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DEBUNKING SOME MYTHS ABOUT
UNCONSCIONABILITY: A NEW
FRAMEWORK FOR U.C.C.
SECTION 2-302

Robert A. Hillman†

Although freedom of contract remains one of the basic tenets of the law of contracts,¹ a belief that free enterprise capitalism may not always be suited to today's pluralistic society² has fostered the growth of government intervention in the contracting process.³ Section 2-302 of the Uniform Commercial Code,⁴ for example, authorizes courts to distinguish between fair and unfair agreements and to strike or rewrite the latter under the theory of unconscionability.⁵ Because conflicts between freedom of contract and government intervention are not easily resolved, and because section 2-302 affords judges great power to police agreements but offers little coherent guidance on how to accomplish the

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¹ See, e.g., J. JACKSON & L. BOLLINGER, CONTRACT LAW IN MODERN SOCIETY 940-43 (2d ed. 1980); Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 358 (1974); Jordan, *Unconscionability at the Gas Station*, 62 MINN. L. REV. 813, 828-29 (1978); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640-41 (1943).

² See, e.g., Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 294 (1975).

³ See, e.g., *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 191, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969):

[W]e have, over the years, developed common and statutory law which tells not only the buyer but also the seller to beware. This body of laws recognizes the importance of a free enterprise system but at the same time will provide the legal armor to protect and safeguard the prospective victim from the harshness of an unconscionable contract.

See also Epstein, *supra* note 2, at 293-95.

⁴ Hereinafter referred to as "U.C.C." or "Code."

⁵ U.C.C. § 2-302 provides:

(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.

task, questions concerning the proper role of and approach to this provision remain unanswered.⁶

Two basic precepts about section 2-302, however, have been commonly accepted. First, the strength of unconscionability is that it enables judges to police agreements directly,⁷ rather than covertly by manipulating existing common law doctrines.⁸ There is wide agreement that unconscionability under section 2-302 is a direct process for policing against oppressive contracts or contract terms and that the law is improved by avoiding the need to employ common law doctrines.⁹

The second precept involves the acceptance of a particular methodological framework to support a finding of unconscionability.¹⁰ Although Professor Leff concluded in his leading article on unconscionability that section 2-302 is "amorphous[ly] unintelligible,"¹¹ his effort to determine whether the focus of inquiry is on the bargaining process or the substance of the agreement, or both, suggested a framework that courts and commentators have followed.¹² Today, the

⁶ See text accompanying notes 16-17 *infra*. Although this Article focuses on the unconscionability provision of the Uniform Commercial Code, the framework and observations presented should be equally pertinent to the unconscionability concept that is gaining recognition outside the U.C.C. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 50 (1969).

⁷ See, e.g., Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

⁸ See notes 87-98 and accompanying text *infra*.

⁹ See notes 87-89 and accompanying text *infra*.

¹⁰ A number of commentators have sought to establish such a framework. See, e.g., Ellinghaus, *supra* note 7; Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Murray, *supra* note 6; Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969). For other helpful articles on unconscionability, see Epstein, *supra* note 2; Jordan, *supra* note 1; Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151 (1976); Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

In contrast to the efforts to establish a framework for unconscionability decisions, the absence of a *definition* of unconscionability has been lauded because of a belief that the doctrine of unconscionability should not be saddled with artificial limitations. See, e.g., *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 143, 340 N.Y.S.2d 268, 272 (Civ. Ct. 1973); Ellinghaus, *supra* note 7, at 758; Murray, *supra* note 6, at 80.

The "best" definition of unconscionability in any single case is set forth in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965): "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." See also *Albert Merrill School v. Godoy*, 78 Misc. 2d 647, 649, 357 N.Y.S.2d 378, 381 (Civ. Ct. N.Y. 1974). For other frequently cited definitions, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d at 450 ("whether the terms are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place'") (quoting 1 A. CORBIN, CONTRACTS § 128 (1963)); *J.J. Newberry Co. v. Mixon*, 440 F. Supp. 20, 21 (E.D. Mo. 1977) ("An unconscionable contract is one which no man in his right senses would make on the one hand and which no fair and honest man would accept on the other.") (citing *Hume v. United States*, 132 U.S. 406 (1889)). Section 2-302, Comment 1 states that the principle of unconscionability "is one of the prevention of oppression and unfair surprise."

¹¹ Leff, *supra* note 10, at 488.

¹² This Article was written prior to Professor Leff's untimely death. The influence of

paradigm case for a finding of unconscionability involves both "bargaining naughtiness" (procedural unconscionability) and grossly unfair terms (substantive unconscionability).¹³ For example, if a party asserting the enforceability of a contract made misrepresentations or engaged in coercive conduct at the bargaining stage, and the resulting agreement includes terms overwhelmingly favorable to that party, the case is ripe for a finding of unconscionability.

This Article challenges the above two basic precepts about unconscionability—that unconscionability must displace the common law doctrines to avoid manipulation and to clarify the law, and that the procedural/substantive framework is helpful in sorting out unconscionability disputes—and offers a new framework for analyzing unconscionability problems that can resolve the questions left unanswered by the present framework. The problem of manipulation of common law doctrines has been overemphasized to justify an overly abstract unconscionability approach. Manipulation occurs when, in the absence of bargaining misconduct, a court still feels compelled to strike an unfair contract or contract provision but is unwilling to do so directly.¹⁴ Today, however, courts invoke unconscionability in many bargaining misconduct situations in which existing or developing common law doctrines could be applied without judicial manipulation. I will show that the starting point for inquiry in unconscionability cases should be these common law categories of bargaining ills, rather than an amorphous concept of "unconscionability" that encompasses all of the doctrines.¹⁵

In addition, the procedural/substantive bifurcation now employed

Professor Leff's superb scholarship on unconscionability is reflected in every article and case decision involving unconscionability. We have suffered an immeasurable loss.

¹³ *Id.* at 539-40. The terminology is Professor Leff's. Procedural unconscionability, involving the process of contract formation, is, in Professor Leff's words, "[w]hat took place between the parties at the making of the contract." *Id.* at 487. Substantive unconscionability deals with the resulting content of the contract. *Id.* See also *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976); *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 269, 315 A.2d 16, 22 (1974) (Clifford, J., dissenting); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* §§ 4-7, at 164 (2d ed. 1980); Spanogle, *supra* note 10, at 932. Professor Leff found that early drafts of the comments to § 2-302 focused on "bargaining naughtiness" and that later drafts changed the emphasis to "lopsided" terms. The final draft, however, was unclear about which aspect of unconscionability was at the forefront. Leff, *supra* note 10, at 501.

Other "frameworks" for unconscionability have been suggested. See, e.g., Murray, *supra* note 6, at 12-13 (circle of assent); Schwartz, *supra* note 10, at 1054-55 (substantive and nonsubstantive).

¹⁴ See notes 91-96 and accompanying text *infra*. Terms such as "bargaining misconduct" and "bargaining infirmities" will refer here to both malfeasance and misfeasance on the part of the party accused of unconscionability.

¹⁵ See Part I *infra*. "The decided cases do not invoke unconscionability in any systematic or even coherent way. Claims of substantive unfairness are mixed with suggestions of fraud, cognitive deficiency, and duress, so that it is not possible to discern a pattern in the factual

in unconscionability cases raises more issues than it resolves, principally because it fails to offer guidance on how to employ the factual elements identified as procedural or substantive unconscionability. At a minimum, the following issues remain unresolved under the current section 2-302 framework: What is the relationship of existing legal doctrines such as duress, undue influence, fraud, the duty to disclose, contract interpretation, and contract formation to procedural unconscionability? Does a finding of unconscionability require both bargaining misconduct and unfair terms, or is either infirmity sufficient? If an offending clause is disclosed and explained, does that process insulate the clause from a finding of unconscionability? Should unconscionability apply when a consumer purchases a luxury item or when the consumer can purchase the item elsewhere without the offending clause? In what circumstances, if any, should unconscionability apply to agreements between merchants?¹⁶ Some of these issues are not easily resolved by employing the procedural/substantive unconscionability distinction, and many are spawned or at least exacerbated by that approach. Accordingly, I offer an alternative approach to cases currently treated under the procedural/substantive unconscionability rubric.¹⁷

Under the proposed framework, in situations involving what I will refer to as "common-law-doctrines unconscionability," courts should explore the applicability of common law assent doctrines to bargaining problems. These doctrines, which are capable of dealing directly with virtually all bargaining misconduct,¹⁸ are helpful because they indicate more precisely than procedural unconscionability the factual elements necessary to bar enforcement of particular contracts and contract terms.¹⁹ Moreover, the application of common law doctrines indicates

situations in which this episodic power is exercised." C. FRIED, *CONTRACT AS PROMISE* 103 (1981).

Because (1) § 2-302 does not preclude examining the bargaining process, (2) the official comment appears to sanction the investigation, and (3) § 2-302 remedies are suited to bargaining ills, I suggest that courts invoke § 2-302 in cases involving bargaining infirmities even though specific common law doctrines are applicable without manipulation. In such cases, courts should acknowledge specifically the bargaining doctrine on which the finding of unconscionability is based so that the guidance offered by the established doctrine is preserved. *See* notes 116-18 and accompanying text *infra*.

¹⁶ *See generally* J. WHITE & R. SUMMERS, *supra* note 13, ch. 4.

¹⁷ In addition, I attempt to answer specifically the questions set out in text in Part IV *infra*.

¹⁸ At least this would be true under an expanded (not manipulated) view of the duty to disclose doctrine. *See* note 31 and accompanying text *infra*.

¹⁹ *See* notes 99-106 and accompanying text *infra*. In his "defense" of unconscionability, Professor Ellinghaus conceded that broad standards like unconscionability should not be employed when more satisfactory methods for resolving problems are available. Ellinghaus, *supra* note 7, at 759-61. I assert that traditional contract doctrines, either already developed or with the potential for development, are available to deal with a substantial number of the cases that are now decided under the unconscionability rubric and that decisions applying the traditional doctrines under a new unconscionability framework would be superior. *See* Part I

when both the bargaining process and the fairness of the resulting terms are the focus of concern, and when problems with the formation process alone are sufficient for a finding of unconscionability. If, for example, a court applies the developing common law duty to disclose, it must examine both the bargaining process and the fairness of the terms of the agreement.²⁰ If, however, the court applies the common law principle that a vague term is unenforceable, the fairness of the term is not particularly relevant.²¹

The principal remaining domain of unconscionability pertains to cases generally involving a lack of assent that results not from bargaining improprieties, but from the special plight of some persons in our society that makes actual assent problematical.²² I will refer to these cases as "pure unconscionability" cases. Like common-law-doctrines unconscionability (and unlike substantive unconscionability), pure unconscionability cases may involve both substantive and procedural elements. For example, formation issues such as whether a party could obtain sufficient market information about a product, as well as substantive issues such as whether the suspect term or terms destroy the essence of the agreement, must be considered in pure unconscionability cases.²³

Part I of this Article discusses common-law-doctrines unconscionability and its application to cases involving bargaining unfairness. Part II develops the framework for determining whether and under what circumstances courts should have the power to intervene in pure unconscionability cases. Part III attempts to refute Professor Leff's argument

infra. Of course, in applying common law doctrines, courts often will be confronted with the need to engage in difficult line drawing. *See* note 84 *infra*. Nevertheless, the alternative—unconscionability in its present form—requires more difficult line drawing and is more abstract and less focused than the common law doctrines.

²⁰ *See* note 107 and accompanying text *infra*.

²¹ *See* notes 108-09 and accompanying text *infra*.

²² *See* Part II *infra*.

²³ *See id.* Professor Epstein seeks to limit unconscionability to improper bargaining situations. *See* Epstein, *supra* note 2. His analysis is premised on economic efficiency theory and acknowledges that in limiting unconscionability to bargaining infirmity situations, the unconscionability doctrine will merely "facilitate" the avoidance of agreements that are "likely to be vitiated by the classical defenses of duress, fraud, or incompetence." *Id.* at 295. My view is that the present unconscionability framework does not "facilitate" the analysis when common law doctrines clearly apply. Rather, it impedes clear analysis of bargaining problems. *See* notes 99-120 and accompanying text *infra*. Professor Ellinghaus observes that unconscionability is properly viewed as a "residual category" when "positively defined categories" fail. Ellinghaus, *supra* note 7, at 759 (quoting 1 T. PARSONS, THE STRUCTURE OF SOCIAL ACTION 17 (1968)). Professor Ellinghaus supports the position that courts already have sufficient ammunition to deal with bargaining infirmities, *see* Ellinghaus, *supra* note 7, at 763-64, but he "confesses" to being unable to improve on the procedural/substantive terminology. *Id.* at 773 n.64.

that equitable unconscionability²⁴ is not helpful in understanding section 2-302,²⁵ and suggests that equitable unconscionability actually supports the proposed framework. Finally, Part IV demonstrates the effectiveness of the proposed framework by applying the common-law-doctrines/pure unconscionability approach to current issues in the unconscionability realm.

I

COMMON-LAW-DOCTRINES UNCONSCIONABILITY

A. *The Doctrines*

This subsection seeks only to demonstrate the broad availability of common law doctrines in cases that are now decided under the unconscionability rubric. Arguments pertaining to whether the common law doctrines deserve greater emphasis are reserved for the next subsection.

Cases involving bargaining unfairness have at their core the issue of assent.²⁶ Despite widespread invocation of the rule that parties who sign a contract manifest assent to it and are bound by its terms regardless of whether they read it or understood it,²⁷ courts may invoke exceptions to the rule more often than the rule itself in order to ensure actual assent. Without hesitation, courts bar enforcement of written contracts on grounds of fraud, duress, undue influence, lack of capacity, and the like.²⁸ Each of these doctrines, which I will refer to as "traditional policing doctrines,"²⁹ is available if a party has not actually and voluntarily agreed to the contract, notwithstanding his outward manifestation of assent.

In addition, courts have barred enforcement of contracts or contract terms based on their interpretation of the terms and their applica-

²⁴ For a discussion of unconscionability in the equity court, see notes 186-221 and accompanying text *infra*.

²⁵ Leff, *supra* note 10, at 533. Professor Leff's assertion has not yet been challenged directly. *See, e.g.*, Ellinghaus, *supra* note 7, at 785-86 & n.123 (Leff's position overstated, but no development of rebuttal). Professor Spanogle came the closest, Spanogle, *supra* note 10, at 948-51, but he did not rebut directly Professor Leff's arguments that equitable unconscionability is irrelevant to § 2-302. *See also* Murray, *supra* note 6, at 39 (asserting that equitable unconscionability is not helpful).

²⁶ *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Kugler v. Romain, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971). *See also* Ellinghaus, *supra* note 7, at 762-73; Murray, *supra* note 6, at 12.

²⁷ This is the "duty to read" rule. *See* Calamari, *supra* note 1. The theory underlying the rule is that a party who reasonably relies on a writing must be protected. Murray, *supra* note 6, at 4.

²⁸ *See, e.g.*, Federal Deposit Ins. Corp. v. Balistreri, 470 F. Supp. 752, 758 (E.D. Wis. 1979) (duress) (dictum); Heintz v. Vestal, 605 P.2d 606, 607 (Mont. 1980) (undue influence); Osterberger v. Hites Constr. Co., 599 S.W.2d 221, 227 (Mo. Ct. App. 1980) (fraud); Uribe v. Olson, 42 Or. App. 647, 651, 601 P.2d 818, 820 (1979) (lack of capacity) (dictum).

²⁹ Other doctrines sometimes invoked in the policing of contracts include mutuality of obligation, adequacy of consideration, and mistake.

tion of the rules of offer and acceptance.³⁰ Contract interpretation and the rules of offer and acceptance, unlike the policing doctrines, are not exceptions to the objective assent framework; when a contract is ambiguous (a contract interpretation problem) or contains hidden terms (an offer and acceptance problem), there has been no objective manifestation of assent. These latter doctrines will be referred to as "formation doctrines."

In addition to the policing and formation doctrines, courts are developing a duty of disclosure.³¹ The duty to disclose is related to the policing doctrines in that it isolates an additional bargaining infirmity: the failure to provide additional information about the nature of the contract. Virtually all unconscionability cases involving bargaining misconduct can be decided under the policing, formation, or disclosure doctrines. A closer examination of these doctrines with case examples is set forth below.

1. *Policing*

Fraud and duress are the principal common law policing doctrines that find their way into unconscionability cases. In *Davis v. Kolb*,³² for example, the trial court granted the seller rescission of a timber deed because the purchaser had misrepresented his experience and knowledge of the value of the timber, and the seller had relied to his detriment on the purchaser's low estimate. The Supreme Court of Arkansas affirmed, invoking the unconscionability doctrine of section 2-302. Because fraud requires a material misrepresentation of fact and reliance on the misrepresentation,³³ both of which occurred in this case, there existed little reason for the court's increasing the level of theoretical abstraction from fraud to unconscionability.³⁴

In *Allen v. Michigan Bell Telephone Co.*,³⁵ the court invalidated as un-

³⁰ See Calamari, *supra* note 1, at 343; cases cited at note 13 *supra*. See also Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 49, 593 P.2d 1308, 1313 (1979); Butcher v. Garrett-Enumclaw Co., 20 Wash. App. 361, 368, 581 P.2d 1352, 1357, 1358 (Ct. App. 1978).

³¹ See, e.g., Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 269 (E.D. Mich. 1976); Weaver v. American Oil Co., 257 Ind. 458, 464, 276 N.E.2d 144, 148 (1972).

³² 263 Ark. 158, 563 S.W.2d 438 (1978).

³³ See, e.g., Osterberger v. Hites Constr. Co., 599 S.W.2d 221, 227 (Mo. Ct. App. 1980). Other elements of fraud include the speaker's knowledge of the falsity or his ignorance of the truth and the intent that the representation be relied on. Constructive fraud, however, does not require that the representation be made knowingly. *Id.*

³⁴ The court also pointed out that the purchaser had no capital investment and no risk. *Davis v. Kolb*, 263 Ark. at 160, 563 S.W.2d at 439. See also *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977); *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1353 (1978).

³⁵ 18 Mich. App. 632, 171 N.W.2d 689 (1969), *rev'd on other grounds*, 61 Mich. App. 62, 232 N.W.2d 302 (1975). *Allen* does not involve a sale of goods but is a helpful illustration of the duress issue that can exist in cases falling under § 2-302. See also cases cited at note 38 *infra*.

conscionable a contract provision exculpating Bell Telephone from liability to yellow page advertisers for failure to include their advertisements in its directories. The court reasoned that the advertising could be obtained only from Bell, that advertising in the yellow pages was an economic necessity, and that the exculpatory clause was unreasonable.³⁶ Had the court applied the common law doctrine of economic duress, it would have reached the same result. Economic duress requires wrongful conduct by one contracting party, which precludes the exercise of free will by the other party.³⁷ Because the court found that Bell was able to insist on an unreasonable clause as a result of its monopoly position and the economic necessities of the advertiser, a finding of duress was appropriate.³⁸

³⁶ 18 Mich. App. at 639-40, 171 N.W.2d at 693-94.

³⁷ "[Economic] duress involves 'wrongful acts . . . that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction.'" Federal Deposit Ins. Corp. v. Balistreri, 470 F. Supp. 752, 758 (E.D. Wis. 1979) (citing RESTATEMENT OF CONTRACTS § 493 (1932)). See generally Dalzell, *Duress By Economic Pressure (I)*, 20 N.C. L. REV. 237 (1942); Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979).

The *Allen* court appeared to focus on the problem of duress without specifically invoking it:

Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered. Where goods and services can only be obtained from one source (or several sources on non-competitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without. Depending on the nature of the goods or services and the purchaser's needs, doing without may or may not be a realistic alternative. Where it is not, one who successfully exacts agreement to an unreasonable term cannot insist on the courts enforcing it on the ground that it was "freely" entered into, when it was not. He cannot in the name of freedom of contract be heard to insist on enforcement of an unreasonable contract term against one who on any fair appraisal was not free to accept or reject that term.

18 Mich. App. at 637, 171 N.W.2d at 692.

³⁸ I take no position on the correctness of the court's finding that the exculpatory clause was unreasonable. Other courts have taken a view contrary to the court's. See, e.g., *Wilson v. Southern Bell Tel. & Tel. Co.*, 194 So. 2d 739 (La. App. 1967); *Russell v. Southwestern Bell Tel. Co.*, 130 F. Supp. 130 (E.D. Tex. 1955). My point is that given the *Allen* court's fact-finding that the exculpatory clause was unreasonable and the economic necessities of the advertiser, application of the doctrine of duress was appropriate.

The remedy for duress is typically rescission, see note 118 and accompanying text *infra*. There is no reason, however, why a court should not have the power to excise a particular unreasonable provision, like the exculpatory clause in *Allen*, and enforce the remainder of the contract. See D. DOBBS, REMEDIES 654 (1973). In fact, I urge later that common law doctrines remain part of the unconscionability framework to ensure that courts applying them enjoy the liberal powers of remedy under § 2-302. See note 117 and accompanying text *infra*. See also *United States v. Bedford Assocs.*, 491 F. Supp. 851, 864-65 (S.D.N.Y. 1980); *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954 (1978); *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482, 489-90, 396 N.Y.S.2d 427, 432 (1977) (new contract that eliminated warranties forced on purchaser shortly before delivery).

Undue influence also may apply to invalidate contracts where the promisee engages in

Allen demonstrates how duress may arise in sales transactions involving standard form contracts of adhesion,³⁹ where a party with superior bargaining power offers a form contract on a take-it-or-leave-it basis.⁴⁰ If the subject matter of the contract is a necessity⁴¹ and is not reasonably available elsewhere, or the weaker party is simply unaware of its availability,⁴² the weaker party is devoid of choice. If the stronger party, knowing of the other party's lack of alternatives, insists on terms overwhelmingly in its favor, a finding of duress may be appropriate.⁴³

2. Formation

Rules of contract interpretation, such as that ambiguous or conflicting contract terms are construed against the drafter, are at the heart of many unconscionability cases. Although some cases clearly have bent or stretched rules of construction to reach just results, in many cases involving unconscionability, interpretational rules applied without manipulation would exclude the offending clause or clauses from the contract.⁴⁴ For example, the frequently cited case of *Williams v. Walker-Thomas Furniture Co.*⁴⁵ involved a contract clause that permitted the seller to reclaim all goods previously sold to the customer upon a single default by

conduct that overpowers the will of a promisor and induces him to do something that he would not have done otherwise. *See, e.g., Stetzel v. Dickenson*, 174 N.W.2d 438, 443 (Iowa 1970); *Heintz v. Vestal*, 605 P.2d 606, 608 (Mont. 1980) (listing five factors leading to undue influence). When a seller knowingly induces a buyer to make a purchase beyond the buyer's means, that conduct should be actionable under the undue influence theory. *See, e.g., Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 758 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967) (contract unconscionable in part because of salesman's awareness of buyer's imminent termination of employment). *See also Ellinghaus, supra* note 7, at 771.

³⁹ Standardized contracts are referred to as contracts of adhesion when one party imposes its will on the other "unwilling" party. E. FARNSWORTH & W. YOUNG, *CASES AND MATERIALS ON CONTRACTS* 451 (3d ed. 1980). For a concise history of the terminology, see *id.*

⁴⁰ *See, e.g., Standard Oil Co. v. Perkins*, 347 F.2d 379, 383 n.5 (9th Cir. 1965). *See also* authorities cited in *Leff, supra* note 10, at 505 n.68.

⁴¹ *See* note 128 *infra*.

⁴² Most courts now apply a subjective test of the victim's lack of choice in duress cases. *See, e.g., Dunham v. Kudra*, 44 N.J. Super. 565, 131 A.2d 306 (1957).

⁴³ Cases involving the purchase of luxury items and cases in which the purchaser is aware of reasonable alternatives should escape the duress net, because the absence of choice cannot be demonstrated. The purchaser can elect not to purchase the luxury or to go elsewhere. Even in these situations, however, courts would retain the power to bar enforcement of a term on pure unconscionability grounds. *See* notes 157-84 and accompanying text *infra*.

Of course, the application of duress will create problems of its own. The difficulties of distinguishing offers from threats, reasonable from unfair terms and choice from lack of alternatives make duress an elusive concept. *See, e.g., C. FRIED, supra* note 15, at 92-103. Nevertheless, the employment of duress helps to focus the issues and avoids the still more elusive doctrine of unconscionability. *See* Part IB *infra*. *See also* note 19 *supra*; text accompanying note 115 *infra*.

⁴⁴ *See* note 91 *infra*.

⁴⁵ 350 F.2d 445 (D.C. Cir. 1965). For further discussion of this case, see notes 141-42 and accompanying text *infra*.

the customer. The clause was sufficiently incomprehensible to a reasonable person so that the court could have determined under the rules of contract interpretation that the clause should not be enforced.⁴⁶ The court, however, remanded the case for a determination on the broader ground of unconscionability.⁴⁷

*Gladden v. Cadillac Motor Car Division*⁴⁸ illustrates how contract interpretation principles can be applied without manipulation to "unconscionability" cases. The *Gladden* court, applying contract interpretation principles to a tire manufacturer's guarantee, concluded that a contract term limiting the buyer's remedy⁴⁹ was unenforceable because the guarantee presented the tire owner with a "linguistic maze" of contradictory provisions; the court indicated that the conflicting terms of the guarantee had induced the purchaser into believing "that he was obtaining a guarantee of performance."⁵⁰ A concurring judge would have held that the remedy limitation was unconscionable.⁵¹

3. Disclosure

Traditional policing and formation doctrines in contract law are less relevant and less effective in the world of mass-produced form contracts.⁵² Today, form contracts generally are not read and even if read, they are not readily understood.⁵³ Instead of assenting to most terms of standard forms, the consuming public by necessity places confidence in industry to draft forms fairly and reasonably, and to omit terms that contradict "dickered" terms.⁵⁴ The duty to disclose doctrine can protect

⁴⁶ The provision, which the court referred to as being "rather obscure," provided: [T]he amount of each periodical installment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by (purchaser) under such prior leases, bills or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each such payment is made.

350 F.2d at 447 (emphasis omitted). See also *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 336, 416 A.2d 394, 402 (1980) (unclear remedy limitation unenforceable).

⁴⁷ 350 F.2d at 449.

⁴⁸ 83 N.J. 320, 416 A.2d 394 (1980).

⁴⁹ The guarantee provided that, in the event of defects in the tire, the purchaser's remedy was limited to replacement or purchase price refund. *Id.* at 333, 416 A.2d at 401.

⁵⁰ *Id.* at 334, 416 A.2d at 401. See also *id.* at 333, 416 A.2d at 401 ("[W]hat is presented is a melange of overlapping, variant, misleading, and contradictory provisions.")

⁵¹ *Id.* at 339, 416 A.2d at 404 (Pashman, J., concurring).

⁵² See, e.g., Llewellyn, Book Review, 52 HARV. L. REV. 700, 700-01 (1939).

⁵³ See note 72 and accompanying text *infra*.

⁵⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-50 (D.C. Cir. 1965); *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 335, 416 A.2d 394, 402 (1980). See also J. JACKSON & L. BOLLINGER, *supra* note 1, at 985. Many statutory enactments now require disclosure to enhance the awareness of contracting parties. See, e.g., Truth-in-Lending Act, 15 U.S.C. § 1601 (1976); U.C.C. § 2-316(1). See also E. FARNSWORTH & W. YOUNG, *supra* note 39, at 471-72.

parties to standardized agreements when the drafters do not play fairly.

Courts apply the duty to disclose doctrine when a party with superior knowledge of facts "resulting in an inequality of condition or knowledge between the parties" fails to disclose important facts regarding the surrounding circumstances of a bargain to the other party.⁵⁵ As in cases to which policing and formation doctrines could apply, some courts employ unconscionability terminology when the issue appears, in fact, to concern the duty to disclose such facts.⁵⁶

The duty to disclose can also require disclosure about the legal effect of agreements.⁵⁷ Courts have found a duty to disclose information about contract terms in contracts of adhesion,⁵⁸ contracts containing fine print,⁵⁹ and contracts containing otherwise hidden terms.⁶⁰ The duty to disclose arises in the latter two kinds of contracts because without disclosure the suspect terms would not become part of the contract in question.⁶¹ The duty to disclose may also arise in the absence of fine print or hidden terms in adhesion situations as a result of the superior knowledge or position of the party asserting the enforceability of the contract, or because of confidence placed in that party.⁶² In such situa-

⁵⁵ For example, in *Smith v. Peterson*, 282 N.W.2d 761, 767 (Iowa 1980), the sellers' failure to disclose that a highway would bar access to the lounge they were selling resulted in rescission of the agreement. See also *Miller v. Berkoski*, 297 N.W.2d 334, 340 (Iowa 1979). The duty to disclose also arises when the parties enjoy a fiduciary or confidential relationship. See, e.g., *Slater v. KFC Corp.*, 621 F.2d 932, 936 (8th Cir. 1980) (citing *McMahon v. Meredith Corp.*, 595 F.2d 433, 438-39 (8th Cir. 1979)).

One court has indicated that the duty to disclose "imposes on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it." *Obde v. Schlemeyer*, 156 Wash. 2d 449, 452, 353 P.2d 672, 675 (1960) (quoting Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEXAS L. REV. 1, 31 (1936)). On the other hand, Professor Kronman suggests that the duty to disclose arises when the information is "casually" acquired but not when it was "deliberately produced." Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUDIES 1, 18 (1978). See also *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 204 (1963); *Osterherger v. Hites Constr. Co.*, 599 S.W.2d 221, 227 (Mo. Ct. App. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979); RESTATEMENT OF CONTRACTS § 472, Comment b (1932). *But cf.* Epstein, *supra* note 2, at 299-300 (duty to disclose should not be "allowed to swallow the basic premise in favor of freedom of contract"); note 27 and accompanying text *supra* (duty to read principle).

⁵⁶ E.g., *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976) (seller knew buyer was unfamiliar with value of carvings and charged twice their value without disclosing true worth).

⁵⁷ *But cf.* *Vargas v. Esquire, Inc.*, 166 F.2d 651, 654 (7th Cir. 1948) (duty of contracting party to know contents of written contract).

⁵⁸ See notes 39-40 and accompanying text *supra*.

⁵⁹ See, e.g., *Egan v. Kollsman Instrument Co.*, 21 N.Y.2d 160, 169, 287 N.Y.S.2d 14, 19 (1967).

⁶⁰ See, e.g., *Kergald v. Armstrong Transfer Express Co.*, 330 Mass. 254, 255, 113 N.E.2d 53, 54 (1953); *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 16 A.D.2d 366, 228 N.Y.S.2d 330, 189 N.E.2d 693 (1962); *David v. Manufacturers Hanover Trust Co.*, 55 Misc. 2d 1080, 287 N.Y.S.2d 503 (Civ. Ct. 1968). An example of a hidden term is a liability disclaimer on the back of a claim check.

⁶¹ See note 30 and accompanying text *supra*.

⁶² See note 55 and accompanying text *supra*. The notion of a special relationship be-

tions, terms that "eliminate the dominant purpose of the transaction" or are "bizarre" or "oppressive" must be disclosed.⁶³ In addition, any term that contradicts the meaning of the dickered terms⁶⁴ must be disclosed.

The superior knowledge or position of a party may be based on some discernible weakness of the other party, such as unfamiliarity with the English language or lack of education.⁶⁵ Suppose, for example, that two parties bargain in Spanish. The seller, however, presents a form contract written in English, which the buyer cannot readily understand. Although there may be no fraud, the seller should be required to explain the terms.⁶⁶ Clearly, the buyer has relied on the superior knowledge of the seller and is in an inferior position to comprehend the terms of the agreement.⁶⁷

The duty to disclose based on a discernible weakness of one party has already surfaced explicitly in some cases decided on unconscionability grounds. In *Weaver v. American Oil Co.*,⁶⁸ a clause in a lease agreement

tween consumers and merchants may account for the widespread employment of the unconscionability doctrine in consumer situations and the reluctance of courts to find unconscionability in merchant-to-merchant agreements. See notes 230-31 and accompanying text *infra*.

⁶³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211(3), Comment f (1979). Professor Llewellyn referred to terms that destroy the essence of the agreement as "manifestly unreasonable." K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960). See notes 169-71 and accompanying text *infra*.

Early drafts of and comments to § 2-302 suggested that the reasonable expectations of the parties and the need to disclose "surprise" provisions were at the heart of the section. See, e.g., MIMEO 1941 DRAFT § 1-C(1)(b), cited in Leff, *supra* note 10, at 489:

When both of the parties *have so directed their attention to a particular point* that . . . variance from this Act may fairly be regarded as the deliberate desire of both, and as reflecting a considered bargain on that particular point . . . the legislature recognizes that policy in general requires the parties' particular bargain to control.

(emphasis added). See also 1950 Draft § 2-302, Comment 1 ("The basic test is whether . . . the clauses involved are so one sided *as not to be expected to be included* in the agreement." (emphasis added)).

⁶⁴ See Spanogle, *supra* note 10, at 940.

⁶⁵ See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 460, 276 N.E.2d 144, 145 (1971); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967).

⁶⁶ See, e.g., *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d at 27, 274 N.Y.S.2d at 759.

⁶⁷ Consider also the plight of the uneducated low income consumer in Washington, D.C. who is subjected to the sales techniques of the Walker-Thomas Furniture Company:

The personal nature of the customer-sales representative relationship touches the key to Walker-Thomas's success: the ability to emphasize the visible and informal while shifting the attention of the consumer from the structural, formal, and contractual. Utilizing the consumer's ignorance, dependency, and lack of information, Walker-Thomas obscures the governing legal rules and is able to manipulate the customer's expectations concerning total cost and financing charges, product quality, and collection requirements.

Greenberg, *Easy Terms, Hard Times: Complaint Handling in the Ghetto*, in *NO ACCESS TO LAW* 384 (L. Nader ed. 1980).

⁶⁸ 257 Ind. 458, 276 N.E.2d 144 (1971).

between American and station-owner Weaver exculpating American from liability for negligence and requiring Weaver to indemnify American for American's negligence was held unenforceable.⁶⁹ Weaver, who did not have a high school education, had never read the lease.⁷⁰ The court stated that "[t]he party seeking to enforce such a contract has the burden of showing 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.*"⁷¹

Even if no clear bargaining weakness exists and no policing or formation doctrine applies—the case involves merely a standard form agreement between a business and consumer—the duty to disclose may still apply. Consumers generally do not read their forms and, if they did, they would not understand them;⁷² so they rely on businesses to draft reasonable terms. Therefore, it is appropriate to protect parties from unexplained terms that belie their reasonable expectations.⁷³ When confronted with adhesion contracts, some courts, particularly in insurance cases, have enforced the reasonable expectations of the weaker party even though specific contract terms contradict those expectations. In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,⁷⁴ for example, the

⁶⁹ *Id.* at 462, 276 N.E.2d at 147.

⁷⁰ In addition, the clause was in fine print. *Id.*

⁷¹ *Id.* at 464, 276 N.E.2d at 148 (emphasis in original). Although the clause at issue in *Weaver* seems manifestly unreasonable, the court intimated that it would have upheld the clause if it had been explained to Weaver: "We do not mean to say or infer that parties may not make contracts exculpating one of his negligence and providing for indemnification, but it must be done *knowingly* and *willingly* as in insurance contracts made for that very purpose." *Id.* at 465, 276 N.E.2d at 148 (emphasis in original). In *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976), the duty to disclose was employed after the court took pains to point out that no basis existed for a finding of "unfair or oppressive conduct, fraud, overreaching, misrepresentation or sharp practices." *Id.* at 269. The court was not motivated solely by virtue of an unfair consequential damages limitation in a contract for the sale of gasoline, noting that such limitations are not *prima facie* unconscionable. *Id.* at 268. *See also* *Bank of Ind. Nat'l Assoc. v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979). *But see* *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 269 N.E.2d 799 (1971). For a critical discussion of *Johnson*, see *Jordan*, *supra* note 1, at 846-55.

⁷² *Ellinghaus*, *supra* note 7, at 765; *Spanogle*, *supra* note 10, at 933. *See also* *Leff*, *supra* note 10, at 504.

⁷³ In *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 269 (E.D. Mich. 1976), the court argued:

[B]efore a contracting party with the immense bargaining power of the Mobil Oil Corporation may limit its liability vis-a-vis an uncounseled layman . . . it has an affirmative duty to obtain the voluntary, knowing assent of the other party. This could easily have been done in this case by explaining to plaintiff in laymen's terms the meaning and possible consequences of the disputed clause.

Professor Llewellyn recognized these realities and suggested that unfair terms that were not expressly agreed upon would be unenforceable. *See* *Llewellyn*, *supra* note 63, at 370-71. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 211(3), Comment f (1979); *Calamari*, *supra* note 1, at 359-62; *Spanogle*, *supra* note 10, at 939. In Part II of this Article, I suggest that in limited situations, terms can be declared unconscionable even if they are disclosed.

⁷⁴ 227 N.W.2d 169 (Iowa 1975).

court held an insurance company liable to reimburse its insured for a burglary that had left no evidence on the exterior of the insured's premises, even though the policy explicitly required such evidence. The court stated that the reasonable expectation of the insured was that such a loss would be covered.⁷⁵

The most viable basis for decisions such as *C & J Fertilizer* is the failure of the party supplying a form contract to disclose the meaning of an offensive term in a situation in which the other party reasonably holds an expectation contrary to the term.⁷⁶ Absent discernible weaknesses such as lack of education or unfamiliarity with the language, the duty to disclose doctrine should not apply in adhesion situations if the evidence suggests that a reasonable consumer would have been aware of and would have understood the particular terms because of their conspicuousness,⁷⁷ commonness, or clarity in the contract. In other words, absent discernible weaknesses of the consumer, only the *reasonable* expectations of contracting parties should be protected.⁷⁸ For example, if a reasonable person would understand a contractual limitation of liability, no duty of disclosure should arise.⁷⁹ Even if there is no duty to disclose, however, the court in limited situations still can refuse to enforce

⁷⁵ *Id.* at 177. See also *Davenport Peters Co. v. Royal Globe Ins. Co.*, 490 F. Supp. 286, 291 (D. Mass. 1980) (refusal to apply doctrine of reasonable expectations where terms unambiguous and insurance policy would not foster coverage expectations); *Rodman v. State Farm Mut. Auto.*, 208 N.W.2d 903, 906 (Iowa 1973) (same). The doctrine is now followed in at least ten states. *Davenport Peters Co. v. Royal Globe Ins. Co.*, 490 F. Supp. at 291 n.5. See also RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979); *id.*, Comment f ("Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.")

⁷⁶ See also RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979): "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." The insured in *C & J Fertilizer* entered into the agreement before receiving the policy. 227 N.W.2d at 172. This is further reason for not holding the insured to the duty to read the policy.

While the duty of disclosure may not lead to much disclosure in standard form transactions—sales merchants in typical everyday transactions are not trained to explain the legal significance of the boilerplate, see *Jordan*, *supra* note 1, at 852—sellers will include terms that belie reasonable expectations at their peril. Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 HARV. L. REV. 529, 532 (1971). Sellers will know that the terms will be unenforceable without disclosure; this should encourage them to draft clearer and, perhaps, fairer terms.

⁷⁷ See, e.g., *Collins v. Uniroyal, Inc.*, 64 N.J. 260, 270-71, 315 A.2d 16, 22 (1974) (Clifford, J., dissenting) (limitation clause italicized and accompanied by chart).

⁷⁸ Poverty, without more, is not a discernible weakness that should entitle a party to disclosure. Schwartz, *supra* note 10, at 1076-83 (poverty alone does not prove incompetence to make rational economic decisions). Often, however, a low-income person can demonstrate a more specific infirmity that would give rise to a duty to disclose, such as lack of education resulting in inability to understand.

⁷⁹ See *Wille v. Southwestern Bell*, 219 Kan. 755, 549 P.2d 903 (1976) (complaint by business against telephone company dismissed); *First New Jersey Bank v. F.L.M. Business Machs., Inc.*, 130 N.J. Super. 151, 162-63, 325 A.2d 843, 850 (1974) (contract between informed businessmen not unconscionable).

the terms on the basis of pure unconscionability.⁸⁰

The policing, formation, and disclosure common law doctrines protect contracting parties from contracts or terms to which they have not assented because of breakdowns in the bargaining process. These doctrines are available to treat virtually all bargaining process problems. Situations that are not encompassed by the common law doctrines—for example, cases involving the purchase of luxury items where the suspect terms have been disclosed—do not involve bargaining misconduct or formation difficulties and, hence, suggest actual assent to the terms. Nonetheless, assent may be tainted by virtue of the special plight of a contracting party, or the term or terms may be so unfair that they should not be enforced regardless of assent. These latter problems are the domain of pure unconscionability and are discussed later in Part II.

B. *Reasons for Applying the Common Law Assent Doctrines Under Section 2-302*

1. *The Manipulation Problem*

The debate over whether legislation should be broad or narrow is not new or uncommon. The controversy emanates from the fundamental dichotomy between the need for certainty and the need for flexibility in the law. Critics of flexible standards such as unconscionability have argued that the absence of specific guidance in such standards increases the potential for unreasoned or arbitrary decisions based on personal value judgments.⁸¹ These critics suggest that rules, on the other hand, provide sufficient certainty to permit people to plan their activities in reliance on the law.⁸²

The criticism of standards directed at the absence of certainty is often rebutted by the assertion that rulemaking does not eliminate judicial discretion. Even the most clearly expressed rules do not deter judicial creativity,⁸³ because judges are unavoidably influenced by nonlegal factors that favor one of the parties.⁸⁴ Consequently, a rule may be

⁸⁰ See Part II *infra*.

⁸¹ The problem is discussed in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976). Standards refer to "substantive objectives of the legal order." To apply a standard, the judge must know the facts of the case and assess them with reference to the purposes of the standard. *Id.* Rules, on the other hand, are "legal precept[s] attaching a definite detailed legal consequence to a definite detailed state of fact[s]." 2 R. POUND, JURISPRUDENCE § 10, at 124 (1959).

⁸² Kennedy, *supra* note 81, at 1688-89.

⁸³ See Slawson, *supra* note 76, at 561-63.

⁸⁴ Balancing of the equities probably plays a greater role in determining the outcome of a case than is currently realized or admitted. Furthermore, an examination of legal rules may result in the discovery of hidden invitations to employ equity. Kennedy, *supra* note 81, at 1700. For example, the determination of materiality questions in mistake or breach cases enables courts to decide on the basis of fairness and the equities. Many rules of contract law were derived from principles pronounced by the equity courts. See, e.g., Holmes, *A Contextual*

"corrupted" in cases in which it would produce an undesirable result.⁸⁵ Because rules often are overinclusive or underinclusive,⁸⁶ courts manipulate them to reach the "right" result.

The unconscionability provision of section 2-302 was a victory for the proponents of broad legislative drafting over those who counseled the need for specificity in commercial law. A principal argument made in favor of unconscionability is that it enables courts to decide cases directly on fairness grounds without resorting to manipulation of existing legal rules.⁸⁷ Manipulation should be avoided, the argument goes, because it renders a rule more ambiguous and therefore less helpful in cases where traditional application of the rule is appropriate.⁸⁸ Moreover, direct invocation of a fairness standard establishes minimum levels of commercial decency and discourages the use of offensive clauses or

Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation, 39 U. PITT. L. REV. 381, 419-20 (1978).

Because there is an inherent limit to the clarity and guidance of language, judges may also avoid mechanical deduction from rules by interpretation (For example, does the rule prohibiting vehicles in the park include bicycles? See H.L.A. HART, *THE CONCEPT OF LAW* 123 (1961)). There is considerable truth to the legal realists' assertion that judges never "find" results based on pre-existing standards; instead, they are inevitably quasi-legislators. See Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 490-91 (1977). Courts avoid the effect of rules by emphasizing contradictory purposes and policies, by creating new rules, or by invoking counter-rules or exceptions. In other words, "the elasticity of the common law, with rule and counterrule constantly competing, makes it possible for courts to follow the dictates of 'social desirability.'" Kessler, *supra* note 1, at 638.

Even if rules were consistently applied by courts, it has been argued that the benefits of planning that theoretically emanate from the consistent application of rules may not be realized. For example, parties may be ignorant of the rules because of a lack of education, expertise, or money. Moreover, because legislative rules cannot respond to unforeseen developments, parties may not be offered sufficient guidance to plan transactions in ever-changing situations. Kennedy, *supra* note 81, at 1699-1700.

None of these arguments about the limitations of rules suggests that rules should not be employed when they are applicable without manipulation. In such situations, application of rules focuses the inquiry and clarifies the decision. See notes 99-115 and accompanying text *infra*.

⁸⁵ Kennedy, *supra* note 81, at 1701.

⁸⁶ *Id.* at 1689. For example, the principal purpose of the rule that requires additional consideration to support contract modifications is to bar modifications made under duress. When a modification is voluntarily made, albeit without additional consideration, the additional consideration rule is overinclusive. In such situations, a court may avoid the rule by creating a fictitious mutual rescission of the original contract. Similarly, because parties can avoid the consideration requirement by supplying sham consideration, the additional consideration rule is underinclusive—it may not avoid a modification made under duress. See generally Hillman, *supra* note 37.

⁸⁷ See, e.g., *Siegelman v. Cunard White Star*, 221 F.2d 189, 204-05 (2d Cir. 1955) (Frank, J., dissenting); *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 603-04 (2d Cir.) (Clark, J., concurring), *cert. denied*, 331 U.S. 849 (1947); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 192, 298 N.Y.S.2d 264, 267 (Sup. Ct. 1969); U.C.C. § 2-302, Comment 1; *Ellinghaus*, *supra* note 7, at 764; *Leff*, *supra* note 10, at 527; *Llewellyn*, *supra* note 52, at 702-03; *Murray*, *supra* note 6, at 4-5; *Slawson*, *supra* note 76, at 563; *Spanogle*, *supra* note 10, at 933-35.

⁸⁸ See, e.g., *Leff*, *supra* note 10, at 527; *Spanogle*, *supra* note 10, at 934.

contracts.⁸⁹

Obviously, manipulation of doctrine should be avoided. The manipulation vice, however, has been overemphasized in arguments in support of the present unconscionability approach. Manipulation occurs when the focus of the court's concern is the fairness of the terms of the agreement and not the bargaining process. When the bargaining process is the primary problem in the case—and it is the primary concern in many unconscionability cases—common law doctrines are available to deal with the problem without manipulation.⁹⁰

Technically, courts often manipulate the facts of a case to fit a particular doctrine rather than manipulate the doctrine itself. For example, courts have found general disclaimers of liability ambiguous, and have thereby permitted injured parties to recover for the other contracting parties' negligence despite the disclaimers.⁹¹ Other courts have held that limitations of liability on the back of claim checks for deposited property are unenforceable on the theory that the offerees never assented to such terms.⁹² If, in fact, the disclaimer of liability was plainly worded, or if a reasonable person would have been alerted to the limitation on the back of the claim check—and if the court's actual aim is to avoid enforcement of the disclaimer or limitation—the court's decision will create confusion among contracting parties in the future as to whether their clearly drafted agreements will be enforced.⁹³ Nevertheless, if the facts of the case do support the findings, there is no manipulation⁹⁴ and the doctrine should be applied.⁹⁵ In fact, virtually all of the cases involving bargaining ills can be resolved without manipulation by applying common law doctrines.⁹⁶

⁸⁹ See W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. § 1.1603, at 46 (1964); Llewellyn, *supra* note 52, at 703; Spanogle, *supra* note 10, at 934-35.

⁹⁰ See Part IA *supra*.

⁹¹ The most frequently cited examples of manipulation of doctrine involve contract interpretation. See, e.g., Standard Ins. Co. v. Ashland Oil & Refining Co., 186 F.2d 44, 47 (10th Cir. 1950); Posttape Assoc. v. Eastman Kodak Co., 387 F. Supp. 184 (E.D. Pa. 1974), *rev'd on other grounds*, 537 F.2d 751 (3d Cir. 1976); Willard Van Dyke Prods., Inc. v. Eastman Kodak Co., 12 N.Y.2d 301, 189 N.E.2d 693 (1963); R. KEETON, BASIC TEXT ON INSURANCE LAW 359-60 (1971); Llewellyn's discussion of the manipulation evil in STENOGRAPHIC REPORT OF THE HEARING ON ARTICLE 2 OF THE U.C.C., 2 REPORT OF N.Y. LAW REVISION COMM. FOR 1954, No. 65, 177-78. See also McPeak v. Baker, 236 Minn. 420, 53 N.W.2d 130 (1952) (disclaimer of warranty of fitness held ambiguous).

⁹² See, e.g., Kergald v. Armstrong Transfer Express Co., 300 Mass. 254, 255-56, 113 N.E.2d 53, 54 (1953).

⁹³ See, e.g., Collins v. Uniroyal, Inc., 64 N.J. 260, 262, 315 A.2d 16, 18 (1974); E. FARNSWORTH & W. YOUNG, *supra* note 39, at 469.

⁹⁴ See, e.g., Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 49, 593 P.2d 1308, 1313 (1979) (disclaimer of liability on the back of a receipt for film to be developed; evidence supported a finding that reasonable person would not have been aware of disclaimer).

⁹⁵ See notes 99-115 *infra*.

⁹⁶ See notes 26-80 and accompanying text *supra*.

Even some of the decisions cited in Comment 1 to § 2-302 to illustrate the "underlying

In some cases, the broadening of a common law doctrine may not represent manipulation in the pejorative sense. Instead, the court's decision may simply illustrate the normal common law growth process under which rules are adapted to fit new factual situations. The proper test for determining whether a rule is manipulated or properly employed is whether its application furthers the goals of the particular area of the law and contributes to the clarity of that law.⁹⁷ This point is particularly relevant to a second argument made by supporters of the present approach to section 2-302. Unconscionability is needed, they argue, because traditional contract doctrines inevitably must be manipulated to deal with changing developments in the modern commercial world of standardized contracts of adhesion.⁹⁸ This argument ignores, however, the proper role of the common law in adapting to change. For example, one of the principal problems that emanates from the world of mass-produced contracts is the need for disclosure. As previously demonstrated, the problem of disclosure can be addressed adequately through the development—not the manipulation—of existing common law doctrines.

The point here is not that unconscionability is superfluous, but that its usage should reflect the underlying purposes of the doctrine. Manipulation of facts or doctrine to reach just results based on a hidden motive of the court—the nullification of unfair contract terms—should be avoided. If manipulation is the evil to which the doctrine of unconscionability is directed, employment of common law doctrines should not be criticized when the facts support their application without ma-

basis" of the section do not appear to have manipulated common law doctrines. Many of the cases involved interpretation of warranty or remedy limitations, and in some, the court seemed to interpret the clause reasonably to permit a claim for breach. *See, e.g.,* Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937) (reasonable to interpret clause limiting the time for complaints for defects to apply only to patent defects); Andrews Bros., Ltd. v. Singer & Co., [1934] 1 K.B. 17 (C.A. 1933) (reasonable to construe disclaimer of express and implied warranties as not applying when the contract called for delivery of new car and a used one was delivered). At the least, the clauses in question were ambiguous as to the parties' intent, suggesting that a holding adverse to the seller would be appropriate on interpretation grounds. *See also* Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P. 273 (1917); Nu Dimensions Figure Salons v. Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (1973); F.C. Austin Co. v. J.H. Tillman Co., 104 Or. 541, 209 P. 131 (1922). *But see* Leff, *supra* note 10, at 526-27; Spanogle, *supra* note 10, at 934-35.

⁹⁷ For example, in *Ortelere v. Teachers' Retirement Bd.*, 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969), the court enlarged the rule of mental incapacity to include a woman who had elected maximum benefits from a public retirement system, leaving her husband with no benefits if she died. The prior rule of mental incapacity required a showing of inability to comprehend; the rule was broadened to include inability to act rationally. *Id.* at 202-03, 303 N.Y.S.2d at 367, 250 N.E.2d at 464. The court was undoubtedly motivated by the forfeiture suffered by the claimant husband upon his wife's death, but the new expanded rule of mental incapacity nevertheless seems defensible and applicable to subsequent cases. In short, hard cases do not always make bad law. For further development of this point in relation to the duty to disclose doctrine, see notes 52-80 and accompanying text *supra*.

⁹⁸ Kessler, *supra* note 1, at 637-39.

nipulation. Employment of common law doctrines is, in fact, beneficial, because it contributes to the certainty of the unconscionability inquiry.

2. *The Benefits of Applying the Common Law Assent Doctrines*

Simply stated, the application of unconscionability to cases involving bargaining problems without reference to the common law doctrines causes confusion by increasing the level of abstraction in judicial reasoning.⁹⁹ For example, instead of determining whether the specific elements of fraud or duress exist, a court using the current unconscionability approach may merely list the many factors influencing its decision—*e.g.*, age, status, intelligence, business sophistication, bargaining power, explanation (or the lack thereof) of terms, firmness of the seller's position (the take-it-or-leave-it approach), and availability of alternative sources of supply¹⁰⁰—and then simply conclude that the contract is or is not unconscionable. The court need not make any effort to show which factors are essential, which are sufficient, and which are superfluous. Consequently, factors previously subsumed under appropriate common law categories simply may be lumped together without consideration of their weight and effect.¹⁰¹

The recent case of *Bank of Indiana National Association v. Holyfield*¹⁰² illustrates the confusion generated by judicial resort to an overly abstract concept of unconscionability. Holyfield, an unsophisticated dairy farmer with an eighth grade education, and his wife leased some dairy cows because they could not afford to purchase them. When many of the cows were destroyed in a storm and Holyfield and his wife were unable to make the payments under the lease, the bank (which had merged with the lessor) brought an action against them. The court, holding for the Holyfields on the ground that the preprinted lease was unconscionable, noted that: the Holyfields had limited education; they did not have the opportunity to read the lengthy, complex lease and relied on the lessor's broker; the lease was never explained to them; they were in an inferior bargaining position in light of their unstable financial position (without the cows, the farm was unprofitable); the

⁹⁹ Professor Leff, for example, argued that "the highly abstract word 'unconscionable' " precludes or at least impinges on "the possibility of more concrete and particularized thinking about particular problems of social policy." Leff, *supra* note 10, at 515.

¹⁰⁰ These factors were enumerated in *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976).

¹⁰¹ The present unconscionability framework encourages courts to make decisions without reference to traditional common law doctrines even when courts are confronted with fraud, duress, undue influence, failure to disclose, and the like. Though some courts may highlight the significant subcomponents of procedural unconscionability that are factors in their decisions or even rank the factors, they are not required to do so. In fact, the importance of such ranking is minimized by the requirement that courts evaluate the overall circumstances in deciding unconscionability cases. *See, e.g.*, *Spanogle, supra* note 10, at 937.

¹⁰² 476 F. Supp. 104 (S.D. Miss. 1979).

lease was presented on a take-it-or-leave-it basis; and the lease was decidedly favorable to the lessor, in that the lessor was obligated only to advance money to purchase the cows and the entire risk of loss was on the Holyfields.¹⁰³

The *Holyfield* court made no effort to determine whether each (or what combination) of the isolated elements constituted grounds for avoidance of the Holyfields' obligation. It is unclear whether the court would have reached the same decision if the Holyfields had been well-educated, if they had read the lease, if the lease had been explained to them, if they had been in good financial condition, if the lessor had been willing to negotiate terms, or if the terms of the lease had been more favorable to them. Had the court applied common law assent doctrines, it would have helped to direct the inquiry and pinpoint the crucial issues. In investigating duress, for example, the court would have determined whether the Holyfields needed the cows to stay in operation, whether they had other reasonable alternatives to obtain them, and whether the lessor unfairly adopted a take-it-or-leave-it position because of the plight of the Holyfields.¹⁰⁴ The court might also have investigated whether, in light of the realities of standard form transactions, the risk of loss provision contradicted the Holyfields' reasonable expectations, whether the term destroyed the essence of the Holyfields' deal, and therefore whether the seller violated the common law duty to disclose.¹⁰⁵ Thus, the duress approach suggests the need for a determination that the Holyfields had no other viable alternatives, while the duty to disclose approach isolates the issue of the reasonableness of relying on the broker and failing to read the terms of the agreement. Of course, the court could have applied more than one assent doctrine. The clarity of the decision would not have been sacrificed. In rendering its decision, the court still would have considered systematically the application of each doctrine and would have stated more clearly why the contract was unenforceable.¹⁰⁶

103 *Id.* at 111. In the event of any loss, the lease required the Holyfields to continue to pay the rentals and replace the cows at their own expense. The casualty insurance on the cows obtained by the lessor was, according to the court, "completely inadequate." *Id.* at 107. Before the lawsuit, the lessor had already received over \$82,000 on an investment of \$70,000. *Id.* at 106-07.

104 *See* notes 35-43 and accompanying text *supra*.

105 *See* notes 52-80 and accompanying text *supra*. The duty to disclose could also have been based on the superior position of the lessor in light of the Holyfields' lack of education. *See* notes 65-71 *supra*.

Other common law doctrines that might apply include fraud or promissory estoppel based on the lessor's failure to obtain sufficient insurance. The court also might have relied on rules of contract interpretation, in view of its conclusion that the printed lease was "so complex that a party with no training in the law could not hope to decipher all the potential disadvantageous terms therein." 476 F. Supp. at 108.

106 *See also* *Murphy v. McNamara*, 36 Conn. Supp. 183, 416 A.2d 170 (Super. Ct. 1979), where the plaintiff, a welfare recipient with four children, entered into a leasing agreement

The categories of procedural and substantive unconscionability do not elucidate the appropriate elements of unconscionability to be considered in any given case. Instead, the categories add to the confusion because they offer guidance neither as to whether both procedural and substantive unconscionability are necessary to avoid a contract or contract term, nor as to the quantities of each that are required. The common law assent doctrines, on the other hand, help to isolate the proper circumstances for investigating both bargaining unfairness and unfair terms. The determination of whether both bargaining unfairness and the unfairness of contract terms are essential, or whether either is sufficient, is made directly in applying the assent doctrines. For example, one element of the duty to disclose is that the undisclosed term destroys the "essence" of the deal.¹⁰⁷ Thus, if the focus of the case is the failure to disclose, both bargaining unfairness (what is the relationship of the parties, and was there disclosure?) and the fairness of the terms of the agree-

for a color television because she did not have to establish credit. She was not told that the total payments would be \$1,268 and that the retail price of the television was \$499. In its discussion of unconscionability and unfair trade practices under Connecticut legislation, the court (1) relied on a decision applying unconscionability to poor persons, (2) indicated that excessive prices charged to persons with unequal bargaining power are governed by § 2-302, (3) suggested that failure to advise the plaintiff of the total price "compounded" the unfairness, (4) stated that the defendant was "clearly obligated" to explain the total amount, and (5) defined unequal bargaining power as the power to dictate terms not "justifiable on the grounds of commercial necessity." *Id.* at 194, 416 A.2d at 177. The court suggested that the plaintiff lacked bargaining power because she needed credit.

Although the court held that under a state truth-in-lending statute the defendant was obligated to disclose the total amount that plaintiff was required to pay, no effort was made in the unconscionability and unfair trade practices discussion to determine whether each (or what combination) of the isolated elements constituted grounds for avoidance of the deal. After *Murphy v. McNamara*, it remains unclear whether the court would have reached the same decision if the seller had disclosed the price of the television, if the plaintiff could have obtained credit elsewhere, if the plaintiff had not been on welfare, or if the price of the television was not excessive. Application of common law assent doctrines, on the other hand, would have helped to isolate crucial issues. For example, in investigating duress the court would have determined whether the defendant unfairly procured the price term as a result of the plaintiff's lack of viable alternatives. The court also would have determined whether the nature of the item—a luxury—sufficiently insulated the seller from a claim of duress. To determine whether a common law duty to disclose existed, the court would have investigated whether the defendant possessed superior knowledge based on a specific weakness of the plaintiff that made it impossible for her to comprehend the total price in relation to the retail price, or whether, in light of the realities of standard form transactions, the price term contradicted the plaintiff's reasonable expectations. In evaluating the duty to disclose, the court also would have ascertained whether the price destroyed the essence of the plaintiff's deal.

In *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976), the court enumerated a host of factors that rendered the contract unconscionable. The case is of limited value, however, in offering guidance in the next case. For example, the court noted that a printed form drawn "by the party in the strongest economic position" on a take-it-or-leave-it basis is a factor in determining unconscionability. *Id.* at 758, 549 P.2d at 906. Merely listing such a factor, however, is of little help unless one knows whether that factor is sufficient by itself, is insufficient if the item was available elsewhere, or is insufficient if the weaker party was educated and sophisticated.

¹⁰⁷ See note 63 and accompanying text *supra*.

ment (does the suspect term destroy the essence of the deal?) must be evaluated. In contrast to the duty to disclose, when a contract term is stricken for vagueness under the doctrine of contract interpretation,¹⁰⁸ the fairness of the term need not be considered.¹⁰⁹

The procedural/substantive framework actually may perpetuate the manipulation that the unconscionability doctrine seeks to avoid, at least as the framework is currently applied. Because of ambiguities about the proper "mix" of procedural and substantive unconscionability and because of the widely accepted notion that the "best" case for a finding of unconscionability involves both aspects of unconscionability,¹¹⁰ courts may continue to manipulate the facts of cases to find procedural as well as substantive unconscionability. For example, suppose a court is persuaded by the unfairness of an exchange involving a welfare mother that the agreement should not be enforced. In order to satisfy the procedural unconscionability requirements and strike the unfair provision, the court may find bargaining misconduct based solely on the mother's status, even in the absence of proof that her poverty entitles her to special protection.¹¹¹ Such manipulation of facts could be avoided by dispensing with the procedural/substantive unconscionability framework and by acknowledging that unconscionability can be found without bargaining misconduct.¹¹² Absent the confusion wrought by the procedural/substantive unconscionability framework, courts may better focus on the need for clear fact-findings concerning the nature of unreasonable terms when no bargaining infirmities exist.¹¹³

¹⁰⁸ See notes 44-51 and accompanying text *supra*.

¹⁰⁹ If no assent doctrine applies to the facts, Part II suggests that the court may find a contract or term unconscionable solely on the basis of its unfairness. The evaluation of the contract under such circumstances may differ from the court's evaluation of the fairness of the contract in applying assent doctrines. For example, a price provision may be inordinately high, and, assuming the other pertinent elements of the duty to disclose are present, disclosure may be required. Nevertheless, the price provision may not be sufficiently disproportionate to the consideration received, or may be fair in light of the credit risks involved, so that a court would not find it unconscionable on its face if disclosed. Thus, considering common law assent doctrines also helps to clarify the fairness inquiry in unconscionability cases. See notes 165-68 and accompanying text *infra*.

¹¹⁰ See note 13 and accompanying text *supra*.

¹¹¹ Professor Alan Schwartz has observed that "courts often infer from the terms of the agreement . . . that a consumer is incompetent. This approach, however, is circular: the party is ruled incompetent because the deal is bad, while the deal is ruled bad because the party is incompetent." Schwartz, *supra* note 10, at 1077-78 (citation omitted). Professor Schwartz concludes that the evidence is inconclusive on whether the poor are less competent to maximize utilities. *Id.* at 1079.

¹¹² See Part II *infra*.

¹¹³ In fact, the most serious criticism of unconscionability is that courts have avoided the difficult fact-finding necessary to its determination. For example, Professor Jordan suggests that courts have failed to consider sufficiently the context of the transaction in evaluating the fairness of terms. Jordan, *supra* note 1, at 814, 855. See also *Bank of Ind. Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 182 (Iowa 1975) (LeGrand, J., dissenting); E. FARNSWORTH & W. YOUNG,

In sum, a greater role for common law doctrines in unconscionability cases may avoid the manipulation of doctrine and contribute to clarity of the law. Parties will be alerted more effectively to those practices that are considered unfair, to their affirmative duties under the law and to specific types of provisions that are considered unacceptable.¹¹⁴ Applying common law doctrines undoubtedly will often require courts to engage in difficult line drawing and interpretation.¹¹⁵ Nevertheless, their application should increase the clarity of decisions because unconscionability in its present form, which encompasses the common law doctrines, is more obscure and unfocused.

C. *Application of Common Law Doctrines to Section 2-302*

The final issue to be resolved here is whether courts should disengage common law assent doctrines from the unconscionability web entirely, or whether they should treat the common law doctrines as one distinct portion of the unconscionability doctrine. Although the primary point to be made is that courts *should consider* the common law doctrines, whether or not they are included within the realm of unconscionability may have some consequence.

If the common law doctrines are excluded from the unconscionability inquiry, the focus of unconscionability—the policing of contract terms in the absence of bargaining misconduct—will be much more distinct. Characterizing the doctrines as one form of unconscionability, however, may be sufficient to preserve clarity. In addition, there are good reasons for including bargaining misconduct within the unconscionability inquiry. First, although the text of section 2-302 nowhere suggests that bargaining unfairness is within the realm of the section, an official comment accompanying section 2-302 appears to sanction such an investigation.¹¹⁶ Moreover, in light of the common reference to bargaining problems under the procedural/substantive framework, it is

supra note 39, at 515-18; J. JACKSON & L. BOLLINGER, *supra* note 1, at 980, 987. Section 2-302(2) directs that the court determine whether a contract (or term) is unconscionable after a hearing to examine the commercial setting of the transaction which, if followed, would help to ensure specific fact-findings on all relevant issues. See Spanogle, *supra* note 10, at 937.

¹¹⁴ For example, if a case like *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), discussed at notes 45-46 and accompanying text *supra*, were decided simply on the basis of the vagueness of the cross-collateral clause, the seller might be encouraged to draft a new, clearer clause. The seller should have that right if vagueness were the basis of the decision. On the other hand, if the decision were made on the basis of the failure to disclose or the basic unfairness of any cross-collateral clause, the seller would be alerted to his affirmative obligations or the types of prohibited clauses.

¹¹⁵ See notes 19, 43 & 84 *supra*.

¹¹⁶ "The principle is one of the prevention of oppression and unfair surprise . . ." U.C.C. § 2-302, Comment 1. *But see* Leff, *supra* note 10, at 501 (suggesting that it is simply unclear whether procedural or substantive unconscionability (or both) is required under § 2-302). Professor Leff aptly pointed out that the use of the term "oppression" in the official comment could apply to the bargaining process or to the effects of the contract on a party. *Id.*

doubtful that courts could be persuaded to dispense with an analysis of the bargaining process in unconscionability cases. Furthermore, to the extent that a flexible approach to remedies adopted in section 2-302 was unavailable at common law, there is an advantage to continuing to treat bargaining infirmity cases under section 2-302. Under the Code, the court can excise the offending term and enforce the remainder of the contract or rewrite the clause.¹¹⁷ Courts applying the common law assent doctrines, on the other hand, often limit the remedies to rescission or restitution.¹¹⁸

Another reason for including bargaining problems under the domain of section 2-302 is that existing common law doctrines occasionally may be unsuited for the fray in situations in which the court is still concerned with the overall effect of the bargaining conduct of the party accused of unconscionability. To avoid manipulation, the court should have the power to strike the offending contract or clause based on the cumulative effect of the conduct. That power should continue to be available under section 2-302. The increase in judicial clarity of decisions resulting from employment of common law assent doctrines will not be threatened because courts rarely should need to exercise such power. The assent doctrines alone, I have argued, will ordinarily be sufficiently flexible to adjust to new circumstances and, therefore, to new or unanticipated unfair business practices without manipulation.¹¹⁹

A realization that the bargaining process branch of unconscionability comprises a host of previously existing and developing common law doctrines should contribute to a clearer application of unconscionability to bargaining ills. It may even help to resolve issues that concern the relationship of process and substance in unconscionability cases. If the bargaining unfairness does not rise to the level of one of the common law doctrines involving formation, policing, or disclosure, the court may directly confront the basic fairness of enforcing the terms of the agreement under pure unconscionability.¹²⁰ The next section discusses how courts should approach that task.

at 499. Similarly, unfair surprise could refer to fraud, misrepresentation, or simply terms that contradict a party's reasonable expectations in a form contract situation.

¹¹⁷ See U.C.C. § 2-302(1).

¹¹⁸ See, e.g., *Wolfe v. Thompson*, 285 Ala. 745, 749, 235 So. 2d 878, 882-83 (1970) (undue influence); *Jennings v. Lee*, 105 Ariz. 167, 171, 461 P.2d 161, 165 (1969) (fraud); *Sjulin v. Clifton Furniture Co.*, 241 Iowa 761, 763, 41 N.W.2d 721, 725 (1950) (incapacity); *Rubenstein v. Rubenstein*, 20 N.J. 359, 365, 120 A.2d 11, 13 (1956) (duress), *remanded*, 40 N.J. Super. 371, 123 A.2d 67 (1956); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 254-55 (1973).

¹¹⁹ Cf. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042-44 (1976) (discussing process of defining contours of § 2-302).

¹²⁰ Professor Leff maintained that the cases discussed in the Comment to § 2-302 suggest that any form contract is subject to an unconscionability finding regardless of the fairness of the bargaining process. Leff, *supra* note 10, at 503-04.

II

PURE UNCONSCIONABILITY

Whether unconscionability should be applied in cases where no policing, formation, or disclosure problem exists is perhaps the most difficult question that has arisen concerning section 2-302. Suppose, for example, that the offending clause of an agreement¹²¹ has been explained to a consumer-purchaser¹²² and that the item purchased is a luxury item or is available elsewhere without the offending clause (and that information is reasonably available to the average consumer). Should courts have the power under section 2-302 to strike such a clause?¹²³ If so, how should they make the decision? In answering these questions, this section addresses the general issue of whether government should intervene in these cases, and if so, whether that intervention should be legislative or judicial.¹²⁴ Finally, I consider *when* such intervention should occur.

A. *Should the Government Intervene At All?*

Although government regulation of free enterprise has expanded, government intervention in the contracting process is, perhaps, easier to justify when the bargaining process suffers from some distinct and identifiable form of unfairness on the part of the stronger party. Even when the bargaining process is devoid of such unfairness, however, the plight of some consumers should not be ignored. For example, although specific terms of an agreement may be disclosed, unsophisticated and uneducated consumers may be unable to comprehend the subject of

¹²¹ Warranty and remedy limitations and price provisions are the most often cited examples of unfair clauses. See J. WHITE & R. SUMMERS, *supra* note 13, at 155.

¹²² Although Part II focuses on consumer transactions, some of the discussion also applies to certain merchant-to-merchant transactions. See notes 230-31 and accompanying text *infra*.

¹²³ "The question is whether the court should write off the individual consumer who should have reasonably understood that a risk was allocated to him or taken better advantage of comparative shopping opportunities." Speidel, *supra* note 10, at 364. Judicial intervention in the situation posited in the text was apparently not the intent of Llewellyn or the direction of the earliest drafts of § 2-302. Spanogle, *supra* note 10, at 942. Nevertheless, Professor Spanogle observes that "the only principle" that can be derived from an examination of the legislative history "is that the original narrow focus of the doctrine was deliberately expanded in several respects." *Id.* For example, by 1949 a comment to § 2-302 suggested that courts could even strike terms that were assented to. 1949 Draft § 2-302, Comment 4, *quoted in* Leff, *supra* note 10, at 495-96. Leff suggested that this approach, although "somewhat radical, had all the virtues of clarity." *Id.* My thesis—that in limited situations courts should have the power to strike offensive clauses in the absence of bargaining misconduct—is in accord with those scholars who have pointed out that direct reasoning is favorable when avoiding harsh provisions. See notes 81-99 and accompanying text *supra*; E. FARNSWORTH & W. YOUNG, *supra* note 39, at 468. For further discussion of the legislative history of § 2-302, see Leff, *supra* note 10; Spanogle, *supra* note 10, at 942.

¹²⁴ Professor Leff isolated these issues in Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 350-52 (1970).

disclosure.¹²⁵ The harsh reality may be that no matter what a merchant does to explain the legal effect of a boilerplate provision, there is never real assent to the term. Consequently, disclosure may not cause buyers to avoid offensive contract terms or prevent sellers from drafting them.¹²⁶ In addition, some consumers are unable to make rational decisions concerning their purchases because they cannot obtain the necessary market information at a reasonable cost.¹²⁷ Today's consumption oriented society and sophisticated marketing techniques also make it unrealistic to assume real assent to contract terms simply because a consumer purchases a luxury item instead of a necessity.¹²⁸ Acceptance of these realities of modern consumer transactions has led the government to promulgate protective "consumer legislation" that goes beyond the requirement of disclosure to outlaw certain types of contracts and contract terms.¹²⁹ In short, government intervention is no longer the subject of realistic debate.

Government intervention should also be permitted when, absent any specific buyer deficiencies, terms of agreements "shock the conscience."¹³⁰ All legal systems include some method for introducing ethics and fairness into law.¹³¹ In the commercial sphere, the Civil Codes of Europe contain "general clauses" providing, for example, that "all immoral transactions are void," or that obligations be performed in good faith.¹³² The civil law doctrine of *laesio enormis*, often compared with our notion of unconscionability, is based on a policy of avoiding oppressive bargains.¹³³ In England, the growth of equity occurred precisely because of the failure of English law courts to employ fairness

¹²⁵ *Id.* at 351; Speidel, *supra* note 10, at 363 n.14 (sources cited), 364. *See also* Schwartz, *supra* note 10, at 1076-82.

¹²⁶ Speidel, *supra* note 10, at 364.

¹²⁷ *See, e.g.*, Leff, *supra* note 124, at 351. *See also* U.S. FEDERAL TRADE COMM'N ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS XIV [hereinafter cited as ECONOMIC REPORT]. *But cf.* Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 682 (1979) ("[W]hen markets are competitive, individuals are protected from the adverse consequences of making decisions in the face of imperfect information.").

¹²⁸ "That one of the incidents of poverty is a tendency to fall victim . . . to purchase commitments entered into over-optimistically is . . . obvious." Ellinghaus, *supra* note 7, at 768. *See also* note 67 *supra*. *But see* Murray, *supra* note 6, at 29-31 (judicial intervention inappropriate where subject matter of contract not a necessity). Although a necessity is something required for the physical or economic well-being of the individual and a luxury is not, the lines separating the two cannot always be easily drawn. *Id.* at 31-32.

¹²⁹ *E.g.*, statutes cited in Speidel, *supra* note 10, at 365-66 nn.19-24.

¹³⁰ This is a definition of unconscionability frequently employed by the equity courts. *See, e.g.*, *Marchant v. National Reserve Co. of America*, 103 Utah 530, 551, 137 P.2d 331, 341 (1943).

¹³¹ *See* Newman, *The Hidden Equity*, 19 HASTINGS L.J. 147 (1967).

¹³² R. SCHLESINGER, *COMPARATIVE LAW* 233 (3d ed. 1970).

¹³³ Leff, *supra* note 10, at 539-40.

principles.¹³⁴ Thus, government intervention in the contracting process solely on the basis of unfair terms has a well established place in legal systems. Government intervention should be limited, however, so that the legitimate goals of contract law—maximizing the welfare of the parties and society and ensuring individual freedom of contract¹³⁵—may be achieved.

B. *What Form Should Government Intervention Take?*

Broad legislative standards that delegate to courts the responsibility of “legislating” are often criticized on the theory that courts are ill-equipped to evaluate social policy issues.¹³⁶ Judges, it is said, do not have sufficient resources or time to evaluate the effects of their decisions on society,¹³⁷ while vast resources are available to legislators to investigate such matters.¹³⁸ At best, courts can compare the conduct of similar commercial parties to determine whether particular behavior fits a community standard; but this approach to fairness questions ensures adherence to the “predominant morals of the marketplace”¹³⁹ and precludes serious consideration of more desirable alternatives.¹⁴⁰

Even if the judiciary is equipped to explore issues of social policy and the effects of alternative approaches on society, the argument goes, the common law process may be an inferior method of achieving the social policy goals that are ultimately identified. For example, Professor Leff contended that after cases such as *Williams v. Walker-Thomas Furniture Co.*,¹⁴¹ sellers affected by unconscionability findings simply will alter their forms slightly to avoid repetition of the findings and that these alterations will not cure the fundamental ills of the sellers’ practices. Nor will the decisions curb similar abuses that are not addressed specifically by the cases.¹⁴² Leff maintained that common law development is costly, time-consuming, and possibly ineffective: “One cannot think of a more expensive and frustrating course than to seek to regulate goods or ‘contract’ quality through repeated lawsuits against inventive

¹³⁴ See note 186 and accompanying text *infra*.

¹³⁵ See, e.g., Epstein, *supra* note 2, at 293; Slawson, *supra* note 76, at 532. For an interesting discussion of how imperfect markets can lead to unfair contract terms, see Kornhauser, *supra* note 10.

¹³⁶ See Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 625 (1943); Leff, *supra* note 124, at 356-57; Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367, 368-70, 390-92 (1974). See also notes 81-82 *supra*.

¹³⁷ Leff, *supra* note 124, at 356.

¹³⁸ There have been numerous legislative responses to the question of fairness in contracting. See, e.g., UNIFORM CONSUMER CREDIT CODE § 6.104, 6.110-.111; Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976 & Supp. IV 1980); 1970 N.Y. LAWS chs. 294-300.

¹³⁹ This is Professor Danzig’s phrase. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 629 (1975).

¹⁴⁰ *Id.* at 629-30.

¹⁴¹ 350 F.2d 445 (D.C. Cir. 1965). See notes 45-47 and accompanying text *supra*.

¹⁴² Leff, *supra* note 124, at 354-56.

'wrongdoers.'"¹⁴³

These arguments in favor of legislative control over social policy issues have been challenged. For example, Professor Posner has suggested that judge-created rules are more "efficiency-promoting" than legislative rules.¹⁴⁴ Appellate judges, he asserts, view the parties as representing activities and make their decisions based on which activity is more valuable economically.¹⁴⁵ Legislators, on the other hand, are subject to interest group pressure and depend on the electoral process; therefore, they "sell" legislation to those parties that can enhance their prospects of reelection.¹⁴⁶ One may question Posner's premise that judges adhere to a model of economic efficiency and that efficiency is the appropriate basis upon which to make policy.¹⁴⁷ Nevertheless, his theory does point out that, at least to the extent that judges are insulated from lobbying groups and politics, judicial decisions can be more objective than decisions made by their legislative counterparts.

The argument that the common law process is an inferior method of achieving favorable reform may also be overdrawn. The general threat of an unconscionability finding may have an *in terrorem* effect that alone deters sellers from including suspect terms in commercial agreements.¹⁴⁸ In addition, legislators cannot successfully draft legislation to encompass unforeseen circumstances.¹⁴⁹ New approaches are needed to deal with unforeseen problems constantly disclosed through litigation; many of these problems occur with sufficient frequency so that it would be unfair and inefficient to await legislative enactment.¹⁵⁰ For this reason, legislative regulation of contract terms generally has been confined to distinct segments of business such as the insurance industry, where

¹⁴³ *Id.* at 356. Professor Leff advocated a more direct approach—permit the legislature to declare illegal the kinds of clauses found offensive in *Williams v. Walker-Thomas Furniture Co.* and create an administrative agency to enforce the law. *Id.* at 357. See also Kornhauser, *supra* note 10, at 1180.

¹⁴⁴ R. POSNER, *ECONOMIC ANALYSIS OF LAW* 404-05 (2d ed. 1977).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 405. See also J. JACKSON & L. BOLLINGER, *supra* note 1, at 1000-01.

¹⁴⁷ For a critique of Posner's position that common law adjudication is superior to legislative decisionmaking, see Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 470-73 (1974).

¹⁴⁸ See, e.g., *Murphy v. McNamara*, 36 Conn. Supp. 183, 194, 416 A.2d 170, 177 (Super. Ct. 1979). See also Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 202 n.10 (1963).

¹⁴⁹ According to Professor Ellinghaus, the very purpose of the unconscionability provision is to deal with unforeseen problems. Ellinghaus, *supra* note 7, at 772-73. Professor Leff argued that unscrupulous merchants can always adjust their practices to circumvent judicial decisions. Leff, *supra* note 121, at 354-56. It would seem equally true that they could alter their behavior to avoid legislative proscriptions.

¹⁵⁰ See J. JACKSON & L. BOLLINGER, *supra* note 1, at 971. According to one commentator, courts play a minor role in the market economy and therefore should be permitted to achieve particularized justice. Speidel, *supra* note 10, at 360 n.6 (citing L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 184-215 (1965)). But see Epstein, *supra* note 2, at 304.

issues are already well-defined and narrowed.¹⁵¹

The availability of judicial intervention ensures that fairness in particular controversies is achieved. As suggested earlier, some consumers are entitled to protection from egregious contract terms because, despite the clarity of disclosure of the offending terms, they are incapable of comprehending the significance of the agreement.¹⁵² Courts can evaluate the facts of a particular case to determine whether the consumer was capable of understanding the subject of disclosure. Legislatures, on the other hand, can only establish broad classifications of those consumers who should not be presumed to have assented.¹⁵³

All of the arguments about the proper forum for effectuating social change probably have some merit. Because of the inconclusiveness of the debate, and because of the pervasiveness of judicial activism,¹⁵⁴ judicial administration of fairness principles in commercial cases should not be precluded.¹⁵⁵ As suggested earlier, the unconscionability doctrine was formulated to avoid manipulation of doctrine to achieve results that were actually based on the unfairness of the terms of the agreement.¹⁵⁶ To avoid that manipulation, courts must have the unconscionability tool to evaluate unfair terms directly.

C. *When Should Courts Intervene?*

Three primary factors may be isolated in evaluating when courts should intervene in situations in which there are no bargaining infirmities: the plight of the party claiming unconscionability, the expectations of that party, and the commercial setting of the contract. The first factor is a process factor and raises the issue of assent. The two other factors already have been isolated by legal scholars in evaluating

¹⁵¹ E. FARNSWORTH & W. YOUNG, *supra* note 39, at 470. "Legislative compulsion works best where a trade has grown into a quasi-governmental function, as, e.g., insurance or traffic; it is almost impossible in all other branches." O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 145 (1937), *quoted in* E. FARNSWORTH & W. YOUNG, *supra*, at 472-73.

¹⁵² *See* notes 125-29 and accompanying text *supra*.

¹⁵³ Some legislation completely outlaws particular contract terms, perhaps upon the generalization that consumers never actually assent to the terms. *See* note-129 *supra*.

¹⁵⁴ *See* note 84; text accompanying notes 83-86 *supra*.

¹⁵⁵ "It seems to be forgotten that approximately half of our private law—the part that prevailed when any conflict arose—was ascribed by the Chancellors who created it to standards no more precise than 'equity and good conscience.' Furthermore, we are entirely accustomed to abstractions like 'due process' . . ." Dawson, *supra* note 119, at 1043; *see also id.* at 1042-44.

One evaluation of the efficacy of rules and standards simply acknowledges that on balance rules are probably more certain and standards more flexible. Accordingly, drafters must determine in each case whether the social desirability of change outweighs the need for certainty. Kessler, *supra* note 1, at 638. Professor Kessler concluded that "very often legal certainty has to be sacrificed to progress." *Id.*

¹⁵⁶ *See* notes 87-90 and accompanying text *supra*.

substantive unconscionability.¹⁵⁷ Application of the three factors will not guarantee legal certainty as to when a finding of pure unconscionability is proper; in fact, it will raise issues similar to those raised by the procedural/substantive framework concerning which factors are essential, and which sufficient, for a finding of unconscionability. Nevertheless, because bargaining misconduct problems need not be considered in evaluating pure unconscionability, the number of relevant factors is significantly narrowed. Ultimately, however, learned decisions in the field of pure unconscionability should be patterned after the Chancellors' role in equity. Within the broad outline of the three above-mentioned factors, the decision whether to strike a term or refuse to enforce a contract rests with judges who, freed from the bargaining misconduct imbroglio, bound by tradition, and limited by the case record, will exercise discretion to avoid results that are abhorrent to modern society.¹⁵⁸ The following is a more detailed discussion of the role that these factors play in the area of pure unconscionability.

1. *The Parties*

The first task of the courts in evaluating when to intervene in the contracting process is to determine who is entitled to special protection from certain contracts or terms; some parties are incapable of understanding the agreement despite the clarity or disclosure of the terms, or are incapable of comparison shopping or avoiding the purchase completely. It has been suggested that the issue of assent be eliminated from all consumer form-padded transactions,¹⁵⁹ but not all consumers should be entitled to a presumption that they did not actually assent to the terms at issue.¹⁶⁰ Some consumers comprehend the nature of the suspect terms because of their clarity and prominence in the contract, or because they have been disclosed and explained. Some consumers have the power to

¹⁵⁷ *E.g.*, Ellinghaus, *supra* note 7; Leff, *supra* note 10; Murray, *supra* note 6.

¹⁵⁸ Justice Cardozo characterized judicial discretion as "informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'" B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921). *See also* Murray, *supra* note 6, at 10-11; Spanogle, *supra* note 10, at 941. Of course, as Justice Cardozo observed, there is no assurance that judges will interpret mores more wisely than others. Nevertheless, the responsibility to interpret them must lie somewhere, and our Constitution has placed that responsibility in the hands of our judiciary. B. CARDOZO, *supra*, at 135. Thus, although judicial discretion is inevitable, tradition ensures, at least generally, the avoidance of arbitrary decisions. *See also* J. MURRAY, *CONTRACTS* § 334, at 703 (2d ed. 1974).

Professor Dworkin once suggested that judges have limited discretion even in applying broad standards and principles because judges are accountable for their decisions—the legitimacy of decisions depends on their relation to public standards of morality. In his view, there is a correct and required decision to be reached in every controversy. *See* Dworkin, *Judicial Discretion*, 60 J. OF PHIL. 624 (1963). *See also* Dawson, *supra* note 119, at 1042-44; Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Soper, *supra* note 84, at 475.

¹⁵⁹ Speidel, *supra* note 10, at 374.

¹⁶⁰ *See, e.g.*, Schwartz, *supra* note 10, at 1076-82 (concluding that evidence of consumer incompetence is inconclusive).

compare prices or resist purchases. By creating an overbroad category of consumers entitled to the presumption of non-assent, we would nullify a principal advantage of judicial intervention: the opportunity to evaluate the facts of particular cases.¹⁶¹ Furthermore, such a presumption would protect some undeserving parties¹⁶² and make it more difficult for consumers in the affected class to obtain goods and services, because sellers may believe that important contract terms will be unenforceable against the consumers.¹⁶³

Determining who should be entitled to a finding of non-assent requires specific findings of fact as to, for example, what market information was available to the particular consumer, whether the particular consumer should have understood the nature of the information that was disclosed, and whether the consumer was the victim of marketing techniques that made the purchase imperative. In considering such issues, the court should evaluate the reasonableness of the consumer's actions in light of his individual situation. Although poverty alone should not be sufficient proof of his inability to act with economic rationality, the usual incidents of poverty, such as lack of education, lack of resources to conduct sufficient investigation, inability to obtain reasonable credit, and even special psychological needs (*e.g.*, to own a color television) may entitle the consumer to special protection against certain terms.¹⁶⁴ If the consumer could not obtain market information, could not comprehend the subject of disclosure, or could not withstand sophisticated marketing techniques because of his special situation, then the consumer did not actually assent to the terms at issue, no matter how clearly stated or how explicitly disclosed.

Although the absence of actual assent is one element that can be considered in determining whether intervention is appropriate, it should not be essential. If the provision is sufficiently egregious, that fact alone should permit a court to decide not to enforce it. For example, if a provision is immoral or contravenes public policy ("I can cut off your head if you do not pay on Saturday"), courts must have the right to strike it directly; otherwise, they will do so covertly. Still, it is hard to think of many contract terms that, although hard bargains economically, are unconscionable if there has been no policing, formation, or

¹⁶¹ See notes 150-53 *supra*.

¹⁶² Epstein, *supra* note 2, at 305.

¹⁶³ *Id.*

¹⁶⁴ Ellinghaus, *supra* note 7, at 772. Such consumers may be protected insufficiently by disclosure. But even if a consumer demonstrates any of these infirmities, a court should not make a finding of unconscionability without also considering the expectations of the consumer and the commercial setting of the contract. See notes 169-79 *infra*.

The availability of credit is probably the primary reason low-income consumers purchase from low-income market retailers, who have high markups and prices. ECONOMIC REPORT, *supra* note 127, at X, XV; Greenberg, *supra* note 67, at 381.

disclosure problem and the consumer does not qualify for special protection on the basis of non-assent. Striking a provision under such circumstances might constitute "disturbance of allocation of risks because of superior bargaining power," something Comment 1 to section 2-302 admonishes courts not to do.¹⁶⁵

Perhaps the contract term challenged in *Weaver v. American Oil Co.*¹⁶⁶ is one example of a clause that should be unenforceable regardless of assent. The clause, which required Weaver, the lessee of a gas station, to indemnify American Oil, the lessor, for American's negligence, seems to have been overprotective of American's legitimate contract needs¹⁶⁷ and may have been sufficiently egregious to be unenforceable.¹⁶⁸ The case is more easily explained, however, on the basis of American's failure to disclose the onerous term; Weaver would have had a much less compelling case if American Oil could have demonstrated that Weaver was aware of and understood the indemnification term. This suggests that a party who actually assented to the suspect terms should be required to establish a higher degree of unfairness to obtain a ruling of unconscionability.

2. *Expectations of the Party Claiming Unconscionability*

If the suspect terms of the contract destroy the basic expectations of the complaining party, the case is ripe for a finding of unconscionability. Analyzing the expectations of a contracting party is a common function of courts in contract cases. For example, problems involving materiality of breach, mistake affecting the root of the contract, frustration of the foundation of the contract, and adequacy of consideration all require that the court determine whether the contracting party can expect to gain substantially what was bargained for in the contract.¹⁶⁹ In analyzing these problems, a host of factors has been suggested to aid in defining the essence of an agreement.¹⁷⁰ These factors are also useful for determining, in a pure unconscionability case, whether the suspect terms deprive the party of his reasonable expectations. Helpful discussions concerning how courts should determine whether contract terms destroy the essence of a party's deal have appeared elsewhere,¹⁷¹ so I will not

¹⁶⁵ U.C.C. § 2-302, Comment 1.

¹⁶⁶ 257 Ind. 458, 276 N.E.2d 144 (1971); see notes 68-71 and accompanying text *supra*. Weaver, of course, was not a consumer. *But see* notes 230-31 *infra*.

¹⁶⁷ See Spanogle, *supra* note 10, at 958.

¹⁶⁸ See notes 169-71 and accompanying text *infra*. *But see* Jordan, *supra* note 1, at 841-46 (discussion of *Weaver*).

¹⁶⁹ See, e.g., Murray, *supra* note 6, at 74-79.

¹⁷⁰ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979) (listing factors for distinguishing material from immaterial breach, such as whether the injured party will be deprived of the benefit reasonably expected, whether the injured party can be adequately compensated for the breach, and whether the other party will suffer forfeiture).

¹⁷¹ For example, Professor Ellinghaus indicates that the essence of a transaction "is

belabor the point here.

3. *The Commercial Setting of the Contract*

A court also should evaluate the contract terms in the context of the commercial setting and in light of other contracts designed for similar purposes.¹⁷² The examination of the commercial setting should focus on whether the suspect terms have a reasonable function to perform in the trade.¹⁷³ The court should determine whether the terms foster the legitimate needs of the party accused of unconscionability, or whether they simply take unfair advantage of the other party. For example, the excessiveness of a price¹⁷⁴ should not be determined without considering the seller's credit risks, unusual selling expenses, the method of financing, the costs of collection, and retail prices charged by similarly situated sellers.¹⁷⁵ Similarly, the conscionability of a clause that requires notification of defects within a specified period that is insufficient to uncover latent defects depends in part on the seller's ability to demonstrate a reasonable need for the clause in the trade.¹⁷⁶ In other words, contract terms drafted decidedly in favor of one party actually may be fair because of the risks involved.

If the contract in question is similar to other contracts involving the same subject matter, this may be evidence that the imbalance is necessary to preserve the expectations of the drafter. Such similarities alone, however, should not be sufficient to legitimize the challenged terms. The contract terms, although commonly employed by businesses, may demonstrate a pattern of unfairness throughout the trade.¹⁷⁷ This con-

rooted in the expectations legitimately raised in the parties." Ellinghaus, *supra* note 7, at 796. Professor Ellinghaus discusses the essence or core of the deal in considering warranty disclaimers and remedy limitations, *id.* at 798-800, but the concept seems more pervasive. *See also* Kornhauser, *supra* note 10, at 1180; Murray, *supra* note 6, at 72-73 (discussing English doctrine of fundamental breach); *id.* at 14-34 (discussing material breach analogy); Speidel, *supra* note 10, at 367-74.

¹⁷² *See* U.C.C. § 2-302(2); Ellinghaus, *supra* note 7, at 785; Jordan, *supra* note 1, at 816, 855. *See also* note 113 and accompanying text *supra*.

¹⁷³ *See* Leff, *supra* note 10, at 543.

¹⁷⁴ Excessiveness of price is an illusive concept:

The price might be said to be excessive because it returns too great a profit to the seller, or because it yields too great a return on the seller's invested capital, or because it is a substantially higher price than other merchants similarly or unsimilarly situated charge for like items.

J. WHITE & R. SUMMERS, *supra* note 13, §§ 4-5, at 157. *See* Speidel, *supra* note 10, at 369-74 for a helpful approach to the problem.

¹⁷⁵ *See, e.g.,* Leff, *supra* note 10, at 549-51 (criticism of American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964)); Kornhauser, *supra* note 10, at 1170, 1180; Speidel, *supra* note 10, at 372-74. In one study, although low income market retailers charged high prices, their net profit return on net worth was lower than that of general market retailers. *See* ECONOMIC REPORT, *supra* note 127, at XI.

¹⁷⁶ *But see* Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937).

¹⁷⁷ Danzig, *supra* note 139, at 629-30. *But see* Gordon v. Crown Central Petroleum Corp.,

sideration helps to ensure that the "predominant morals of the marketplace"¹⁷⁸ do not control the unconscionability finding and that merchant collusion does not insulate an offensive term from judicial scrutiny. The power to evaluate commonly employed provisions for their fairness is a significant one. Courts have long enjoyed such power, however, and will continue to do so in the future.¹⁷⁹

4. *Other Considerations*

Discussions of "substantive" unconscionability offer different approaches depending on whether the issue is "overall imbalance" or "component" unconscionability.¹⁸⁰ Overall imbalance in a contract occurs when "the sum total of its provisions drives too hard a bargain for a court of conscience to assist."¹⁸¹ In contrast, component unconscionability involves the "assessment of single contractual components."¹⁸² To date, the problem of component unconscionability has surfaced predominantly with respect to excessive price terms and the restrictiveness of the purchaser's warranties and remedies.¹⁸³

Separate analyses of component and overall unconscionability may be unnecessary. The nature of the parties, the expectations of the party claiming unconscionability, and the commercial setting are pertinent in both types of cases. Whether a court should strike an entire agreement or enforce part of it depends on which remedy is more appropriate. If the contract suffers from overall imbalance, there may be little left to enforce. On the other hand, if only a small number of provisions are unfair, the remainder of the contract could be enforced.¹⁸⁴ These are problems involving selection of the proper remedy, however, which does not alter the fact that the elements to be considered in determining whether overall imbalance or component unconscionability exists are essentially the same.

Although courts will enjoy significant flexibility in resolving claims of pure unconscionability,¹⁸⁵ the framework offered in this Article pre-

423 F. Supp. 58, 61-62 (N.D. Ga. 1976) (unconscionability determined by comparison with local business practices), *aff'd mem.*, 564 F.2d 413 (5th Cir. 1977).

¹⁷⁸ See note 139 *supra*.

¹⁷⁹ See notes 83-86 & 158 and accompanying text *supra*.

¹⁸⁰ *E.g.*, Ellinghaus, *supra* note 7, at 773.

¹⁸¹ *E.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir. 1948).

¹⁸² Ellinghaus, *supra* note 7, at 786.

¹⁸³ J. WHITE & R. SUMMERS, *supra* note 13, §§ 4-5. For example, in *Murphy v. McNamara*, 36 Conn. Supp. 183, 189-90, 416 A.2d 170, 175 (Super. Ct. 1979), a price two and one-half times the reasonable retail value was held unconscionable. Another court reached the same result where a tire warranty excluded liability for personal injury and property damage. *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 433, 347 A.2d 253, 260-61 (1975).

¹⁸⁴ See Ellinghaus, *supra* note 7, at 779-82, 791.

¹⁸⁵ Because of the difficult fairness evaluations that must be made in pure unconscionability cases, the burden of proof is of paramount importance. Under the proposed framework, the party claiming unconscionability should have the burden of producing evidence of enti-

serves a proper balance of certainty and flexibility by establishing clearly the types of situations that call for the exercise of discretion. In these situations, the judicial role is analogous to that of the Chancellors in the equity courts. The next section therefore focuses on the guidance offered by the equity decisions.

III

THE ROLE OF EQUITABLE UNCONSCIONABILITY IN THE PROPOSED FRAMEWORK

Prior to the merger of law and equity in England, Chancery courts administered a body of equitable rules and remedies that developed when inflexible law courts failed to employ principles reflecting moral values.¹⁸⁶ In response to criticism of their flexibility,¹⁸⁷ however, the Chancellors began to consider the broader implications of their decisions¹⁸⁸ and gradually began to establish and follow their precedents.¹⁸⁹

tlement to special protection and of destroyed expectations. After the claimant successfully produces evidence on those issues, the other party should be required to justify inclusion of the term or terms by presenting evidence of the commercial setting and the fairness of the pertinent trade practice. *See also* Speidel, *supra* note 10, at 368-69.

¹⁸⁶ R. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 30 (1961); Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U.L. REV. 59 (1961). The provisions of Oxford, 1258, ended the flexibility of the common law by barring the recognition of new writs. Walsh, *Equity Prior to the Chancellor's Court*, 17 GEO. L. REV. 97, 104-05 (1928). The early Chancellors were mostly members of the Church who did not consider themselves bound by precedent. *See* F. MATTLAND, *EQUITY: A COURSE OF LECTURES* 8 (2d ed. 1936); R. NEWMAN, *supra*, at 26-28. Because equitable principles were available to ameliorate the rigidity of the common law, *id.* at 11, one general meaning of equity today refers to the process by which social concerns are introduced into the law. D. DOBBS, *supra* note 118, at 56.

By the eighteenth century, the view was held that freedom from social control was the major objective of society. R. NEWMAN, *supra*, at 11, 26-28. Accordingly, rules promulgated by courts of law were concerned primarily with the need for certainty so that the rules could be applied uniformly. On the other hand,

[i]t has long been an unvarying rule of equity, where the facts justified it, to grant . . . (equitable) relief. In the very nature of things, there cannot be a hard and fast rule laid down which should apply to all cases, because the facts in each case are scarcely ever identical [E]ach case must be governed by its own facts.

Herzog v. Gipson, 170 Ky. 325, 327, 185 S.W. 1119, 1120 (1916).

¹⁸⁷ *See, e.g.*, O. METCALFE, *GENERAL PRINCIPLES OF ENGLISH LAW* 29 (8th ed. 1967); R. NEWMAN, *supra* note 186, at 38, 255; Garvey, *supra* note 186, at 63, 65; Newman, *supra* note 131, at 151. The same phenomenon occurred in Roman praetorian equity 2,000 years before the equity experience. *Id.*

¹⁸⁸ *See* Keigwin, *The Origin of Equity* (Pt. 3), 18 GEO. L. REV. 215, 234 (1930).

¹⁸⁹ Additional reasons for the establishment of precedent in the equity courts included the increasing number of cases confronting the Chancellors, Sevens, *19th Century Equity: A Study in Law Reform*, 13 CHI.-KENT L. REV. 305, 309 (1934), and the growing number of Chancellors that were lawyers as well as ecclesiastics, Keigwin, *supra* note 188, at 234. Even with these changes, the equity courts maintained their allegiance to high standards of conduct and managed to preserve their discretion to fashion innovative remedies. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483 (1937). Even today, equity decisions inspire judges to apply higher standards and to fashion innovative remedies. *See* B. CARDOZO, *supra* note

Substantive rules of fraud, mistake, trusts, and mortgages crystallized, and remedial principles such as estoppel, clean hands, laches, and unconscionability emerged. These rules and principles reflected the allegiance of the early equity court to principles of fairness and preserved the court's flexibility and reforming influence on the law.¹⁹⁰ The equity/law distinction was recognized in the United States, and American equity courts developed equitable principles much like their English counterparts.¹⁹¹

The doctrine of equitable unconscionability was employed most often in cases involving specific performance of land sales contracts, although it appeared in other cases as well.¹⁹² Courts denied specific performance on the basis of unconscionability if the exchange was deemed inadequate, and, like present day cases under section 2-302, conflicting authority developed on whether bargaining unfairness was required as well. Some equity decisions required a degree of bargaining unfairness, such as concealment of facts or trickery, in addition to a finding of unfair terms.¹⁹³ Other decisions in equity found a contract (or the offending part) unenforceable on the basis of its unfairness even when the formation of the contract was devoid of bargaining unfairness.¹⁹⁴ Still other courts would find a contract unenforceable without emphasizing the fairness of the exchange if, as a result of fraud, misrepresentation,

158, at 137; R. LEAVELL, J. LOVE & G. NELSON, *CASES AND MATERIALS ON EQUITABLE REMEDIES AND RESTITUTION* 9 (3d ed. 1980). According to Cardozo, the Chancellors "built up the system of equity with constant appeal to the teachings of right, reason and conscience." B. CARDOZO, *supra*, at 137.

¹⁹⁰ R. NEWMAN, *supra* note 186, at 261-63. Professor Newman isolates certain principles among moral standards that developed in equity courts:

[R]ights should be based on substantial factors rather than on form[,] . . . the law should not aid the unscrupulous[,] . . . fully intended agreements should be carried out[,] . . . advantages gained through accident or mistake should be relinquished, and . . . hardship arising from accident or mistake should be fairly distributed . . .

Id. at 19. Interestingly, principles of equity in all legal systems are similar, apparently because equity derives from justice considerations common to all. Newman, *supra* note 131, at 157.

¹⁹¹ R. NEWMAN, *supra* note 186, at 33-34.

¹⁹² *See, e.g.*, *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Texas Co. v. Central Fuel Co.*, 194 F. 1 (8th Cir. 1912); *Eastern Polling Mill Co. v. Michlovitz*, 157 Md. 51, 145 A. 378 (1929). *See also* Leff, *supra* note 10, at 534 & n.209. Like Professor Leff, some of the cases cited here do not employ specifically the "unconscionable" terminology. Because they involve the fairness of granting specific performance, however, they legitimately can be treated as reflecting that doctrine.

¹⁹³ *Herzog v. Gipson*, 170 Ky. 325, 328, 185 S.W. 1119, 1120 (1916); *Banaghan v. Malaney*, 200 Mass. 46, 49, 85 N.E. 839, 840 (1908). *See also* K. LLEWELLYN, *supra* note 63, at 371 n.338; Leff, *supra* note 10, at 538-39; Spanogle, *supra* note 10, at 949.

¹⁹⁴ *E.g.*, *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948); *Koch v. Streuter*, 232 Ill. 594, 604-05, 83 N.E. 1072, 1077 (1908). *See also* 3 J. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 928, at 639 (5th ed. 1941); Spanogle, *supra* note 10, at 949. In some cases, courts assumed unfair bargaining on the basis of the status or class of the weaker party. Spanogle, *supra* note 10, at 949.

duress, undue influence, or other policing doctrines, the bargaining conduct itself was sufficiently egregious.¹⁹⁵

Thus, equitable unconscionability raised many of the same questions concerning the relationship of bargaining misconduct and unfair terms that currently exist under section 2-302. The failure of the equity courts to develop a systematic framework for dealing with unconscionability is understandable in view of the tradition of flexibility in the equity courts. Because of the restriction of the equity courts' jurisdiction to cases in which the legal remedy was inadequate,¹⁹⁶ if a case was properly in the equity court a decision, in effect, had already been made that the need for the certainty of the law courts was outweighed by the need for equity's flexibility. Another reason the Chancellors did not establish an unconscionability framework is that they lacked the benefit of case development concerning the policing, formation, and disclosure doctrines that occurred prior to the promulgation of section 2-302.

In light of the Chancellors' failure to develop a framework for deciding unconscionability cases, it is worth asking whether there is any utility to the equity unconscionability cases today. Professor Leff, in considering whether equitable unconscionability provides "sufficient illumination" of section 2-302,¹⁹⁷ concluded that the importation of equitable unconscionability is not "sensible."¹⁹⁸ Closer analysis suggests, however, that the equity cases lend further reinforcement to the position that bargaining problems generally fit into the categories of policing, formation, and disclosure.¹⁹⁹ Furthermore, the equity cases are helpful in suggesting approaches to cases involving pure unconscionability.

¹⁹⁵ *E.g.*, Jaeggi v. Andrews, 124 N.J. Eq. 155, 161, 200 A. 760, 764 (1938) (fraud); McDougall v. O'Hara, 129 Cal. App. 2d 12, 14, 276 P.2d 6, 7 (1954) (false representations); Margraf v. Muir, 57 N.Y. 155 (1874) (undue influence). "That mistake, duress and fraud—especially the extraordinary doctrine of 'constructive fraud'—served, in any case, as functional equivalents of 'unconscionability' on many occasions is hardly open to debate." Ellinghaus, *supra* note 7, at 786 n.123.

¹⁹⁶ *See* D. DOBBS, *supra* note 118, § 2.2, at 33.

¹⁹⁷ Leff, *supra* note 10, at 528.

¹⁹⁸ *Id.* at 534. Professor Leff asserted that commentators had wrongly formed a consensus that unconscionability is not too vague because equitable unconscionability cases establish the meaning of unconscionability. Interestingly, these commentators referred only obliquely to equitable unconscionability. *See id.* at 528 n.164. Leff's conclusion that equitable unconscionability is irrelevant to § 2-302 has not been challenged directly except for a brief reference to doubts about Leff's thesis in Ellinghaus, *supra* note 7, at 766 n.37. *See also* Spanogle, *supra* note 10, at 949. Although it is undoubtedly true that all equitable doctrines may not always be proper for use in legal cases, the position that equitable unconscionability cases are always "irrelevant" and that it is never "sensible" to employ them in seeking guidance on the proper application of § 2-302 seems difficult to support. *See* notes 201-21 and accompanying text *infra*.

¹⁹⁹ *See, e.g.*, Federal Oil Co. v. Westeru Oil Co., 121 F. 674, 677 (7th Cir. 1902); Banaghan v. Malaney, 200 Mass. 46, 49, 85 N.E. 839, 840 (1908); Butler v. Duncan, 47 Mich. 94, 96-97, 10 N.W. 123, 124 (1881); Jaeggi v. Andrews, 124 N.J. Eq. 155, 161, 200 A. 760, 764 (1938).

With respect to bargaining problems, Professor Leff distinguished land and chattel sale transactions on the basis that, unlike today's standard form chattel sale transactions, land sale transactions involve individualized bargaining.²⁰⁰ The grounds for unconscionability determinations in land sale cases (such as fraud or duress) are undoubtedly still relevant, however, when they appear in form contract chattel sales.²⁰¹ Furthermore, these factors today appear more often than Professor Leff implied.²⁰² When specific policing or formation problems do not exist, the bargaining issue presented today in standard form transactions is whether a duty to disclose has arisen. As demonstrated earlier, disclosure may be required when one party has a particular weakness such as a lack of familiarity with English or a lack of education.²⁰³ Equity courts protected participants with similar weaknesses in land sale transactions and, like today's cases, some of the equity decisions can be explained on the basis of the failure to disclose.²⁰⁴

Because contracts for the sale of land are not formed in the same hurried setting as today's typical standard form adhesion contract, the presumption that reasonable people do not read or understand the forms would not apply to land sale contracts. Thus, Professor Leff probably was correct that the equity cases do not add significant light to the bargaining disclosure case in which form contract terms contradict the

²⁰⁰ Leff maintained that the "dramatic" conditions that produced the equity cases in the context of specific performance of the sale of land are unlikely to recur today. Leff, *supra* note 10, at 537. He asserted that discrepancy in price and value is more likely to lead to hardship in land transactions because those transactions are more often "economically significant" to the actors. *Id.* at 535. The idea that overall imbalance will more likely lead to hardship in land transactions, however, seems helpful in ascribing meaning to § 2-302. Courts should find a contract or contract clause unconscionable only when the contract as a whole is economically significant to the party claiming unconscionability.

Leff also argued that land transactions typically are once-in-a-lifetime and involve personal commitment, while the Uniform Commercial Code is not "primarily" designed for such transactions. *Id.* at 535. In addition, he asserted that real property may have been the only property of value to the party claiming unconscionability. Accordingly, it was natural that courts afforded the actors great protection. *Id.* at 536. These points seem merely an embellishment of his "economic significance" point and emphasize only that in the absence of a finding that the contract or term was "significant," it is probably not unconscionable. Although chattel sales may not be as "economically significant" as land sales, courts should have little trouble distinguishing significant from insignificant exchanges. The real issue is whether the *types* of improper bargaining are dissimilar in land transactions and chattel transactions. See notes 201-08 *infra*. Leff offered no evidence that the type of trickery in chattel sales cases, when it occurs, is necessarily different *because* the land sale is so important to the consumer.

²⁰¹ See Ellinghaus, *supra* note 7, at 766 n.37.

²⁰² See notes 32-43 and accompanying text *supra*.

²⁰³ See notes 65-71 and accompanying text *supra*.

²⁰⁴ See the list of "presumptive sillies" collected in Leff, *supra* note 10, at 532-33. Some of the cited cases suggest that if the offending terms had been explained, a different result might have been reached. *E.g.*, *Dvsarz v. Janczarek*, 238 Mich. 529, 213 N.W. 694 (1927); *Miller v. Tjexhus*, 20 S.D. 12, 104 N.W. 519 (1905). See also Ellinghaus, *supra* note 7, at 766 n.37.

reasonable expectations of a party.²⁰⁵ Nevertheless, the equity cases do offer some guidance in this area. The plight of consumers who sign contracts without understanding the meaning of the terms is much like the plight of the "presumptive sillies" Professor Leff referred to in his analysis of equitable unconscionability. This group was unable to protect itself and therefore was afforded special protection.²⁰⁶ According to Leff, the equity courts adhered to "gross classifications . . . of the amount of power of certain classes of people . . . without too much inquiry into the actual . . . bargaining situation."²⁰⁷ If the equity decisions can be criticized for drawing overly broad generalizations, such criticism is helpful in offering guidance to courts in modern disclosure cases. Courts faced with generalizing the behavior of modern day consumers in reading standard forms must consider fully the particular evidence presented and avoid sweeping generalizations about the reasonable expectations of consumers.²⁰⁸

Equitable unconscionability not only casts light on common-law doctrines unconscionability, but offers guidance to courts considering pure unconscionability as well. Although it has been asserted that modern judges are empowered to exercise the prerogatives of a Chancellor to consider morality, ethics, and good conscience in deciding cases, courts infrequently have gone that far directly, in deference to the countervailing goals of certainty and predictability in the law.²⁰⁹ By invoking

²⁰⁵ See notes 72-80 and accompanying text *supra*.

²⁰⁶ Leff, *supra* note 10, at 532-33. Those afforded special protection included sailors, heirs, farmers, illiterates, and drunkards. See also Ellinghaus, *supra* note 7, at 766 n.37. Because land is unique by definition, the purchaser cannot make an alternative purchase and may be required to adhere to the terms offered by the seller. Thus, a land purchaser and modern day chattel purchaser may be in a more similar position than Professor Leff suggested.

²⁰⁷ Leff, *supra* note 10, at 556.

²⁰⁸ *But see* Speidel, *supra* note 10, at 374-75 (advocating elimination of the issue of assent in consumer transactions). Generalizations about consumers who are entitled to a presumption of non-assent in pure unconscionability cases should also be avoided.

²⁰⁹ Newman, *supra* note 131, at 152. Because it was largely a historical accident that led to the administration of equitable principles in the equity court, commentators have questioned whether any valid reason exists for continued allegiance to the dichotomy between law and equity. R. NEWMAN, *supra* note 186, at 265. See also Walsh, *supra* note 189, at 479, 486. Thus, judges, empowered to exercise the prerogatives of the Chancellor, should consider morality, ethics, and good conscience in deciding cases that previously were denominated legal in nature. See, e.g., Watkin, *The Spirit of the Seventies*, 6 ANGLO-AM. L. REV. 119, 127 (1977). Nevertheless, equitable discretion has been exercised overtly in the merged system primarily in those cases that would have arisen in equity courts prior to the merger, involving a request for specific performance. Newman, *supra* note 131, at 152. Of course, some equitable principles have been applied covertly to expand flexibility within legal rules, and some equitable principles such as estoppel and laches have been employed directly in legal cases. Even when courts have employed equitable principles, however, according to Professor Newman they have been applied in a fragmented and restricted manner that has hampered the influx of fairness principles into law. R. NEWMAN, *supra* note 186, at 258-59.

Although the abolition of separate courts of equity would suggest that equitable principles are now available in all proceedings, the statutes abolishing equity courts do not affirma-

the equitable term "unconscionability,"²¹⁰ the Code nevertheless encourages the exercise of discretion in cases involving section 2-302.²¹¹ Both the nature of pure unconscionability cases and the equitable heritage of unconscionability clearly support that approach.

The equity cases also offer guidance as to what contract provisions "shock the conscience." Professor Leff argued that the equity cases emphasized overall imbalance; in contrast, he observed that section 2-302 specifically permits courts to strike single provisions. Thus, he concluded, equity's "weighing technique" for overall imbalance is "generally irrelevant."²¹² Nevertheless, the equity cases are relevant to U.C.C. cases that *do* involve overall imbalance.²¹³ Analysis of the equity "overall imbalance" cases is also useful in understanding today's cases involving component unconscionability. As argued earlier,²¹⁴ the issues in overall imbalance and component unconscionability cases are essentially the same. The equity cases approached the question of overall imbalance by considering whether the imbalance of the contract materially destroyed the reasonable expectations of the party seeking to avoid the deal.²¹⁵ In a modern component unconscionability case, if a suspect provision materially destroys the benefit that reasonably could be expected from the contract, the provision may be unconscionable. Consider, for example, a single contract provision requiring notification of latent defects within a period during which the defects would not ordinarily be detected. Such a provision deprives the party who has purchased defective goods of the reasonable benefit of the deal and

tively state or imply that equity is always available in the merged system. R. NEWMAN, *supra*, at 51-53. Nor are the Judicature Acts in England, which merged England's systems of law and equity, a source for the proposition that the substantive principles of law and equity have been merged. *See* Watkin, *supra*, at 119-20; *cf.* FED. R. CIV. P. 1 (abolishing only procedural distinctions between law and equity).

²¹⁰ Section 2-302 provides a host of clues that suggest the section was patterned after equitable unconscionability. Section 2-302(1) indicates that the determination of unconscionability is a matter of law for the court. Thus, like the Chancellors at equity, judges rather than juries will determine matters of unconscionability. Section 2-302(1) also permits the court, like the Chancellors at equity, to strike selective portions of the contract and still enforce other provisions. Finally, employment of the term unconscionability itself suggests that the drafters intended reference to the equitable unconscionability decisions. If the drafters had wanted to avoid such reference, another name for their concept would have been a simple matter. *But see* Leff, *supra* note 10, at 529-30.

²¹¹ My effort in Part I of this Article, of course, is to temper that discretion. Nevertheless, I acknowledge the need for broad judicial discretion in the proper case, *i.e.*, cases involving pure unconscionability.

²¹² Leff, *supra* note 10, at 539.

²¹³ *See, e.g.*, Bank of Ind. v. Holyfield, 476 F. Supp. 104 (S.D. Miss. 1979), *discussed in text* at notes 102-06 *supra*.

²¹⁴ *See* notes 180-84 and accompanying text *supra*.

²¹⁵ *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Koch v. Streuter, 232 Ill. 594, 604-05, 83 N.E. 1072, 1077 (1908); Butler v. Duncan, 47 Mich. 94, 10 N.W. 123 (1881).

therefore may be unconscionable.²¹⁶ Although the court must engage in difficult line drawing, equitable unconscionability cases provide a hint as to what questions to ask and indicate that the exercise of discretion is proper and inevitable when drawing the line.

Professor Leff also maintained that equity cases focused on imbalance at time of performance, in contrast to the Code, which permits only an investigation of whether the contract was unconscionable at the time of the contract's formation.²¹⁷ Some equity cases, however, appear to have applied the time-of-formation rule.²¹⁸ On the other hand, courts construing section 2-302 often will face a determination of imbalance at the time of performance, because the party claiming unconscionability will assert that the suspect provision was intended *at the time of contracting* to cover the particular situation that has arisen.²¹⁹ Finally, some decisions have ignored or "interpreted" the section 2-302 time-of-contracting requirement to permit some investigation of the circumstances at the time of performance.²²⁰ Thus, the time frame for examining unconscionability issues does not negate the utility of equitable unconscionability.

One of the underlying goals of the Uniform Commercial Code is to permit the expansion of commercial practices.²²¹ Courts therefore should continue to develop the principles of equity and law to respond to growth and development in commercial practices. My point here is not that the equity cases freeze the definition of unconscionability, but that these cases should not be dismissed as irrelevant. Under the framework suggested in this Article, equity cases involving bargaining unfairness are relevant in contributing to the meaning of the common law bargaining doctrines. Similarly, the discussions of equitable discretion and imbalance of consideration are helpful in deciding pure unconscionability cases.

IV

APPLYING THE NEW FRAMEWORK TO MODERN UNCONSCIONABILITY CASES

A positive evaluation of the framework offered here depends on

²¹⁶ See *Majors v. Kalo Laboratories, Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975).

²¹⁷ Leff, *supra* note 10, at 539-41.

²¹⁸ See, e.g., *Herzog v. Gipson*, 170 Ky. 325, 327, 185 S.W. 1119, 1120 (1916); *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 A. 898 (1900).

²¹⁹ Ellinghaus, *supra* note 7, at 803. "And the court, in denying the applicability of the clause to the contingency before it, is in effect saying that, insofar as the clause was intended to cover that contingency, it was unconscionable from its inception and must be limited, or struck down, accordingly." *Id.*

²²⁰ See, e.g., *Industrallease Automated & Scientific Equipment Corp. v. R.M.E. Enterprises, Inc.*, 58 A.D.2d 482, 490, 396 N.Y.S.2d 427, 432 (1977).

²²¹ U.C.C. § 1-102(1).

whether it contributes to a resolution of the difficult issues that have surfaced in construing section 2-302. A discussion of the following questions, which were posed at the outset, may clarify certain remaining ambiguities as well as review the arguments set forth above.

1. *What is the relationship of existing legal doctrines such as duress, undue influence, the duty to disclose, contract interpretation, and the rules of offer and acceptance to procedural unconscionability?* These common law doctrines, which are employed to ensure actual assent in contract formation, evolved to deal with what courts and commentators commonly refer to today as procedural unconscionability. For example, the failure to disclose is a common bargaining infirmity in form contract situations that has led to findings of procedural unconscionability.²²² Many common law assent doctrines go beyond procedural unconscionability, however, because one requirement of the doctrines involves the substantive fairness of the agreement. Thus, these doctrines are helpful in determining when both bargaining misconduct and unfair terms are necessary for a finding of unconscionability, and when either alone is sufficient. Application of the doctrines also clarifies the courts' approach because the common law doctrines indicate more precisely than unconscionability the factual elements necessary to bar enforcement of contracts and contract terms.

2. *Does a finding of unconscionability require both bargaining misconduct and unfair terms, or is either sufficient?* As suggested above, the proposed framework helps to distinguish situations that require both bargaining misconduct and unfair terms from those that require only one or the other. If, for example, the problem involves the duty to disclose, both contract formation and the resulting terms of the agreement must be examined. If the focus is on the vagueness of a term, its fairness is, at most, of secondary importance.²²³ If a term "shocks the conscience," however, the proposed framework suggests that no bargaining unfairness need exist to declare the term unconscionable.²²⁴

3. *Does pointing out and explaining an offending clause insulate it from a finding of unconscionability?* Full disclosure of a suspect provision—"super-conscionable" procedural conduct²²⁵—obviously insulates a party from the duty to disclose doctrine and may avoid the applicability of some of the other policing or formation assent doctrines as well. Such disclosure would not shield the party from a claim of duress, however, or from allegations that the disclosure was insufficient to protect a party who may not have comprehended the subject of disclosure.²²⁶ In addition,

²²² See notes 52-80 and accompanying text *supra*.

²²³ See notes 108-09 and accompanying text *supra*.

²²⁴ See notes 165-68 and accompanying text *supra*; Part III *supra*.

²²⁵ See J. WHITE & R. SUMMERS, *supra* note 13, §§ 4-7, at 164.

²²⁶ See notes 125-29, 159-68 and accompanying text *supra*.

some contract terms may be so egregious that they should not be enforceable under any circumstances.²²⁷

4. *Should unconscionability apply when a consumer purchases a luxury item or when the consumer can purchase an item elsewhere without the offending clause?* Assuming that the offending portions of the contract are clear or have been disclosed and that the consumer has sufficient information concerning product availability, unconscionability arguably should not apply because the consumer had a choice not to purchase, or to purchase elsewhere. The decision to purchase, in other words, appeared to involve actual assent.²²⁸ Under the proposed framework, however, a claim of pure unconscionability may be sustainable notwithstanding the absence of bargaining misconduct. Courts should consider the reasonableness of a consumer's actions in light of the consumer's particular situation and should not assume, on the basis of broad generalizations about the class of persons of which he is a member, that the consumer actually did or did not assent to the contract terms. Lack of education, lack of resources to investigate alternatives, or psychological needs may have compelled the consumer to make a purchase, and these factors should be investigated individually and weighed in determining unconscionability. The consumer's expectations and the commercial setting are also relevant in determining whether a contract or term is unconscionable.²²⁹

5. *In what circumstances should unconscionability apply to agreements between merchants?* Most unconscionability findings have been made in cases involving sales to consumers; merchants have been largely unsuccessful in making claims of unconscionability. The new framework explains this trend and indicates when it is appropriate to employ section 2-302 in merchant-to-merchant transactions. One element of the duty to disclose involves the relationship of the parties and generally requires some dependency upon one party by the party claiming unconscionability. Between merchants, such dependency ordinarily does not exist. Therefore, no duty to disclose arises. Similarly, pure unconscionability rarely exists in agreements between merchants, because merchants generally do not need special protection resulting from the absence of actual assent. It is also unlikely that terms or agreements that shock the conscience will find their way into agreements between parties who are on equal bargaining footing.²³⁰ But when the "merchant" involved is more like a consumer—for example, a "one-person" business operated by a person with little education—the merchant may be in a position of dependency so that the duty of disclosure may arise or a particularly offen-

227 See notes 130-35, 165-68 and accompanying text *supra*.

228 See, e.g., Murray, *supra* note 6, at 31.

229 See Part II *supra*.

230 See, e.g., Tacoma Boatbuilding Co. v. Delta Fishing Co., 28 U.C.C. Rep. Serv. 26 (W.D. Wash. 1980).

sive term may be included in the agreement.²³¹ In such situations, dealings between merchants should be the subject of careful scrutiny.

CONCLUSION

A superior framework for approaching unconscionability problems requires a proper balance between certainty and flexibility. Because rules tend to be more certain and standards more flexible, drafters of legislation must determine whether the social desirability of change outweighs the need for certainty in any particular area of the law.²³² The desirability of a direct policing mechanism to nullify agreements made as a result of improper bargaining conduct, by parties incapable of actual assent, or with provisions that shock the conscience, does outweigh the need for certainty. Thus, the underlying purpose of section 2-302 seems justified. This does not mean, however, that the 2-302 framework must be overbroad and confusing. The framework offered here seeks to focus the inquiry under the Uniform Commercial Code and answer some of the questions that have eluded advocates of a broader approach. Under the new framework, Code unconscionability will promote greater commercial certainty while maintaining overall flexibility in commercial transactions.

²³¹ *E.g.*, *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1972).

²³² *See Kessler, supra* note 1, at 638.