading case."

[148] See, e.g., Richard J. Hunter, Jr., Unconscionability Revisited: A Comparative Approach, 68 N.D. L. Rev. 145, 150 note 31 (1992), Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765, 788 note 140 (1977) and Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 Cornell L. Rev. 1, 12 (1981).

[149] See generally Jane P. Mallor, Unconscionability in Contracts between Merchants, 40 SW L.J. 1065 (1987).

[150] The clause in the contract read as follows:

> Lessor, its agents and employees shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused to the person or property of anyone (including Lessee) on or off the premises, arising out of or resulting from Lessee's use, possession or operation thereof, or from defects in the premises whether apparent or hidden, or from the installation existence, use, maintenance, condition, repair, alteration, removal or replacement of any equipment thereon, whether due in whole or in part to negligent acts or omissions of Lessor, its agents or employees; and Lessee for himself, his heirs, executors, administrators, successors and assigns, hereby agrees to indemnify and hold Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on the Lessor in connection therewith) for such loss, damage, injury or other casualty. Lessee also agrees to pay all reasonable expenses and attorneys' fees incurred by Lessor in the event that Lessee shall default under the provisions of this paragraph.

Weaver v. American Oil Co., 276 N.E.2d 144, 145 (Ind. 1971).

[151] The suit was filed jointly by American Oil and the employee who caused the accident.

[152] Id. at 146-147.

done to call Weaver's attention to the liability provision or explain it, and he was not advised to seek counsel; Weaver did not read it. This was repeated each year as Weaver and American Oil renewed the lease agreement.

As in Williams v. Walker-Thomas, the court cited UCC 2-302 and its official comment regarding the basic test for unconscionability.[153] The court noted that the clause could potentially cost Weaver thousands of dollars in damages for negligence not caused by him, while the income from the gas station, despite much work, was relatively small. And the court emphasized procedural aspects: the clause was in fine print without a header, in a contract offered on a take it or leave it basis to a man with little education. It went on to quote Justice Frankfurters dissent in United States v. Bethlehem Steel Corp.,[154] in which Frankfurter rhetorically asks if any principle has more universal application than the "doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other."[155]

After venturing into a discussion of the parol evidence rule,[156] the court suggested that a provision or contract should be declared contrary to public policy where it is the result of one party using his superior bargaining power (unknown to the lesser party) to secure the contract, and the contract's terms imposes great risk or hardship on the other party. An exception to this rule would be if the party seeking to enforce the contract shows "that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting."[157] In the final paragraph of the opinion, the court explains that its role is to administer justice and that the contract was not really an agreement despite being signed by both parties.

[153] See above under 4.1.
[154] United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942).
[155] Weaver v. American Oil Co., 276 N.E.2d 144, 147 (Ind. 1971) (quoting United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942)).
[156] The parol evidence rule does not apply to evidence necessary to show unconscionability. See, e.g., John E. Murray, Jr., The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts, 123 U. Pa. L. Rev. 1342, 1345 (1975).
[157] Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) (italics omitted).

5 Theoretical development

Virtually everyone agrees that there are some contracts that are unfair and should not be enforced, e.g., a contract procured by holding a gun to the other party's head. It is thus possible to establish a core of rules to which most people would subscribe regardless of ideology. But outside of this core, the definition of what is an unfair contract is essentially a matter of morality: individual autonomy and personal responsibility contra distributive equality and concern for those (supposedly) unable to care for themselves. The doctrine of unconscionability is almost completely located outside of this core and therefore subject to debate necessarily based in ethics.

The libertarian view emphasizes rights and personal autonomy: unconscionability is only acceptable as long as it does not interfere with the "meeting of the minds" at the time of contracting.[158] This implies a minimization or possibly a complete elimination of the concept. On the other end of the spectrum is the Marxist view, where unconscionability is seen as a suitable tool for redistributing wealth and power.[159] This would be an expansion of unconscionability beyond its current meaning. Trying to reconcile these views seems bound to be a futile effort.

With the above in mind, this chapter focuses on two established and important critiques of unconscionability: one essentially utilitarian critique through law and economics[160] and one critique of the rule as being ambiguous and too abstract. Finally, I offer my own analysis of unconscionability.

5.1 Law and economics

Law and economics is a school of thought arguing for the use of economics in legal reasoning; the idea is best described as economic analysis of law. Its application was until the 1960s limited mostly to antitrust law but has since then been expanded to cover virtually all areas of the legal system.[161] Economics can show whether a given rule is efficient or not, i.e., if the use of resources to maximize production is more efficient with the rule than without it.[162] Law and economics is devoid of distributive considerations and it is not necessarily meant to be used as a moral compass.[163] While it is

[158] Daniel T. Ostas, Economics and the Law of Unconscionability, 27 J. Econ. Issues 647, 649 (1993).
[159] Id. at 651.
[160] This critique is particularly interesting because it claims that even those protected by the rule are better off without it, see, e.g., Richard A. Posner, Economic Analysis of Law (7th ed. 2007) p. 117-118.
[161] Id. at 23.
[162] Id. at 24.
[163] Id. at 24 and Richard A. Posner, Law and Economics Is Moral, 4 Val. U. L. Rev. 163, 167 (1989).

often associated with libertarianism, personal rights will only be sustained if the goal of economic efficiency is better served by enforcing such rights.[164]

Professor Richard A. Epstein in 1975 wrote a law review article which primarily uses economics to argue for the elimination of substantive unconscionability.[165] The premise of the article is that freedom of contract is good for two independent reasons: one is the economic argument of wealth maximization and the other is the libertarian idea that two individuals should be able to do between them what each individual is entitled to do alone.[166] Epstein infers that freedom of contract requires contract terms to be enforced unless there are procedural deficiencies like duress, fraud and incompetence or the contract contains exceptional terms which violate public policy.[167] Most importantly, a contract should not be set aside for being too unfair or harsh, which leaves no place for unconscionability.[168]

Epstein starts by looking at the traditional common law defenses of duress, fraud and incompetence.[169] He analyzes these rules based on natural rights and not using economic efficiency, which is perhaps explained with the limited point Epstein is making: classical contract defenses are concerned with the procedure and not the substance of the contract.[170] But a claim of one of these contract defenses might be hard to prove, and he suggests that a relaxation of the amount of proof necessary might reduce the number of errors in enforcement.[171] Epstein contends that this is how unconscionability should properly be conceived: as an instrumental rule against contracts procured by means of fraud, duress or incompetence, similar to the intentions of the Statute of Frauds and the parol evidence rule.[172]

When should the unconscionability doctrine be applied? Epstein first suggests the traditional case of undue influence.[173] It is not clear whether he simply means that undue influence is one case of unconscionability or if he advocates an expansion of undue influence under the title unconscionability. Another proposed situation is the historically common case of a sale of an interest in a trust fund or real estate by a young and inexperienced person to a mature and (in such transactions) experienced person.[174] Epstein suggests that the buyer should make sure that the seller is properly represented, and does not appear dismissive of the idea that courts should sometimes consider a value-price disparity.[175] Finally, Epstein takes the case of

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[164] Id. at 166-167.
[165] Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975).
[166] Id. at 293-294.
[167] Id. at 294-295 and 293.
[168] Id. at 293.
[169] Id. at 295-301.
[170] Id. at 295-301.
[171] Id. at 302.
[172] Id. at 302.
[173] Id. at 303.
[174] Id. at 303-304.
[175] Id. at 304, note 32. The latter is typical for substantive unconscionability, see above under 3.2.1.

returned Vietnam War prisoners being tricked out of their accumulated back pay through the purchase of municipality bonds from shrewd sales-men. He thinks that these contracts should be invalidated by using the unconscionability doctrine, though with limitations, so that former captives who themselves took the initiative to purchase these bonds are not protected.[176]

Importantly, Epstein does not think unconscionability should be used to protect "those who are poor, unemployed, on welfare, or members of disadvantaged racial or ethnic groups."[177] He gives two reasons: first, these people are generally competent to engage in market transactions, and second, the subject matter is usually consumer goods sold in competitive markets.[178] And, Epstein adds, the cost for this legal rule would be higher than without it, partly because it will be costly to transact with the rule in place and partly because it would be prone to exploitation.[179] Thus, in consumer transactions, Epstein thinks there is little place for unconscionability, and that situations suspect to fraud etc., such as door-to-door sales, are better handled through legislation.[180]

Most of the economic analysis in the article is concentrated on substantive unconscionability: Epstein takes on a number of different clauses that are particularly frequent in unconscionability cases. The different arguments can be exemplified by the one against the so called add-on clause, present in Williams v. Walker-Thomas Furniture Co.[181] The clause gives the seller a right to repossess all previously purchased goods upon default on the current purchase. Epstein contends that these clauses are sensible: they alleviate the risk of the seller being unable to recover the value of the contract and thus reduces costs for both parties.[182] The security arrangements also come with one important restriction: the seller cannot recover more than the value of the contract.[183] The only disadvantage for the buyer, according to Epstein, is that he cannot use the goods for economic benefit in a later transaction.[184]

The other clauses are similarly defended by means of economics. Perhaps the most important contention is that the consumer receives benefits by the use of the clauses, i.e. "[the seller] will not get something for nothing."[185] In conclusion, Epstein argues that a court should only refuse enforcement in two situations: if there is a defect in the bargaining process (duress, fraud or

[176] Id. at 304.
[177] Id. at 304. See also at 304-305.
[178] Id. at 304-305.
[179] Id. at 305.
[180] Id. at 305.
[181] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).
[182] Id. at 307.
[183] Id. at 307-308.
[184] Id. at 307.
[185] Id. at 313. While this particular statement is concerned with lenders, it appears from the article that it can be generalized.

undue influence) or if there is incompetence on part of one of the parties, and only if the incompetence is qualified.[186]

Judge Richard A. Posner considers the merits of unconscionability in his book on economic analysis of law.[187] He notes that contracts of adhesion are the result of sellers trying to avoid costs of negotiating and drafting separate agreements for each purchaser.[188] The important thing, Posner argues, is not whether there has been bargaining in every case, but if competition in the marketplace makes sure sellers in their form contracts appropriately protect buyers.[189] Recognizing that form contracts often are, in fact, one-sided, Posner explains that "[c]ompetition cannot be relied upon to eliminate [the] asymmetry because the benefits of the 'good' form to the consumer are too slight to overcome the information costs of making those benefits an effective selling point."[190] Nonetheless, Posner thinks these contracts may still be optimal because the seller will behave nicely since he otherwise risks his reputation and the buyer will at the same time be prevented from behaving opportunistically, together leading to lower costs compared with negotiating each contract.[191] Generally, Posner thinks that the unconscionability defense hurts poor people by making transactions more expensive, while helping a few of them (the ones who make use of the defense).[192]

The principles of law and economics outlined above are referred to by some as traditional law and economics; at its core is the assumption that people behave a certain way, specifically that they are rational and aim to maximize their expected utility.[193] This so called traditional view can be compared with behavioral law and economics where the assumption about people's behavior is (more) tentative and based primarily on empirical studies.[194] Those who favor the behavioral approach consider this foundation in empiricism to be vital for reaching correct decisions to maximize utility.[195] Perhaps even more, the law and economics behaviorists stress the difference between the traditional and the behavioral view: the former uses a supposedly deficient model for human behavior while the latter aspires to identify actual human behavior.[196]

Behavioral law and economics has by Professor Russell Korobkin been applied to one unconscionability case, namely Williams v. Walker-Thomas

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[186] Id. at 315.
[187] Richard A. Posner, Economic Analysis of Law (7th ed. 2007).
[188] Id. at 115.
[189] Id. at 116.
[190] Id. at 116.
[191] Id. at 116.
[192] Id. at 117.
[193] Russell Korobkin, A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company, 26 U. Haw. L. Rev. 441, 447 (2004).
[194] Id. at 448.
[195] Id. at 448.
[196] Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1476 (1998). But see Richard A. Posner, Rational Choice, Behavioral Economics and the Law, 50 Stan. L. Rev. 1551, 1552 (1998).

Furniture Co.[197] At the center of his analysis is the add-on clause present in the Williams case.[198] Under the traditional view, Korobkin writes, the existence of the clause is by itself evidence that customers prefer having it in the contract (compared to paying a higher price): the add-on clause is the result of market forces.[199] Thus, if judicial intervention is going to increase utility, a market failure must be identified.[200] Procedural deficiencies cannot change this, with the exception of a clause that is completely unreadable, though it is hardly necessary to use unconscionability to invalidate a clause where one party has not properly assented.[201] The traditional view of law and economics, as Korobkin defines it, implies that, short of a market failure, no term should be deemed unconscionable.

Behavioral law and economics emphasize that buyers generally do not consider all the terms of a contract but concentrate on a few important ones, such as price and product attributes.[202] This, according to Korobkin, severely weakens the traditional analysis; an add-on clause might for example become a part of a contract even if it is inefficient, simply because customers do not evaluate the clause and thereby attributes no cost to its inclusion.[203] In addition, individuals appear to show judgment biases which make them unable to properly evaluate alternatives in certain situations.[204] Overconfidence implies that Williams might consider the likelihood of her default to be minimal and thus attributes to the add on-clause only a fraction of its actual cost.[205] The complexity of risk estimates also seems to lead to possible judgment biases (or decision-making based on heuristics).[206]

Procedural aspects play a larger role within behavioral law and economics than under the traditional view, and the key question is whether a clause is attributed a proper value in order to maximize the individual's utility.[207] Complicated or relatively hidden terms might be more likely to be ignored by the buyer and thus factored less than warranted into the purchase decision.[208] The social class or status of the buyer might be relevant if

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[197] Russell Korobkin, A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company, 26 U. Haw. L. Rev. 441 (2004). See also above under 4.1. Although Korobkin does not claim that the analysis can be generalized, it seems reasonable to assume that the method and its results are applicable to other unconscionability cases as well.
[198] Korobkin refers to the it as a "cross-collateralization clause."
[199] Id. at 449.
[200] Id. at 451.
[201] Id. at 455.
[202] Id. at 459. See also id. at 465.
[203] Id. at 460.
[204] Id. at 460-461. It seems important to distinguish judgment bias from lack of information; the former, as I understand the concept, means an irrational belief despite correct information while the latter means that information has not been acquired because the cost is too high. It is unclear to me whether Korobkin considers this difference.
[205] Id. at 461.
[206] See id. at 461-462.
[207] "The directly relevant issue is whether buyers […] will incorporate the presence of [the term] into their purchase decision and do so based on an objectively accurate understanding of the risks the term poses." Id. at 464.
[208] Id. at 464.

inferences regarding their (in)ability to make rational purchase decisions can be made.[209] In the case of add-on clauses and the Williams case, Korobkin notes that studies have shown that people tend to underestimate their own probability of financial problems compared to the actual probabilities.[210]

Even if buyers value the term incorrectly, there is still not reason enough to consider it unconscionable.[211] The expected cost of the clause to buyers must also exceed the expected benefit to sellers, i.e., it must be inefficient.[212] Courts often use a test of one-sidedness to determine substantive unconscionability,[213] and Korobkin considers this to be a rough proxy for the inefficiency test that behavioral law and economics prescribes.[214] In conclusion, Korobkin states that behavioral law and economics suggests reasons for why market forces will not always guarantee efficiency, thus justifying judicial consideration of whether a particular term is efficient and, in the end, more interference by the courts (compared to traditional law and economics).[215]

5.2 The Emperor's New Clause

Professor Arthur Allen Leff's law review article titled "Unconscionability and the Code – The Emperor's New Clause"[216] has become one of the most cited concerning unconscionability.[217] It helped elevate Leff to the faculty of Yale and it established the procedural and substantive dichotomy, which has been incorporated in almost all subsequent unconscionability analyses.[218] Leff does not mince his words in the introduction to the article, writing that he intends it to be "a study in statutory pathology, an examination in some depth of the misdrafting of one section of a massive, codifying statute and the misinterpretation which came to surround it." The critique is not subtle, and the gist of it is that UCC 2-302 is an ambiguous and abstract section resulting in uncertainty.

One of Leff's main points is that the UCC's draftsmen did not appreciate how important a division into substantive unconscionability and procedural unconscionability is, and that this resulted in the section's "final amorphous

[209] Id. at 464.
[210] Id. at 465.
[211] Id. at 466.
[212] Id. at 467.
[213] See above under 3.2.
[214] Id. at 466.
[215] Id. at 468.
[216] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).
[217] A Shepard's citation search on LexisNexis yields 56 citing decisions and 430 citing law reviews and periodicals. (11/13/2010)
[218] Ellen A. Peters, Arthur Leff as a Scholar of Commercial and Contract Law, 91 Yale L.J. 230, 230-231 (1981).

unintelligibility and its accompanying commentary's final irrelevance."[219] Thus, his analysis is aptly divided into the two categories, and the examination is in part of the drafting process and in part of the cases in the section's comment. As he continues, Leff looks to equity for guidance, as well as to the final version of the section and to the cases that had been decided using it.

Leff begins by looking at procedural unconscionability: The draftsmen, in the very beginning, posed the question of procedural unconscionability in terms of conduct which could insulate a contract from judicial interference.[220] But it was unclear what kind of conduct that would be and there was a hint of the idea that certain contracts might be unenforceable regardless of bargaining procedure.[221] As the clause evolved, the target became form contracts only, but that was abandoned in favor of a more general application.[222] Leff considers one particular change, which occurred between the drafts of 1950 and 1952, to be illuminative of the general trend in section 2-302's evolution: an unconscionable clause was first described as "so one sided as not to be expected" and then changed to "so one sided as to be unconscionable."[223] In 1952, "oppression" was added ("unfair surprise" already existed at this point) to the comment, which in Leff's opinion made it all the more confusing.[224] Leff concludes that the draftsmen were faced with two alternatives: defining the bargaining conduct that would insulate a contract or exposing that there were some, presently unknown, clauses that would never be accepted; in the end, they decided to do neither.[225]

The article proceeds to search the cases mentioned in the comment to section 2-302. Leff's analysis is that the cases feature little that can help expose the meaning of procedural unconscionability apart from the fact that all but one are form contract cases.[226] For this to be correct one has to bear in mind that facts such as extremely fine print and being indifferent to whether the other party read the contract cannot, in Leff's opinion, be considered evidence of procedural unconscionability.[227] Moving on and noting that all form contracts cannot suffer from procedural unconscionability, Leff suggests that others have identified adhesion contracts as the subset of form contracts that might open the door to interference by courts.[228] Concluding the analysis of the cases, Leff (with

[219] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 488 (1967).
[220] Id. at 489.
[221] Id. at 490-491.
[222] Id. at 492 and 494.
[223] Id. at 498.
[224] Id. at 499.
[225] Id. at 501.
[226] Id. at 502.
[227] Leff would probably have considered such facts irrelevant after concluding that there is a form contract present: "[t]he form contract is designed not to be read or pondered" (italics omitted). Id. at 504.
[228] Id. at 504. Leff considers the essence of the adhesion contract to be monopoly-like power held by one party and the form contract merely the result of that power. Id. at 505.

some doubt) appears to think that an adhesion contract is necessary but not sufficient for an unconscionability finding, and he wonders what else might be required.[229]

Thus, Leff continues by examining the drafting history in terms of substantive unconscionability: The original idea appears to have been "gross overall imbalance,"[230] i.e., of the contract viewed as a whole.[231] This was changed in 1948 so that a certain clause could be deemed unconscionable per se.[232] Leff considers this to be the most important change throughout the draft.[233] According to him, the section went from mandating an investigation of the balance of the contract to prohibiting unknown clauses subject to the opinions and emotions of the judge.[234] It is potent and appealing logic, but the lack of clear stipulations is also the source of the section's flexibility, which Leff recognizes albeit denounces.[235]

Returning to the cases in the comment, only two kinds of clauses are present: warranty disclaimers and remedy limitations.[236] Both of the clauses are regulated in other parts of the code.[237] Leff argues with some force that the detailed regulation of warranty disclaimers means that they cannot be unconscionable and that remedy limitations have a better and more enlightening regulation in the particular clause dealing with those. [238] How can the cases then be helpful? Leff tries the hypothesis that they identify something more general, but concludes that the only thing they illustrate is "the skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result."[239]

Leff moves on to equity and the origins of unconscionability,[240] and quickly disputes the commonly held belief that cases in equity can help determine what unconscionability under the code means.[241] The only link between section 2-302 and unconscionability in equity is, according to Leff, the case of Campbell Soup Co. v. Wentz. [242] Equity cases deal with real property which is, Leff argues, essentially different from goods for a number of reasons[243]: 1. real property is often valuable and great price disparity is more likely to cause severe hardship;[244] 2. the purchase or sale of real

[229] Id. at 508.
[230] Id. at 509.
[231] Id. at 509-511.
[232] Id. at 513.
[233] Id. at 513.
[234] Id. at 515-516.
[235] See id. at 516.
[236] Id. at 516.
[237] See above under 3.2.2.
[238] Id. at 523 and 525.
[239] Id. at 527.
[240] Cf. above under 2.
[241] Id. at 528-529.
[242] Id. at 530. See also above under 4.3.
[243] Id. at 534-535.
[244] Id. at 535. Two arguments against this seem obvious: first, severe hardship should perhaps not be required to get out of an unconscionable contract, and second, there are

property is often a once in a lifetime transaction which means there is generally not an ongoing relationship between buyer and seller;[245] 3. real property is unique;[246] 4. real property is the only thing worth tricking "relatively unsophisticated people"[247] out of.[248] Leff adds that most equity cases do not deal with form contracts, but particularized bargaining.[249]

Viewing equity cases from a substantive unconscionability perspective is also "bootless," writes Leff, because all that equity recognizes as unconscionable is inadequate consideration (overall imbalance).[250] Leff claims that the only factor of substantive unconscionability that equity is concerned with is the price clause, because price is the essence of overall imbalance; he suggests that this was indeed the case in Campbell Soup Co. v Wentz.[251] The fundamental point Leff makes is that because section 2-302 can also be used to strike a single clause, the idea of overall imbalance is "generally irrelevant."[252] In the last paragraphs of the investigation of equity, he clarifies that unconscionability cannot equal harshness because virtually all risk dividing clauses can end up being harsh to one party. [253]

Then there is subsection 2-302(2) which provides that "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."[254] The critique here becomes rather humorous with made-up testimonies from the leading cases to illustrate how this rule is nonsense: it does not provide any help in determining unconscionability because every businessman wants to make money and that is why all clauses are in the contract.[255] After this, Leff looks to two actual unconscionability cases: American Home Improvement, Inc. v. MacIver[256] and Williams v. Walker-Thomas Furniture

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certainly clauses that could result in severe hardship, and limitation of remedies is a good example of such a clause. (The example is invalid if one takes Leff's position and assumes that limitation of remedies is regulated exclusively in other parts of the UCC.)

[245] Id. at 535. This argument, while possibly true, does not mean that a party would not be willing to sacrifice a relationship when the profit from doing so is great.

[246] Id. at 536. This argument might be true, but it is hardly a good reason against applying equity principles to goods.

[247] Id. at 536.

[248] Id. at 536. This is hardly true: people are certainly tricked out of less valuable things than real property.

[249] Id. at 537. This is not a persuasive argument if one considers all the aspects mentioned under procedural unconscionability in this thesis (see 3.1 above). Leff himself points out that equity cases often involve relatively weak parties, and gives a list of examples. Id. at 532. It should be noted (and Leff acknowledges this) that Campbell Soup Co. v. Wentz invovled a form contract.

[250] Id. at 539.

[251] Id. at 539 and 538.

[252] Id. at 539.

[253] Id. at 540.

[254] UCC § 2-302 (2010).

[255] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 544-546 (1967).

[256] American Home Improvement Inc. v. MacIver, 105 N.H. 435 (1964).

Co.[257] The first feature some peculiar economics which Leff illustrates well.[258] It is the second, and the leading unconscionability case, which Leff criticizes the most, especially for two reasons: first, he considers classification of poor and the application of special rules to certain classes wrong[259] and second, lack of clarity: what was it, exactly, that made the contract unconscionable?[260]

In the article's conclusion, Leff summarizes his analysis with the following delightful words: "The gist of the tale is simple: it is hard to give up an emotionally satisfying incantation, and the way to keep the glow without the trouble of the meaning is continually to increase the abstraction level of the drafting and explaining language."[261]

5.3 Analysis

The critique offered by Epstein and Posner through law and economics is concerned with the consequences of unconscionability and, more specifically, whether it is an efficient rule. While I am not going to argue that efficiency is a just moral goal, I will presume that the free exchange of goods and services between two parties where each party is sufficiently informed, mature and experienced is generally beneficial to both parties and thus to society.[262] I will also presume that sufficient information, experience and maturity are minimum requirements. This qualification of freedom of contract should not be interpreted to mean that both parties should be equal in every aspect, but rather that each party should be sufficiently informed, mature and experienced in relation to the contract situation at hand, i.e., they should understand the meaning of the contract and be somewhat aware of the risks. It seems reasonable to assume that such a basic level of competence in contracting is a requirement for making rational self-interested decisions.

Standard form contracts provided by one party are common and, because they are not negotiated, more suspect to the one-sidedness that unconscionability seeks to prevent. They are usually not read or understood, and are not intended to be—therein lies much of their appeal: if everyone who wanted to purchase a TV, rent a car or join an online social network were to read the terms, perhaps ask a few questions and hire an attorney to make sure everything was fine, the transaction costs would be enormous. But all this would often be necessary in a legal system where terms were strictly enforced and there were no consumer legislation, unconscionability

[257] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). See also 4.1 above.
[258] Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 549-550 (1967).
[259] Id. at 556.
[260] Id. at 554-555 and 558.
[261] Id. at 558.
[262] In some cases, negative externalities may make such an exchange harmful for society or particular individuals. There may also be some cases where paternalism is warranted.

defense or other rules to avoid overly harsh contracts. The risks involved in signing a contract without reading it would simply be too severe.

A rule against overly harsh contracts, particularly form contracts, or overreaching businessmen can be viewed as a way to either fulfill or legitimately circumvent the requirement of sufficient information, maturity and experience.[263] There should be two effects of a properly conceived rule against unfair contracts: first, it should not invalidate contracts where the sufficiency requirements are, in fact, met, and second, where they are not met, it should offer moderate protection from one-sided contracts. The protection should only prevent the most outrageous contracts, to make sure there are no incentives to avoid reading contracts and to avoid unpredictability. The results would be: lower transaction costs, because anyone can be sure that even if they do not read the contract carefully, any truly awful terms will not be enforceable (minimizing risk aversion); incentives for making sure that both parties have sufficient information; and incentives to avoid contracting with parties who are not sufficiently mature or experienced.

The above is a tentative hypothesis about a rule against unfair contracts. It is essentially an empirical question whether my inferences about lower transaction costs and proper incentives are correct. The requirement of sufficiently informed, mature and experienced parties can of course also be defended on moral grounds, but such a discussion is beyond this thesis. What, in fact, would constitute sufficient information, maturity and experience is a question of immense importance though hard to answer in any brief or precise manner. The contract situation and the subject matter must reasonably be relevant. It is also conceivable that limited experience can be offset by more information and vice versa. Behavioral law and economics might be helpful in trying to determine the appropriate level of sufficiency required.

Assuming that there is legitimate need for a rule against unfair contracts, the question is whether unconscionability is a proper rule. A good starting point seems to be a consideration of whether such an abstract rule is required. Professor Leff's article is one of the most forceful critiques of UCC section 2-302, though it is important to note that it is primarily section 2-302 and its drafting that is being criticized and not rules against unfair contracts generally.[264] Leff rightfully criticizes the idea of having a rule such as unconscionability because it allows courts to avoid giving concrete reasons for their decision.[265] But can an abstract rule like unconscionability be avoided without enforcing the kind of contracts it intends to invalidate? Consumer legislation can do some, e.g., the mandatory "cooling off" period

[263] By legitimate circumvention, I mean a limited fulfillment because of other interests of importance. An example of such an interest is the predictability of legal rules.
[264] Leff for example agrees with the result in Williams v. Walker-Thomas while criticizing the rationale. Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 552 (1967).
[265] Id. at 515.

for door-to-door sales. More particularized rules, as with limitation of remedies, can also be helpful. But in unconscionability cases, there are often a number of circumstances which each play a role in the decision, making these alternatives hard to use. This is especially so because the circumstances are diverse and hard to specify. The best way to avoid situations where a court does not give reasons for its decision would probably be to define an unconscionability rule in terms of what the purpose and effects of the rule should be.

Unconscionability is an abstract rule and whether it should exist depends on the necessity of the abstraction; concrete rules are otherwise better because they are predictable and consistent. As suggested in the preceding paragraph, the abstraction can be justified because unconscionability cases often involve multiple offensive parts which taken together is a reason to refuse enforcement. Unconscionability should thus be used to target such situations and not be used in cases which are better handled through legislation or other, more concrete rules.

Bibliography

Books and treatises

John D. Calamari & Joseph M. Perillo, The Law of Contracts (3rd ed. 1987).

Thomas D. Crandall & Douglas J. Whaley, Cases, Problems, and Materials on Contracts (4th ed. 2004).

Arthur L. Corbin, Corbin on Contracts (1963).

E. Allan Farnsworth, Farnsworth on Contracts (3rd ed. 2004).

Lon L. Fuller & Melvin Aron Eisenberg, Basic Contract Law (7th ed. 2001).

Andreas Norlén, Oskälighet och 36 § avtalslagen (2004).

Richard A. Posner, Economic Analysis of Law (7th ed. 2007).

Kevin M. Teeven, A History of the Anglo-American Common Law of Contract (1st ed. 1990).

Articles

Robert Braucher, The Legislative History of the Uniform Commercial Code, 58 Colum. L. Rev. 798 (1958).

Stephen A. Broome, An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39 (2006).

Dando B. Cellini & Barry Wertz, Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC, 42 Tul. L. Rev. 193 (1967).

William B. Davenport, Unconscionability and the Uniform Commercial Code, 22 U. Miami L. Rev 121 (1967).

M. P. Ellinghaus, In Defense of Unconscionability, 78 Yale L.J. 757 (1969).

Howard C. Ellis, Employment At-will and Contract Principles: The Paradigm of Pennsylvania, 96 Dick. L. Rev. 595 (1992).

Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975).

H. C. C., Jr., Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302, 45 Va. L. Rev. 583 (1959).

Ford W. Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951).

Jeffrey C. Fort, Understanding Unconscionability: Defining the Principle, 9 Loy. U. Chi. L.J. 765 (1977).

Robert A. Hillman, Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302, 67 Cornell L. Rev. 1 (1981).

Richard J. Hunter, Jr., Unconscionability Revisited: A Comparative Approach, 68 N.D. L. Rev. 145 (1992).

Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998).

Charles L. Knapp, Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device, 46 San Diego L. Rev. 609 (2009).

Russell Korobkin, A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company, 26 U. Haw. L. Rev. 441 (2004).

Arthur Allen Leff, Unconscionability and the Code – The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).

Stewart Macaulay, Klein and the Contradictions of Corporations Law, 2 Berkeley Bus. L.J. 119 (2005).

Jane P. Mallor, Unconscionability in Contracts between Merchants, 40 SW L.J. 1065 (1987).

Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability, 33 Fla. St. U. L. Rev. 1067 (2006).

John E. Murray, Jr., The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts, 123 U. Pa. L. Rev. 1342 (1975).

John E. Murray, Jr., Unconscionability: Unconscionability, 31 U. Pitt. L. Rev. 1 (1969).

Daniel T. Ostas, Economics and the Law of Unconscionability, 27 J. Econ. Issues 647 (1993).

Ellen A. Peters, Arthur Leff as a Scholar of Commercial and Contract Law, 91 Yale L.J. 230 (1981).

Richard A. Posner, Law and Economics Is Moral, 4 Val. U. L. Rev. 163 (1989).

Richard A. Posner, Rational Choice, Behavioral Economics and the Law, 50 Stan. L. Rev. 1551 (1998).

Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459 (1994).

Alan Schwartz, Reexamination of Nonsubstantive Unconscionability, 63 Va. L. Rev. 1053 (1977).

Byron D. Sher, The Cooling-Off Period in Door-to-Door Sales, 15 UCLA L. Rev. 717 (1968).

W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971).

John A. Spangle, Jr., Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931 (1969).

Clinton A. Stuntebeck, The Doctrine of Unconscionability, 19 Me. L. Rev. 81 (1967).

Other

Black's Law Dictionary (9th ed. 2009).

Prop. 1975/76:81. (Swed.)

Restatement (Second) of Contracts.

Uniform Commercial Code (2010).

Uniform Commercial Code, Official Comment (2010).

Uniform Commercial Code, Text Appendix T (2010).

Table of Cases

United Kingdom

United States

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

Maxwell v. Fidelity Financial Services, Inc., 184 Ariz. 82 (1995).

Wilson v. Arkansas, 514 U.S. 927 (1995).

Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83 (2000).

Wisconsin Auto Title Loans, Inc. v. Jones, 290 Wis.2d 514 (2006).

Acosta v. Fair Isaac Corp., 669 F.Supp.2d 716 (N.D. Texas 2009).

Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616 (3d Cir. 2009).