THE DOCTRINE OF UNCONSCIONABILITY: A JUDICIAL BUSINESS ETHIC

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I. INTRODUCTION

The historical public policy favoring freedom of contract is promoted through expansive allocations of power to contractual parties who seek to engage in the presumptive transactional and economic benefits of contractual relations. These policies instill confidence in the enforcement of contractual provisions so long as the provisions are mutually and voluntarily agreed. The presupposition that human beings are mature, responsible, and sufficiently morally upstanding so as to engage in fair exchanges has recurrently proven itself a rule with vicissitudes of exceptions. Perhaps it is the nature of humanity or perhaps it is due to unfortunate circumstances of nurturing that some human beings become so self-interested that they attempt to attain advantage by unscrupulous means at the expense of other, more vulnerable human beings. When such advantage is gained through contract and the degree of that advantage becomes sufficiently immoral, unjust, or inequitable, the doctrine of unconscionability becomes a prophylactic of the vulnerable. Although outside of contractual settings, often advantageous behavior of humans, sometimes arising from an abundance of self-love or a failure of empathy, rarely has a viable legal remedy. When such behavior is documented in an otherwise legally binding contract, there is recourse for victims of such injustice. What constitutes an unconscionable contract remains an amorphous standard that encourages minimal adherence to ethical behavior in both the process of contracting and in the terms of the contract itself, thereby promoting a necessary, albeit imprecise baseline of ethics in business. This article proposes a new approach to examining purportedly unconscionable contracts –an approach based in ethical pluralism– and by doing so, contends that business ethics theory may play an integral role in defining the boundaries of unconscionability.

Part II traces the major historical developments of the doctrine of unconscionability. Part III contends that the pragmatic implementation of the doctrine of unconscionability is creating a judicially construed business ethic. Part IV suggests that business ethics theory may inform future applications of the doctrine of unconscionability. Part V introduces a pluralistic approach to unconscionability. Part VI concludes.

II. THE RISE OF THE DOCTRINE OF UNCONSCIONABILITY

The notion that a contract with unfair terms can be rescinded is not unique to common law countries, but is also present in many civil law countries. In civil law countries, this notion is rooted in the doctrine of *laesio enormis* which is preserved in, among other places, the Roman Code of Justinian (529-565 C.E.).[2] The doctrine, as defined in the Code of Justinian, allows a seller to rescind a contract if the sales price is less than half of the actual price.[3] Today, the doctrine of

[2] *Code of Justinian*, THE ENCYCLOPEDIA BRITANNICA, (Nov. 12 2014), http://www.britannica.com/topic/Code-of-Justinian (last visited Aug. 5, 2017). In addition to the doctrine of *laesio enormis*, doctrines similar to unconscionability are found in a variety of places in many civil law countries. A group of scholars compiled many of the legal instruments in several European countries that relate to the common law doctrine of unconscionability. *See* MEL KENNY, JAMES DEVENNEY, & LORNA FOX O'MAHONY, UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE (Eds. 2010). *See also* ELENA D'AGOSTINO, CONTRACTS OF ADHESION BETWEEN LAW AND ECONOMICS: RETHINKING THE UNCONSCIONABILITY DOCTRINE (2015) (for criticisms of the main criteria of the doctrine of unconscionability in the context of contracts of adhesion).

[3] RAYMOND WESTBROOK, EX ORIENTE LEX: NEAR EASTERN INFLUENCES ON ANCIENT GREEK AND ROMAN LAW (edited by Deborah Lyons and Kurt A. Raaflaub) (2015).

laesio enormis continues to protect buyers and sellers in many civil law countries.[4] Although spurring from similar principles, the doctrine of unconscionability emerged much later in history.

The doctrine of unconscionability arose in English courts of equity. As early as 1686, Lord Chancellor Jefferies enunciated a loan agreement an "unconscionable bargain" in the case of *Berney v. Pitt*.[5] In *Berney*, the debtor borrowed two-thousand English pounds from the lender, promising (among other things) that if the debtor's father died, the debtor would pay the lender five-thousand pounds in return for the two-thousand pound loan.[6] However, if the debtor died before his father, the lender was to forgive the loan.[7] After the debtor's father died, the lender attempted to collect the five-thousand pounds, but instead of paying the lender in full, the debtor filed a bill of complaint.[8] The case was first heard by Lord Nottingham who enforced the loan agreement, and ordered the borrower to repay the five-thousand pounds plus interest.[9] Upon rehearing, Lord Chancellor Jefferies found the loan-arrangement to be an "unconscionable bargain," and decreed the lender pay back all monies collected from the debtor except the original two-thousand pounds with interest.[10] Lord Jefferies did not elaborate as to the meaning of "unconscionable," but it is apparent he perceived this loan agreement to be distasteful and unfair.

In 1750, a similar outcome was reached in *Earl of Chesterfield et al. v. Janssen*.[11] In *Chesterfield*, Lord Chancellor Hardwicke eloquently considered the principles and powers of English courts of equity when he inquired into whether a contract was "contrary to conscience" and concluded that preventing uncontentious contracts was the "duty of a court."[12] In his analysis, Lord Chancellor Hardwicke discussed *Berney*,[13] and categorized several types of fraud including what he termed as "unequitable or unconscientious bargains" which are those that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[14] The doctrine of unconscionability began to develop from early English equity cases like *Berney* and *Chesterfield*. Whereas the doctrine of *laesio enormis* often provides a bright-line, half-the-price rule, the doctrine of unconscionability provides a much more flexible standard, based in equity, which is better suited to meet the changing needs of individual factual circumstances.

The doctrine of unconscionability was carried across the pond to early American colonial and state courts. In 1730, the General Court of Virginia declared in *Graves v. Boyd* that courts will not enforce "unconscionable Bargains" and that "Now if it be a Sin and a Man in Conscience ought not to Insist on an unreasonable Bargain; no Court of Conscience will Decree such a Bargain to be Executed."[15] In 1787, the Connecticut Superior Court held in *Lankton v. Scott* that when a note was unconscionably and unduly attained, a decree declaring the note void and null is appropriate,[16] and in 1795 this same court deemed the sale of a property worth an estimated 60 pounds for 300 pounds to be unconscionable.[17] In *Whipple v. McClure* the Connecticut Superior

[4] Van den Bergh H., *The long life of laesio enormis*, SERIE: IURISPRUDENTIA 4 (Studia Universitatis Babes-Bolyai, 2012).
[5] Berney v. Pitt, 2 Vern 14, 15 (1686).
[6] *Id.* at 14–15.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Earl of Chesterfield et al. v. Janssen, 2 Ves. Sen. 125 (1750).
[12] *Id.* at 156.
[13] *Id.* at 129.
[14] *Id.* at 156.
[15] Graves v. Boyd, 1 Va. Colonial Dec. R45 (1730).
[16] Lankton v. Scott, 1 Kirby 356, 358-359 (Superior Court of Connecticut 1787).
[17] Whipple v. McClure, 2 Root 216, 217 (Superior Court of Connecticut 1795).

Court took into account, not only the disparity between contract and true price, but also the "debility of intellects" spurring from the victim's limited capacities[18] when declaring the sale unconscionable. In the 1801 case, *Beall v. Prather*, the Court of Appeals of Maryland, enforced a contract which it deemed fair at the time it was created, and that no "subsequent change of circumstance will alter the case,"[19] reserving, however, that a "court of equity is not bound to decree a specific execution of articles which appear. . .*unjust* or *unconscionable*. . ."[20] In 1815, the Supreme Judicial Court of Massachusetts held in *Baxter v. Wales* that an agreement to hire cows for six dollars a year per cow was "unconscionable".[21] The *Baxter* court explicitly acknowledged that courts should render reasonable damages and are not bound by the damages terms of the contract (when courts deem contracts unconscionable).[22] The doctrine of unconscionability was recognized early in American jurisprudence across the colonies and then the states.

By the late 1800s, the Supreme Court of the United States expressly recognized the doctrine of unconscionability. In its 1870 decision, the Supreme Court held that "[i]f a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to."[23] Moreover, in 1889, the Supreme Court not only acknowledged but discussed the doctrine of unconscionability in *Hume v. United States*.[24] *Hume* involved a contract for shucks; the evidence showed that a mistake was made in the contract drafting, setting the price for shucks much too high.[25] The appeal to the Supreme Court came from the Court of Claims which determined that "an agreement to pay $1,200 a ton for shucks, actually worth not more than $35 a ton, is a grossly unconscionable bargain."[26] In considering the appeal from the Court of Claims, Chief Justice Fuller intricately analyzed the types of fraud set forth by Lord Chancellor Hardwicke in *Chesterfield*, and acknowledged the use and necessity of the doctrine of unconscionability.[27] Chief Justice Fuller affirmed the decision of the Court of Claims holding the contract unconscionable, and that the seller was only due the market rate for the shucks.[28] After the Supreme Court's recognition and application of the doctrine of unconscionability, it was continued to be utilized by lower courts across the United States.[29]

The codification of the doctrine of unconscionable contracts is rooted in the 1940s with the drafting of the Uniform Commercial Code (hereinafter, UCC). The drafting of the UCC is often attributed to the tenacious efforts of Karl Llewellyn, but other people, such as Hiram Thomas, also assisted in the process.[30] In the early stages of drafting the UCC, Thomas suggested the "unconscionability" standard be included in the code.[31] Thomas's suggestion was ultimately

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[18] *Id.* at 219.
[19] Beall v. Prather, 1 H. & J. 210, 223 (Court of Appeals of Maryland 1801).
[20] *Id.* at 221 (emphasis in original).
[21] Baxter v. Wales, 12 Mass. 365, 367 (1815).
[22] *Id.*
[23] Scott v. United States, 79 U.S. 443, 445, (1870).
[24] Hume v. United States, 132 U.S. 406 (1889).
[25] *Id.*
[26] *Id.* at 406; *see* also Hume v. United States, 21 Ct.Cl. 328 (1886).
[27] *Id.* at 411.
[28] *Id.*
[29] In 1853, the U.S. Supreme Court also acknowledged that "[a] disposition of property so revolting to common sense and natural affection ought to be looked upon with suspicion." Eyre v. Potter, 56 U.S. 42, 46, (1853).
[30] Allen R Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFF. LAW REV. 359, 380-381 (2001).
[31] *Id.*

accepted when the doctrine of unconscionability was incorporated into UCC §2-302.[32] UCC Article 2, which includes §2-302, has been adopted (often without modifications) into the statutory law of 49 states.[33] As a consequence of the UCC, the doctrine of unconscionability is preserved in the sales law of most states, yet the term "unconscionable" is not fully defined by the UCC.[34] Although not defined, the official comments do lay out the test of unconscionability: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[35] The official comments also note the underlying "principle is one of the prevention of oppression and unfair surprise…and not of disturbance of allocation of risks because of superior bargaining power."[36] Despite these clarifying comments, as a result of the insufficient definition in the UCC, critics claim that there is the potential for judicial abuse of the amorphous unconscionability doctrine and, further, that the UCC proffers insufficient practical guidance to businesspeople who seek to identify proper business conduct when drafting and entering contracts.[37] Critics claim that the doctrine of unconscionability has become an "all-purpose weapon" for resolving problems of contract.[38] As a result, many judges look to the common law to define unconscionability even in the context of statutory sales law.

In the 1960s, courts began citing the adopting state statutes of UCC §2-302 in their opinions. In 1964, *American Home Improvement Co. v. MacIver* cited §2-302, holding a contract invalid because of its unconscionable features.[39] In this case, the New Hampshire Supreme Court held that "Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying $1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction…It has long been the law in this state that contracts may be declared void because unconscionable and oppressive…"[40] Surrounding the citation to §2-302, the court expressly confirmed that the common law doctrine of unconscionability had long been accepted in New Hampshire.[41] Subsequently, in 1965, the District of Columbia Circuit Court explicitly confirmed the applicability of the doctrine of unconscionability in *Williams v. Walker-*

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[32] UCC §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.

[33] Louisiana has not adopted UCC Article 2. California has not adopted §2-302 of Article 2, but has adopted most of Article 2 provisions.

[34] Martin B. Shulkin, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C.L. REV. 367, 367-368 (1968), available at: http://lawdigitalcommons.bc.edu/bclr/vol9/iss2/3 (last visited Aug. 5, 2017).

[35] UCC §2-302, Official Comment 1.

[36] *Id.*

[37] Shulkin, *supra* at 369 (also commenting that some criticize §2-302 because the official comment 2 allows for judicial reformation of unconscionable clauses, and thus altering the agreement of the parties).

[38] John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 UNIV. OF PENN. LAW REV. 931, 931 (1969).

[39] American Home Improvement Co. v. MacIverv, 105 N.H. 435 (1964). *See also* Martin B. Shulkin, *Unconscionability—The Code, the Court and the Consumer*, 9 B.C.L. REV. 367, 369 (1968).

[40] *Id.* at 439.

[41] *Id.*

Thompson Furniture Co.[42] The contracts in *Williams*, however, arose before the legislature adopted §2-302 but the court nevertheless pronounced several guidelines for unconscionability determinations.[43] These include considering (1) whether there was a meaningful choice or if meaningful choice was absent due to unequal bargaining power; (2) the manner by which the parties entered the contract, including whether the parties had a reasonable opportunity to understand it; and (3) if the terms of the contract were so grossly unfair so as to require enforcement be withheld.[44] In 1966, the principles enunciated in *Williams* were applied by a New York Supreme Court in *Application of State of New York v. ITM, Inc.*[45] Then in 1969, a New York Supreme Court applied §2-302 to invalidate a contract in *Jones v. Star Credit Corp.*[46] In *Jones*, the plaintiffs, husband and wife, were welfare recipients who contracted to purchase a freezer from a salesman, inclusive of all fees, insurances, and taxes, for the amount of $1234.80.[47] The evidence showed the freezer was worth only approximately $300.[48] In deeming this contract unconscionable, the court stated that "[t]here was a time when the shield of *caveat emptor* would protect the most unscrupulous in the marketplace –a time when the law, in granting parties unbridled latitude to make their own contracts, allowed exploitive and callous practices which shocked the conscience of both legislative bodies and the courts," but that time has now passed, and the doctrine of unconscionability protects victims of such abuses.[49] Decisions citing §2-302 continued as the doctrine of unconscionability evolved through judicial decisions over the subsequent decades.

Since 1964, courts have rendered many controversial decisions involving the doctrine of unconscionability. The doctrine has been used (or attempted to be used) in a variety of contexts including real estate transactions,[50] exculpatory clauses,[51] entertainment contracts,[52] arbitration clauses and agreements,[53] waivers of class action lawsuits,[54] matrimonial agreements (such as

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[42] Williams v. Walker-Thompson Furniture Co., 350 F.2d 445 (1965).
[43] *Id.* at 448-449.
[44] *Id.* at 449-450.
[45] Application of State of New York v. ITM, Inc., 2 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966).
[46] Jones v. Star Credit Corp., 59 Misc. 2d 189; 298 N.Y.S.2d 264 (1969).
[47] *Id.* at 265.
[48] *Id.*
[49] *Id.*
[50] Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555 (2002) (using unconscionability in a real estate transaction).
[51] *See, e.g.*, Trudy Nobles Sargent, *Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts*, 35 HASTINGS L.J. 161 (1983); James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011 (2006).
[52] *See generally* Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 NYU J. INTELL. PROP. & ENT. L. 106, 121-122 (2013).
[53] *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); *Franchisee's Unconscionability Claims in Court's Hands*, 62 DISP. RESOL. J. 5 (February-April 2007); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 463 (2011); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Gerald M. Levine, *Challenging Arbitration Agreements for Unconscionability: An Uphill Battle for Employees and Others*, 65 DISP. RESOL. J. 24 (November 2010-January 2011); William Allen Nelson II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 U. PA. J. BUS. L. 573 (2015).
[54] *See, e.g.*, Megan Barnett, *There is Still Hope for the Little Guy: Unconscionability is Still a Defense Against Arbitration Clauses Despite AT&T Mobility v. Concepcion*, 33 WHITTIER L. REV. 651 (Spring 2012); *See also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011); Steven G. Pearl, *The Conscience of Arbitration*, 37 L.A. LAW. 34 (April 2014); Jerett Yan, *A Lunatic's Guide to Suing for $30: Class Action Arbitration, The Federal Arbitration Act and Unconscionability after AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551 (2011).

prenuptial agreements),[55] sports liability waivers,[56] internet and software agreements,[57] lease contracts,[58] warranty disclaimers,[59] contracts containing excessive prices,[60] mandatory mediation clauses,[61] and music and recording contracts.[62] It has even been argued that corporate executive compensation should be checked by an unconscionability standard,[63] and that hospital-patient agreements are sometimes unconscionable.[64] The breadth of the application of the doctrine of unconscionability corresponds to the scope of situations wherein individuals are victimized by inequitable contracting processes or contract terms.

State and federal courts adopt a variety of definitions of unconscionability and approaches to applying the doctrine of unconscionability.[65] Some courts define an unconscionable contract

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[55] *See, e.g.*, Paul Bennett Marrow & Kimberly S. Thomsen, *Drafting Matrimonial Agreements Requires Consideration of Possible Unconscionability Issues*, 76 N.Y. ST. B.J. 26 (March/April 2004); Lou McPhail, *Divorce—Alimony, Allowance, and Disposition of Property – Abuse of Discretion – The Unconscionable Stipulated Divorce Agreement and Rule 60(B)(VI): What about the Children? Crawford v. Crawford, 529 N.W.2d 833 (N.D. 1994*), 72 N.D. L. REV. 1099 (1996);

[56] *See, e.g.*, Douglas Leslie, *Sports Liability Waivers and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L. 341 (2004).

[57] *See, e.g.*, Paul J. Morrow, *Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) On the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 U. PITT. J. TECH. L. & POL'Y 7 (Spring 2011); Cory S. Winter, *The Rap on ClickWrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249 (2008); Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in ClickWrap Dispute Resolution Clauses and a Proposal for Improving the Quality of these Online Consumer Products*, 26 OHIO ST. J. ON DISP. RESOL. 119 (2011).

[58] *See generally* Charles A. Heckman, *Unconscionability and Personal Property Leasing Law in Connecticut*, 18 QLR 203 (1998); Michael J. Herbert, *Unconscionability Under Article 2A*, 21 U. TOL. L. REV. 715 (1990).

[59] *See generally* John A. Menchaca II, *Unconscionability and As Is Disclaimers in Sales Contracts*, 16 OKLA. CITY U. L. REV. 345 (1991).

[60] *See, e.g.*, Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS.L.REV. 1819 (1994); Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971); Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78 (Dist. Ct. 1970); Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (Super. Ct. Law Div. 1968), *aff'd in part*, 108 N.J. Super. 129, 260 A.2d 244 (Super. Ct. App. Div. 1970); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (Sup. Ct. 1966); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 39, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd as to damages*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. Term 1967); Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. 1971); Morris v. Capital Furniture & Appliance Co., 280 A.2d 775 (D.C. 1971); see also Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940 (1986).

[61] *See, e.g.*, Jennifer M. Ralph, *Unconscionable Mediation Clauses: Garrett v. Hooters-Toledo*, 10 HARV. NEGOT. L. REV. 383 (2005); Paul Bennett Marrow, *Coming to New York? An Unconscionable Mediation Agreement*, 78 N.Y. ST. B.J. 40 (2006).

[62] *See, e.g.*, Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739 (2003); Ian Brereton, *The Beginning of the New Age?: The Unconscionability of the "360-Degree" Deal*, 27 CARDOZO ARTS & ENT. L.J. 167 (2009); Emily Burrows, *Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clauses*, 30 REV. LITIG. 101 (2010); Phillip W. Hall Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT L.J. 189 (2002).

[63] *See, e.g.*, Lawrence A. Cunningham, *A New Legal Theory To Test Executive Pay: Contractual Unconscionability*, 96 IOWA L. REV. 1177 (2011); and Kent Greenfield, *Unconscionability and Consent in Corporate Law (A Comment on Cunningham)*, 96 IOWA L. REV. BULL. 92 (2011).

[64] *See generally* George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101 (2005-2006).

[65] *See, e.g.*, THE RESTATEMENT (SECOND) OF CONTRACTS, § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.")

as "one abhorrent to good morals and conscience..."[66] Other courts define an unconscionable contract as requiring "an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party."[67] Generally, courts divide the concept of "unconscionability" into substantive and procedural unconscionability; thus including both aspects of the previous definition within a dichotomous definition of unconscionability.[68] Substantive unconscionability generally relates to the fairness of the contract terms. A contract is substantively unconscionable when a clause or term in the contract is "alleged to be one-sided or overly harsh" such as contracts that contain terms that are "shocking to the conscience, monstrously harsh, and exceedingly callous."[69] Procedural unconscionability relates to the fairness of the process of contract formation.[70] Contracts are procedurally unconscionable when, "impropriety during the process of forming a contract" results in a party not having a "meaningful choice" when entering into the contract.[71] In deciphering whether a contract is substantively and procedurally unconscionable, some courts adopt the "sliding scale" approach (a sliding scale is used so that the more substantively oppressive a contract term, the less of a need there is for procedural unconscionability, and *vice versa).*[72] The evolving and various applications of the doctrine of unconscionability aside, this essay next discusses how the pragmatic implementation of the doctrine of unconscionability is creating a judicially construed business ethic, albeit one not consistent across the nation.[73] The essay then explains how business ethics theory may be utilized to inform the doctrine of unconscionability.

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[66] Driggers v. Campbell 247 Ga.App. 300, 303 (2000); F.N. Roberts Pexst Control Co. v. McDonald, 132 Ga.App. 257, 260(3) (1974). *See* also Ahern v. Knecht, 202 Ill.App.3d 709, 150 Ill.Dec. 660, 563 N.E.2d 787, 792 (1990) ("[g]ross excessiveness of price alone can make an agreement unconscionable"); Frostifresh Corp. v. Reynoso, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist.Ct.1966), *rev'd as to damages only*, 54 Misc.2d 119, 281 N.Y.S.2d 964 (App.Div.1967); Toker v. Perl, supra, 103 N.J.Super. 500, 247 A.2d 701; Toker v. Westerman, 113 N.J.Super. 452, 274 A.2d 78 (Dist.Ct.1970).; Hall v. Wingate, 159 Ga. 630, 667 (126 SE 796) (1924) (internal quotations and citations omitted); Thomas v. T & T Straw, Inc., 254 Ga. App. 194, 561 S.E.2d 495, 497 (Ga. App. 2002).

[67] Collins v. Click Camera & Video, Inc. 86 Ohio App.3d 826, 834 (1993); Wilmer v. Exxon Corp., 495 Pa. 540, 551 (1981).

[68] *See, e.g.*, *Nelson*, 73 Wash. App. at 768; Patterson v. Walker–Thomas Furniture, 277 A.2d 111 (D.C.1971); Mobile Am. Corp. v. Howard, 307 So.2d 507, 508 (Fla.Dist.Ct.App.1975); K.D. v. Education Testing Service, 87 Misc.2d 657, 386 N.Y.S.2d 747 (Sup.Ct.1976); Truta v. Avis Rent A Car System, Inc., 193 Cal.App.3d 802, 238 Cal.Rptr. 806 (1987); Adams v. American Cyanamid Co., 1 Neb.App. 337, 498 N.W.2d 577 (1992).

[69] *Nelson*, 127 Wash.2d at 131 (internal citations and quotations omitted).

[70] Sitogum Holdings, Inc. v. Ropes, 352 N.J.Super. 555, n. 13 (2002) ("There do not appear to be any decisions where procedural unconscionability was present but not substantive unconscionability. This should not come as any surprise. No matter how the contract came about, it would be unlikely that a party would complain—or a court would listen—if the contract was otherwise fair or reasonable. It would be much like arguing about negligent conduct which failed to result in any damage").

[71] *Nelson*, 127 Wash.2d at 131 (internal citations and quotations omitted).

[72] *Sitogum Holdings, Inc.*, 352 N.J.Super. 555 (2002); *see* also Funding Systems Leas. Corp. v. King Louie Intern., 597 S.W.2d 624, 634 (Mo.Ct.App.1979) ("if there exists gross procedural unconscionability then not much be needed by way of substantive unconscionability, and that the same 'sliding scale' be applied if there be great substantive unconscionability but little procedural unconscionability"); Tacoma Boatbuilding, Inc. v. Delta Fishing Co., 28 UCC Rep.Serv. 26, 1980 WL 98403 n. 20 (W.D.Wash.1980) ("The substantive/procedural analysis is more of a sliding scale than a true dichotomy"); and Hahn v. Massage Envy Franchising, LLC, No. 12CV153 DMS BGS, 2014 WL 5099373, at *7 (S.D. Cal. Apr. 15, 2014) ("A sliding scale is applied, so that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to find it unenforceable, and *vice versa.")*

[73] Kugler v. Romain, 58 N.J. 522, 543, 279 A.2d 640, 651 (1971) ("The intent of the [unconscionability] clause is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion. Viewed in that sense, freedom to contract survives, but marketers of consumer goods are

III. UNCONSCIONABILITY: A JUDICIALLY CONSTRUED BUSINESS ETHIC

The doctrine of unconscionability is an inherently moral doctrine.[74] It allows judges to invalidate morally repugnant contracts. The doctrine of unconscionability is necessary to ensure a minimal standard of decency within the unique factual circumstances of contractual and business relationships. It is utilized by judges to invalidate otherwise valid contracts that violate the ethical norms of society. The doctrine of unconscionability is regularly used to enforce the norm that the vulnerable should not be exploited. In unconscionability's early enunciation in English courts of equity, the doctrine was used to protect the youth from being taken advantage of by usurious agreements. Since that time, it has regularly been used to protect the youth along with the ignorant, the poor, the elderly, the grieving, and others exploited by cunning businesspeople attempting to maximize profits. The doctrine of unconscionability is also frequently used to promote the ethical norm of equality. It is regularly utilized to invalidate otherwise valid contracts that were created pursuant to an inequality of bargaining power. The rest of this section discusses judicial applications of unconscionability involving the enforcement of these ethical norms.

A. Protecting the Vulnerable and Unconscionability

The doctrine of unconscionability is regularly used as a vehicle for protecting vulnerable contractual parties from exploitation. It has long and recurrently been held that a core purpose of unconscionability is to protect the vulnerable. The vulnerability of the victims is occasionally cited as not merely the purpose, but in some cases, as a prerequisite or element of unconscionability. Although classes of particularly vulnerable individuals may be identified, each case brings with it unique facts that describe why the victims of unconscionable contracting are deemed vulnerable. Classes of the vulnerable people include, among others, those of lessened or weakened education, age, intelligence, wealth, business experience, and those subject to a position of trust or influence.[75]

The client in an attorney-client relationship is a class of individuals that is particularly vulnerable because clients are subject to a position of trust and influence.[76] *In the Matter of Cassel*[77] the New York Supreme Court considered the vulnerability of an elderly woman who was a client of an attorney.[78] *Cassel* involved an attorney who was charged with a number of violations of the New York rules of professional conduct.[79] Some of these violations involved a conflict-of-interest spurring from representing his elderly client, Eliane Veve, in a dubious transaction.[80] Although Cassel represented Eliane in many transactions going back to 1978 including assisting with settling her husband's estate and a wrongful death action, in May of 1983, when Eliane was

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brought to an awareness that the restraint of unconscionability is always hovering over their operations and that courts will employ it to balance the interests of the consumer public and those of the sellers").

[74] Turner v. Ferguson, 149 F.3d 821, 825 (1998) (referring to the "moral issue of unconscionability"); F.N. Roberts Pest Control Co. v. McDonald, 208 S.E.2d 13 (Ga. App. 1974) ("An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another") (quotations omitted).

[75] Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976). See also Larry DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FL. ST. UNIV. L. REV. 1067, 1075-1080 (2006) (discussing the factors of procedural and substantive unconscionability).

[76] Keith William Diener, *A Battle for Reason: The Unconscionable Attorney-Client Fee Agreement*, 2016 THE J. OF THE PROF. LAW. 129 (2016).

[77] Matter of Cassel, 154 A.D.2d 876, 547 N.Y.S.2d 427 (1989).

[78] *Id.*

[79] *Id.*

[80] *Id.*

84 years old, approximately two weeks before she died, Cassel did prepare a deed to transfer Eliane's residence to Cassel and his wife.[81] Eliane signed the deed and transferred her residence for no consideration, and without independent counsel.[82] When questioned about this dubious transaction, Cassel said that Eliane owed his wife approximately $40,000 for running errands for her and taking her to doctor's appointments for a five-year period.[83] Mrs. Cassel claimed she and Eliane agreed to a wage of $8 per hour and that after five years, Eliane owed her $40,000, and thus signed the house over to her.[84] The court determined that "such an arrangement, if in fact it existed, would be unconscionable given [Eliane] Veve's vulnerable condition and meager assets."[85] The vulnerability of Eliane, and the circumstances surrounding the transfer of the property only two weeks before her death did play a significant role in the court's deeming this contract unconscionable. Cassel was ultimately suspended from the practice of law for a period exceeding five years.[86] In *Cassel*, the client was deemed particularly vulnerable not only because of the intimate relationships with her attorney but also because of her (elderly) age and the unique circumstances surrounding her unconscionable contract. From its very inception, the doctrine of unconscionable contracts has protected the young,[87] and it has recurrently been used to protect the elderly (particularly when ill or grieving).[88]

Courts have recurrently used the doctrine of unconscionability to protect the elderly residents of nursing homes.[89] The New Mexico Court of Appeals identified the vulnerability of nursing home residents and their families as a key reason why contracts with nursing homes should be considered special, and treated different than other commercial contracts.[90] The court

[81] *Id.* at 877.
[82] *Id.*
[83] *Id.* at 879.
[84] *Id.*
[85] *Id.* at 879 (the court also mentioned that Cassel sold the property for $65,000 only months after acquiring it).
[86] *Id.* (suspending Cassel initially for five years); *see* also Matter of Cassel, 220 A.D.2d 925, 925-26, 632 N.Y.S.2d 984, 985 (1995) ("We conclude that petitioner has not shown by clear and convincing evidence that he possesses the character and general fitness to resume the practice of law. . . .We especially note the circumstances of his involvement with his former client Elaine Veve which, in part, resulted in his suspension from practice") (internal citations omitted).
[87] Berney v. Pitt, 2 Vern 14 (1686) (holding a contract unconscionable, in part, because of the young age of one party). *See* also State v. Vernor, 191 P. 729 (1920) (holding an attorney-client fee agreement unconscionable, in part, because of the vulnerability of a young girl).
[88] Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555 (2002) (the New Jersey Superior Court held an option agreement entered into by a grieving, eighty-one year old widow as unconscionable).
[89] Clark v. Renaissance W., LLC, 232 Ariz. 510, 514, 307 P.3d 77, 81 (Ct. App. 2013) ("a vulnerable patient who was retired with a fixed income, and little savings, who entered into an agreement with an arbitration provision with a nursing facility, successfully had arbitration provision deemed unconscionable because he would not be able to afford to arbitrate"); Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc., 415 N.J. Super. 272, 299, 1 A.3d 806, 822 (App. Div. 2010) ("When considered together, the restrictions on discovery, limits on compensatory damages, and outright prohibition of punitive damages form an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers. . . .We thus hold that these provisions in the arbitration clause of the residency agreement are void and unenforceable under the doctrine of substantive unconscionability"); Strausberg v. Laurel Healthcare Providers, LLC, 2012-NMCA-006, 269 P.3d 914, 920 (N.M. Ct. App. 2011*), rev'd, and remanded*, 2013-NMSC-032, 304 P.3d 409 (N.M. 2014), *on remand*, 2013 N.M. App. Unpub. LEXIS 292 (N.M. Ct. App. Sept. 11, 2013); Brown ex rel. Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 724 S.E.2d 250 (2011) *cert. granted, judgment vacated sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) ("The Supreme Court held that West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes was categorical rule which prohibited arbitration of particular type of claim, which was preempted by the Federal Arbitration Act (FAA)").
[90] *Strausberg*, 269 P.3d at 920.

noted that when individuals are being admitted to a nursing home, the issues of health are often critical, and so severe that "such individuals are often at their most vulnerable, emotionally or physically, or both."[91] Moreover, due to "illness, incapacitation, or physical or mental impairment, people being admitted to a nursing home are usually quite vulnerable...."[92] This rationale rooted in protecting the vulnerable nursing home residents, and even their families, was used to challenge arbitration agreements with nursing homes.

Although protecting the vulnerable from being taken advantage of by grossly unfair contract terms is at the heart of unconscionability, and many courts consider the vulnerability of the victims in their unconscionability analyses, in some cases, a lack of vulnerability has prevented findings of unconscionability.[93] The Seventh Circuit is particularly elucidating with its distinction between unsophisticated parties ("vulnerable consumers or helpless workers") and sophisticated parties ("business people") as determinative in finding a contract unconscionable.[94] According to the Seventh Circuit, the doctrine is meant to apply to those vulnerable and helpless classes.[95] Other classes of individuals that are normally considered "the poorest and most vulnerable members of society" include "single parents, pensioners, persons on social assistance, the working poor, [and] the chronically underemployed."[96] Some courts consider the vulnerability of parties as indicative of a lack of choice. These courts examine, *inter alia*, the "age, education, intelligence, business acumen and experience" of the parties when analyzing whether there was a choice and a meeting of the minds.[97] The moral imperative of protecting the vulnerable is promoted through *ad hoc* applications of the doctrine of unconscionability in state and federal courts.[98] Promoting the equality of parties is also an often cited moral imperative underpinning the doctrine of unconscionability.

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[91] *Id.* at 920.

[92] *Id.*

[93] Best Vendors Co. v. Air Express, Inc., No. CIV. 00-2224 JRTFLN, 2002 WL 31163039, at *7 (D. Minn. Sept. 23, 2002); Siemer v. Quizno's Franchise Co. LLC, No. 07 C 2170, 2008 WL 904874, at *7, n. 2 (N.D. Ill. Mar. 31, 2008); We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 843 (7th Cir.1999); Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir.1992); Vaeda Indus., Inc. v. Jason, Inc., No. 3:07-CV-348, 2008 WL 687304, at *5 (N.D. Ind. Mar. 7, 2008); Reno v. SunTrust, Inc., No. E2006-01641-COA-R3CV, 2007 WL 907256, at *6 (Tenn. Ct. App. Mar. 26, 2007) (denied finding arbitration agreement unconscionable, in part, because the plaintiffs were not in a vulnerable position relative to defendants). Cf. Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731 (Tenn.Ct.App.2003); Raiteri v. NHC Healthcare/Knoxville, Inc., No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn.Ct.App.E.S., Dec. 30, 2003).

[94] Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir.1992).

[95] *Id.*

[96] Baillie v. Processing Sols., LLC, No. A125167, 2010 WL 2127000, at *7 (Cal. Ct. App. May 27, 2010) (quoting the complaint in this action).

[97] Nahra v. Honeywell, Inc., 892 F. Supp. 962, 970 (N.D. Ohio 1995) (quoting Johnson v. Mobil Oil Corp., 415 F.Supp. 264, 268 (E.D.Mich.1976)).

[98] Bennett v. Bailey, 597 S.W.2d 532, 535 (Tex.Civ.App. 1980) ("holding a dance studio liable for an unconscionable act in its inducement of a vulnerable widow to pay $30,000 for dance lessons"); Abbott Labs., Inc. (Ross Labs. Div.) v. Segura, 907 S.W.2d 503, 509-10 (Tex. 1995); Nahra v. Honeywell, Inc., 892 F. Supp. 962, 970 (N.D. Ohio 1995) ("The doctrine of unconscionability, like the public policy exception to limitation clauses, protects vulnerable parties from undue coercion."); In re Elkins–Dell Manufacturing Co., 253 F.Supp. 864, 871 (E.D.Pa.1966) (citing 3 CORBIN, CONTRACTS § 559, at pp. 270–71 (1960)) (one species of unconscionability requires "a finding that the position of one was so vulnerable as to make him the victim of a grossly unequal bargain"); Peoples Mortgage Co. v. Fed. Nat. Mortgage Ass'n, 856 F. Supp. 910, 927 (E.D. Pa. 1994); Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S.W. 803, 811 (1917) (the "arrangement...to exploit the necessities of the poor by unconscionable contracts...therefore were usurious and void"); Voicestream Wireless Corp. v. U.S. Communications, Inc., 912 So.2d 34 (Fla. 4th DCA 2005) (arbitration agreement not procedurally unconscionable where part of commercial transaction between experienced business persons and no evidence party was "vulnerable"); Reuter v. Davis, No. 502001CA001164XXXXMB, 2006 WL 3743016,

B. Equality and Unconscionability

The notion of equality is itself an amorphous and contextual conception, the definition of which is tailored to the specific needs of a given time. The ironic phallogocentrism evident in the Declaration's assertion that "all men are created equal" is reminiscent of a time when the second sex remained subordinated to the whims of the masculine.[99] Beyond the Declaration, equality has played an essential role in the development of the jurisprudence of the U.S. since as early as 1868 when the Fourteenth Amendment to the Constitution came into effect, espousing that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."[100] This notion of "equality," for over a half century, meant that "separate but equal" facilities for minorities were Constitutional.[101] Yet, the meaning of equality changed over time towards a more absolutist, yet less convenient meaning for the generations imbued with bigotry.[102] Within the context of unconscionability, far from an absolute equality is required, but rather, when the inequality reaches beyond normal transactional differences, the moral norm of equality is utilized to undermine improperly advantageous business arrangements. It is exactly because gross inequalities continue to exist within contemporary business and societal organizations that the doctrine of unconscionability necessitates the avoidance of certain contractual provisions.

Although the inequality in bargaining power does not *ipso facto* equate to unconscionability, it is one principle of morality that regularly influences such determinations. It is the forced adherence to an inequitable contractual diktat that makes inequality of the oppressive kind repugnant. As the official comment to UCC §2-302 provides, unconscionability is based in a principle "of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power."[103] Contracting becomes an instrument of oppression when inequality crosses beyond the differentiating characteristics of

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at *3 (Fla. Cir. Ct. Dec. 12, 2006); Higgins v. Superior Court, 140 Cal.App.4th 1238, 1252-1253, 45 Cal.Rptr.3d 293 (2006) ("finding procedural unconscionability where the arbitration clause was buried in a document of 24 single-spaced pages plus attachments; there was nothing to draw attention to the clause; and plaintiffs were young, unsophisticated, and emotionally vulnerable"); Phelps v. U.S. Metals Grp., No. 1:09-CV-1039, 2010 WL 816609, at *16 (N.D. Ohio Mar. 4, 2010); McGuire v. CoolBrands Smoothies Franchise, LLC, No. H030202, 2007 WL 2381545, at *14 (Cal. Ct. App. Aug. 22, 2007) ("We conclude that in the context of adhesive contract involving franchisees, a vulnerable group widely recognized as needing protection an inherently one-sided provision barring class or consolidated proceedings, whether in arbitration or in the courts, is unconscionable under California law in the absence of evidence establishing otherwise. This state-law principle is not predicated on the fact that a contract to arbitrate is at issue."); Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 585, 61 Cal. Rptr. 3d 344, 355-56 (2007); Sosa v. Paulos, 924 P.2d 357, 360 (Utah 1996) (finding Sosa in a nervous, anxious, and vulnerable position, and thus finding unconscionability); Feacher v. Hanley, 2014 U.S. Dist. LEXIS 4526, 15 (2014) (mentioning vulnerability as evidence of substantive unconscionability); Assocs. Home Equity Servs. v. Troup, 343 N.J. Super. 254, 278, 778 A.2d 529 (App. Div. 2001) (quoting Kugler, 58 N.J. at 544) ("[T]he need for application of that standard 'is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes'"); Waugh v. Nevada State Bd. of Cosmetology, 36 F. Supp. 3d 991, 1019 (D. Nev. 2014) (considering the vulnerability of students); Joule, Inc. v. Simmons, No. SUCV200904929A, 2011 WL 7090714, at *5 (Mass. Super. Dec. 5, 2011) (citing Waters v. Min., 412 Mass. at 68–69, 587 N.E.2d 231 ("trial court's finding of unconscionability upheld where naive and vulnerable plaintiff was inveigled by agent of defendant to enter contract to sell her rights under annuity for one-fourth of its present value"));
Garrett v. Fite, 2009 Ark. App. 869, 3 (2009) (finding of unconscionability because of inadequate consideration coupled with vulnerability spurring from depression, sickness, and family conflict).

[99] DECLARATION OF INDEPENDENCE, ¶.2 (U.S. 1776).

[100] U.S. CONST. amend. XIV, §2.

[101] Plessy v. Ferguson, 163 U.S. 537 (1896).

[102] *See, e.g.*, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); and Loving v. Virginia, 388 U.S. 1 (1967).

[103] UCC §2-302, official comment 1.

individuals and companies transacting in the marketplace and into the subjugating and repressive arena of contractual abuse. Indeed, unconscionability "rarely exists in a commercial setting involving parties of equal bargaining power,"[104] because utilizing the freedoms of contract granted for pernicious purposes is antithetical to the norms of the marketplace. When fairly positioned savvy businesspeople are engaging in commercial transactions, rarely will courts use unconscionability to avoid otherwise valid contracts even if the contract is arguably unfair.[105] That is, because businesspeople have a greater understanding of the risks they assume when engaging in such contracts, thus placing them on a more equal footing when negotiating and executing contractual provisions.

Many courts consider the principle of equality in contract analyses. The language comes in a variety of guises, including consideration of "the parties' relative bargaining position,"[106] the parties' inequality of bargaining power,[107] and the "imbalance of power"[108] relevant to the circumstances. Some courts describe unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."[109] Despite the various linguistic formulations, the principle of equality remains the underpinning commonality in each standard. Across jurisdictions, ethics and particularly the principles of equality and protecting the vulnerable are frequently considered in unconscionability analyses.[110] Both of these principles are commonly accepted principles of justice and morality.[111] The next section explains how business ethics theory may further inform a more rigid understanding of unconscionability.

IV. USING BUSINESS ETHICS THEORY TO INFORM THE DOCTRINE OF UNCONSCIONABILITY

The field of business ethics has exploded since the 1970s with several camps of commentators supporting varied views of ethics in business. The major factions include those

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[104] Dry Dock, L.L.C. v. Godfrey Conveyor Co., 717 F. Supp. 2d 825, 834 (W.D. Wis. 2010).
[105] *Id.*
[106] Rudbart v. North Jersey District Water Supply Comm'n, 127 N.J. 344, 356, 605 A.2d 681, *cert. denied*, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992).
[107] Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195, 204 (3rd Cir.1995); Marbro, Inc. v. Borough of Tinton Falls, 297 N.J. Super. 411, 416-18, 688 A.2d 159 (Law Div.1996).
[108] Hahn v. Massage Envy Franchising, LLC, No. 12CV153 DMS BGS, 2014 WL 5100220, at *7 (S.D. Cal. Sept. 25, 2014)
[109] Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007); *see* also Gainesville Health Care Ctr,, Inc. v. Weston, 857 So. 2d 278, 284 (Fla. Dist. Ct. App. 2003) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party") (quotations omitted); Wisconsin Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 165 (Wis. 2006) ("Unconscionability has often been described as the absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party"); and F.N. Roberts Pest Control Co. v. McDonald, 208 S.E.2d 13 (Ga. App. 1974) ("An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties takes a fraudulent advantage of another") (quotations omitted).
[110] *See* also Romero v. Allstate Insurance Co., 2016 U.S. Dist. LEXIS 9968, 24-26 (2016); Novak v. Tucows, Inc., No. 06CV1909(JFB)(ARL), 2007 WL 922306, at *12 (E.D.N.Y. Mar. 26, 2007) *aff'd*, 330 F. App'x 204 (2d Cir. 2009); Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 541 A.2d 1063 (1988); S.M. Wilson & Co. v. Smith Int'l, Inc., 587 F.2d 1363 (9th Cir. 1978); Royal Indemnity Co. v. Westinghouse Elec. Corp., 385 F.Supp. 520 (S.D.N.Y.1974) (applying New Jersey law); Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903 (Sup.Ct.1976); Abel Holding Co., Inc. v. American Dist. Tel. Co., 138 N.J. Super. 137 (Law Div.1975), aff'd, 147 N.J. Super. 263 (App.Div.1977); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403-404 (1960); and Allen v. Prudential Property and Casualty Insurance Co., 839 P.2d 798, 815 (1992).
[111] Keith William Diener & Shazia Rehman Kahn, *Thwarting the Structural and Individualized Issues of Mediation: The Formalized Reflective Approach*, 26 THE S. LAW J. 137, 139-142 (2016); TIM FORT, THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS, AND ASPIRATIONS 128-30 (2015); DAVID SCHMIDTZ, THE ELEMENTS OF JUSTICE (2005).

that support stockholder theory, stakeholder theory, the social contract, and virtue ethics.[112] Although these theorists do not always marry themselves to a single theory, some commentators do view these approaches as mutually exclusive.[113] Other commentators contend that some renditions of each theory may be compatible with others.[114] Each theory of business ethics has something of value to add to the discussion of what constitutes an unconscionable contract. In this way, the field of business ethics may aid the judiciary and practitioners by more rigidly refining the boundaries of the amorphous doctrine of unconscionability. The rest of this section discusses each theory in turn and explains how each may influence determinations of unconscionability. The next section utilizes these theories to develop a pluralistic approach to unconscionability.

C. Stockholder Theory

The stockholder theory, sometimes referred to as shareholder theory, provides a framework by which ethical restraints upon contracting may be perceived. The stockholder theory itself is limited to corporations that separate ownership from control of the company, typically through delegations of the power to make the day-to-day decisions of the firm to managers and executives.[115] For this reason, stockholder theory is most often utilized within publicly traded corporations (which contain stockholders who presumptively own the corporation and managers who perform the corporation's daily operations).[116] Stockholder theory is one of the most misunderstood and misinterpreted theories in contemporary business because the restrictions inherent in its central mandates are often overlooked by practitioners.[117] Among those central mandates is the notion of giving primacy, or first consideration, to the interests of stockholders.[118] In most situations, it is presumed that stockholder interests involve increasing the amount of wealth of the stockholders by increasing company profits.[119] Among the often overlooked inherent restrictions to stockholder primacy are the requirements that profits be maximized only when doing so accords with legal and ethical requirements.[120] Although originally intended to apply to corporate structures, theories of profit motivations have followed in the progeny of classical stockholder theory, which contend that businesses should seek profits

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[112] Each of these theories is a "normative" theory of business ethics in the philosophical sense, wherein each asserts a "should" or an "ought." Although, at times, stockholder and stakeholder theory may be considered theories of corporate governance insofar as they are often infused with prescriptions regarding how managers should govern their organizations, they are regularly also considered normative theories of business ethics. *See generally* John Hasnas, *The Normative Theories of Business Ethics: A Guide for the Perplexed*, 8 BUS. ETHICS Q. 19 (1998); and TIM FORT, THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS, AND ASPIRATIONS (2015).

[113] See e.g., John Hasnas, *The Normative Theories of Business Ethics: A Guide for the Perplexed*, 8 BUS. ETHICS Q. 19, 22 (1998).

[114] *See, e.g.*, THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 235–62 (1999).

[115] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

[116] Keith William Diener, *Shareholder Primacy*, in THE ENCYCLOPEDIA OF BUSINESS ETHICS AND SOCIETY (2d ed., Robert Kolb ed., forthcoming 2018).

[117] *See, e.g.*, Keith William Diener, *The Restricted Nature of the Profit Motive: Perspectives from Law, Business, and Economics*, 30 NOTRE DAME J. OF LAW, ETHICS, & PUB. POL'Y 225 (2016).

[118] *Id.*

[119] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

[120] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970; and Friedrich A. Hayek, *The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run?*, *in* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 300, 301 (Friedrich A. Hayek ed., 1967).

(but typically the profit motive is asserted only within the bounds of legal and ethical restrictions).[121]

Stockholder theory offers insight into the underpinning justifications for the doctrine of unconscionability. The far-reaching public policy of freedom of contract permits significant leeway for those seeking to profit via contracting. Nevertheless, there are limits to permissible contracting, just as there are limits to permissible profit-seeking. One uncontroversial limit to both permissible contracting and profit-seeking is the limitation of legality. In order for a contract to be valid, it must not violate the law. This limit prevents, among other things, purported contracts that violate usury laws, licensing laws, or gambling laws from meeting the requirements of a valid and enforceable contract.[122] In a similar vein, the theoretical limitations to profit seeking, as described in stockholder theory and its progeny, incorporate prohibitions against violating laws in the pursuit of profits. Albeit the remedy for such prohibitions is quite different than the remedy for illegal purported contracts, which are generally deemed void *ab initio* in a court of law, and restitution offered the parties, when appropriate. In the case of profit-seeking that violates the law, the sanctions may indeed be extreme, particularly when harm is caused to consumers pursuant to the illegal transaction.

Insofar as the ethical restrictions upon profit seeking are concerned, stockholder theory remains ominously vague as to what constitutes ethical violations aside from the baseline of prohibiting fraudulent transactions.[123] Like the ethical restrictions upon profit-seeking, unconscionability is contract law's means of placing ethical restrictions upon freedom of contract by limiting the situations by which profits may be pursued pursuant to contractual agreements. The public policy in favor of freedom of contract is immense, but so is the need to protect vulnerable and weak parties from being taken advantage of by means of contracts. In this way, the doctrine of unconscionability provides the process by which stockholder theory's mandate of restricting profit-seeking by ethical precepts is implemented by the judiciary.

The extent of the comparison between the doctrine of unconscionability and stockholder theory is limited, however, due to the limited applicability of stockholder theory to mandate the dictates of the stockholder-manager relationship. Theories of profit motivations that were inspired by stockholder theory (and are applicable beyond the stockholder-manager relationship), do allow the comparison to extend further.[124] Stockholder theory and its progeny do provide a framework that limits the permissible scope of profit-seeking, including profit-seeking via contracting. Next, this essay suggests that stakeholder theory may fill the explanatory gap of stockholder theory.

D. Stakeholder Theory

The central mandate of stakeholder theory is that obligations are owed to all stakeholders, including stockholders. For each decision, the decision maker should attempt to identify stakeholders and determine which stakeholder should be given primacy in a given circumstance. According to stakeholder theory, the stockholders should not in all circumstances be given

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[121] *See, e.g.*, Keith William Diener, *The Restricted Nature of the Profit Motive: Perspectives from Law, Business, and Economics*, 30 NOTRE DAME J. OF LAW, ETHICS, & PUB. POL'Y 225 (2016).

[122] *See, e.g.*, TIM FORT & STEPHEN B. PRESSER, BUSINESS LAW 342 (2015); and Jimerson v. Tetlin Native Corp., 144 P.3d 470 (Alaska 2006).

[123] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970; and Friedrich A. Hayek, *The Corporation in a Democratic Society: In Whose Interest Ought It to and Will It Be Run?*, *in* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 300, 301 (Friedrich A. Hayek ed., 1967).

[124] *See, e.g.*, Keith William Diener, *The Restricted Nature of the Profit Motive: Perspectives from Law, Business, and Economics*, 30 NOTRE DAME J. OF LAW, ETHICS, & PUB. POL'Y 225 (2016).

primacy, but rather, which stakeholder should be given primacy varies and should be determined on an *ad hoc* basis.[125] There is no universally accepted definition of a stakeholder, but one commonly cited definition is that a stakeholder is anyone who is affected by or can affect the business decision at issue, including its consequences.[126] Any viable definition of a stakeholder includes those people and companies one does business with, including those with whom one contracts. Consequently, stakeholder theory informs the doctrine of unconscionability insofar as its primary precept entails that moral obligations are owed to those with whom one contracts.

Although stakeholder theory unquestionably imposes moral obligations on contracting parties, the scope and extent of those obligations are controversial. Some leading stakeholder theorists contend that being in business places enhanced moral obligations upon those doing business, over and above the baseline ethical obligations owed generally to all persons.[127] In other words, one owes one's stakeholders increased moral obligations that are more stringent than the obligations owed to non-stakeholders. In essence, there are two types of obligation owed within this version of stakeholder theory: first, the general moral obligation owed to all mankind, and, second, the specific moral obligation owed within a business relationship.[128] The general moral obligations include abiding by principles, such as those embodied by moral rights and duties, justice, and utilitarianism.[129] The general moral obligations also include those obligations embodied by hypernorms.[130] These general moral obligations remain constant across time and locations, but the specific moral obligations owed uniquely within business relationships are circumstantially variable.

The doctrine of unconscionable contracts may be informed by the two types of obligation suggested by stakeholder theorists. A contract may purportedly be deemed unconscionable when it violates either type of moral obligation: those general obligations applicable to all of humanity, or those specific obligations applicable to people in business relationships. The contours of these obligations has not reached consensus among stakeholder theorists, but there is no need to identify all obligations by type in order for this dichotomy to pose instrumental value to applications of the doctrine of unconscionability. The dichotomy, if accepted, allows one to hold business practitioners morally culpable for certain actions, even is a person outside of business would not be held to the same standard. Assuming there is some business component to all contracting, and there likely is, even in the case of marital contracts, all contracting parties may similarly be held morally culpable for their actions in contracting even if similarly-situated people would not be held morally culpable for similar actions outside of contractual settings. The implications of accepting this dichotomy are vast and open the potential for judicial findings of unconscionability in unique business situations which give rise to breaches of moral obligation that may not manifest also as general obligations in non-business settings.

A close analogy to the enhanced "stakeholder obligations" is the notion of "fiduciary obligations," which similarly place enhanced, although different obligations upon fiduciaries. Nonetheless, there are at least two caveats to this comparison. First, the stakeholder obligation is not identical to the fiduciary obligation, but the two obligations merely function in a similar manner. Second, the stakeholder obligation is a moral obligation whereas the fiduciary obligation

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[125] R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, in ETHICAL THEORY AND BUSINESS, 7TH ED. (Tom L. Beuchamp & Norman E. Bowie eds., 2004).
[126] *Id.* at 58.
[127] ROBERT PHILLIPS, STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS 162-163 (2003).
[128] *Id.*
[129] WILLIAM FREDERICK, VALUES, NATURE, AND CULTURE IN THE AMERICAN CORPORATION 251 (1995) (analyzing rights, justice, and utilitarianism as the basis for ethical business behavior).
[130] *See* infra, Part IV(C) Social Contracts Theory.

is first and foremost a legal obligation. A fiduciary has enhanced legal obligations to her principal beyond those legal obligations generally owed by persons (who are not in fiduciary relationships). These legal obligations include, *inter alia*, avoiding conflicts of interest, not usurping principal opportunities, not accepting undisclosed gifts, not self-dealing, not attaining secret profits, and not disclosing confidential information.[131] Although these are certainly good practices in many non-fiduciary settings, and various other laws may at times make these same practices illegal under other circumstances, generally, a person is free to accept undisclosed gifts, self-deal, attain secret profits, disclose confidential information, or usurp the business opportunities of others. Such actions are often necessary to excel within a capitalistic environment. Simultaneously, both fiduciaries and persons generally must follow all generally applicable laws, such as avoiding fraud, abiding by regulations, and so on. The fiduciary has enhanced obligations over and above the baseline obligations that are generally applicable to all people. Relevant stakeholder theorists similarly claim that businesspeople have enhanced moral obligations to stakeholders over and above the baseline moral obligations owed to people generally.[132] Although any analogy can only be taken so far, there are heuristically motivated parallels between the fiduciary and stakeholder obligations. These additional obligations of stakeholder theory may be better identified by use of social contracts theory and virtue ethics.

E. Social Contracts Theory

The political social contract is forever sealed in the historical works of such authors as Jean-Jacques Rousseau, John Locke, and Thomas Hobbes.[133] The business social contract, on the other hand, is a relatively new phenomenon which aims to provide guidance to individuals seeking to behave ethically in business. The traditional political social contract analyzes the principles and norms upon which society and its political construct should be formed. The business social contract is concerned with the principles and norms upon which businesses and business communities should be formed, as well as business's relationship to society. The business social contract attempts to define intra-business obligations, inter-business obligations, and obligations between business and other community members (such as non-business entities and individuals). The business social contract is a source of guidance for those seeking to behave ethically in business.

The preeminent vision of the business social contract is magnificently articulated by theorists, Thomas Donaldson and Thomas Dunfee, in what they term as "Integrative Social Contracts Theory" (hereinafter, ISCT).[134] ISCT is the leading attempt to provide a means of classifying, identifying, and prioritizing ethical norms within the business social contract. Although a full explication of ISCT is beyond the scope of this essay, some useful classifications from this theory arise in ISCT's distinction between hypernorms and microsocial norms. Hypernorms are generally applicable obligations of all human beings.[135] Some theorists suggest that the obligations of stakeholder theory that apply to all humans are embodied in something akin to hypernorms.[136] According to Donaldson and Dunfee, hypernorms include core human

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[131] *See, e.g.*, TIM FORT & STEPHEN B. PRESSER, BUSINESS LAW 604 (2015); Tarnowski v. Resop, 236 Minn. 33, 51 N.W.2d 901 (1952).

[132] ROBERT PHILLIPS, STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS 162-163 (2003).

[133] *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762); JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT (1689); THOMAS HOBBES, LEVIATHAN (1651).

[134] THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999).

[135] *Id.* at 49-138.

[136] ROBERT PHILLIPS, STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS 124-125 (2003).

rights, human dignity, and necessary social efficiency.[137] Hypernorms play a unique function within ISCT by acting both as a baseline for moral obligations owed by everyone and to everyone, but also as a means of validating microsocial contracts.[138] Microsocial contracts give rise to microsocial norms, and so long as they accord with hypernorms, these microsocial norms are considered legitimate norms.[139] Microsocial contracts are extant, actual agreements within a community that reflect the shared understandings about the microsocial moral norms in a community.[140] These microsocial norms are abided by, via actions and attitudes, by a substantial majority of the relevant community.[141] It is this concept of microsocial norms and particularly legitimate microsocial norms that has significant potential for aiding the application of the doctrine of unconscionable contracts.

Many vocations and particularly the professions have conventional practices that are understood and abided by within each particular vocation. Microsocial norms reflect those moral practices that are understood and abided by within a particular vocation or community. ISCT explicitly allows for differing moral practices to exist within different communities (and communities is defined quite broadly by ISCT, by including different businesses, vocations, industries, or even societies). The microsocial norm is that moral practice that a substantial majority of a community adopts and adheres to. Microsocial norms are somewhat similar to the "usage of trade" descriptor of the Uniform Commercial Code,[142] but the concept of the "microsocial norm" includes only the moral customs of a trade that are adopted by a clear majority of a community, and not non-moral customs or moral customs not adopted by a clear majority of a community. Further, the concept of a "microsocial norm" is applicable beyond a mere trade, but also within any industry, business, department of a business, vocation, profession, or any other community.

Looking to norms within a given trade is not foreign to unconscionability analyses. In fact, the official comment to U.C.C. §2-302 instructs courts to look to the "general commercial background" of "the particular trade" when determining if a given contract or provision thereof is unconscionable.[143] What ISCT adds to this analysis is the explicit identification of not only moral norms that are generally applicable to all mankind (hypernorms) but also moral norms that are particular to the trade, or other relevant community (microsocial norms). Hence, the moral norms that are particular to a trade, business, or industry may inform determinations of unconscionability. If microsocial moral norms are violated when contracting, a violation may, although not dispositive in and of itself, provide evidence in favor of a finding of unconscionability. Microsocial norms may be found in a variety of places. For a trade or industry, they may be found in professional codes of conduct, or professional or industry standards.[144] For a business or company, they may be found in corporate creeds, mission statements, or even ethics or compliance

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[137] THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 49-138 (1999).
[138] *Id.*
[139] *Id.* at 83-116.
[140] *Id.*
[141] *Id.*
[142] UCC §1-303(c) ("A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.")
[143] UCC §2-302 (cmt. 1).
[144] THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 105 (1999).

programs.[145] Any of these proxies are places where microsocial norms could arise from, but microsocial norms need not be found in one of these places in order to be practiced in a business, trade, industry, or other community.

Different industries reflect different norms which develop over time to meet certain needs of that industry. In the industry of publishing academic articles, for example, within some professional fields the norm is that authors submit for publication consideration to only one journal at a time. In other fields, it is acceptable to submit to multiple journals simultaneously for publication consideration. Depending on the field, the norm may be to send only one journal an article to consider it for publication, or to send an article to many journals. Within those fields wherein it is acceptable to submit to multiple journals, there is a generally accepted moral norm that once an author accepts an offer of publication with a journal, that the author not then rescind the acceptance subsequently even if a higher quality journal makes the author an offer. There are the occasional violators of this norm, but the substantial majority of the academic publishing community abides by it. In certain industries and locations, a simple hand-shake signifies the commitment of the parties to an agreement, yet in other industries and locations, a hand-shake means little without a binding contract accompanying it. When deciphering whether a contract is unconscionable, the judiciary should consider industry and community specific moral norms (microsocial norms), which may influence whether a contract should be deemed unconscionable or not. Hypernorms and microsocial norms often work in conjunction with relevant virtues – altogether, they may be used to determine whether a contract is violative of morality.

F. Virtue Ethics

Ethicists have used virtue ethics theory to address certain financial problems since the time of its original enunciation in ancient Greece, despite that Aristotle himself proclaimed disdain for exploitative trade practices.[146] Virtue ethics theory has since played an influential role in the development of Catholic Theology, and is utilized still today to address questions of ethics in business.[147] In Aristotle's original declaration of virtues, he identified liberality as a virtue pertaining to spending; a virtue that exists at the mean between the two vices of niggardliness and prodigality.[148] In contemporary business ethics literature, many ethicists apply virtue ethics to attempt to provide ethical guidance to businesspersons. The core mandate of virtue ethics is that persons should seek to act virtuously, which often requires balancing the unique circumstances at hand to decipher what the proper moral action is in each circumstance. To act virtuously is to aim to act in accordance with the virtues which include not only liberality, but also courage, honor, integrity, trustworthiness, humility, responsibility, community, and mercy.[149] As one leading virtue ethicists declares, "the integrity of the corporation and of the individual within the corporation is the essential ingredient in the overall viability and vitality of the

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[145] *Id.*

[146] Antony Flew, *The Profit Motive*, 86 ETHICS 312, 312-322 (1976).

[147] F. A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 47 (1988), available at: http://cnqzu.com/library/Philosophy/neoreaction/Friedrich%20August%20Hayek/Friedrich_Hayek%20-%20The_fatal_conceit.pdf

[148] ARISTOTLE, NICOMACHEAN ETHICS, BOOK IV, available at: http://classics.mit.edu/Aristotle/nicomachaen.4.iv.html (last visited Aug. 5, 2017).

[149] This is a non-exclusive list of virtues composed from the author's education and experience. Virtues, more broadly construed, include: integrity, trust, honesty, proper pride, humility, courage, tenacity, frugality, community, mercy, responsibility, and respectability.

business world."[150] One should embrace integrity and the other virtues by attempting to act in accordance with them in every action and reaction, in life and business.

Virtue ethics theory provides businesspeople with the flexible guidance of the virtues, making virtue ethics an often pragmatic approach to the ever-changing and often plastic environment of business. The virtues may be particularly illuminating when analyzing procedural unconscionability because the actions that give rise to an unfair process of contracting do frequently involve a failure to act with integrity, trust, honor, or in accordance with any number of other virtues. The oppressive tactics that some parties embrace when inducing others to enter into contractual relations are often lacking in virtuous behavior, but instead violate the very virtues which, if embraced, would promote a more functional and feasible business environment.

In summary, the four leading theories of business ethics have potential to add to the richness and refine the boundaries of the amorphous doctrine of unconscionable contracts. Business ethics theory may help legal practitioners attempting to educate their clientele about the boundaries of unconscionability. Business ethics theory may also assist the judiciary in properly applying the doctrine, and particularly in deciphering circumstances involving ethical violations in the process of contracting. As an inherently moral doctrine, unconscionability should take into account the general ethical obligations of humankind, those specific obligations within the business community at issue, and virtue, by analyzing unconscionability, when appropriate, through appeals to stockholder theory, stakeholder theory, social contracts theory, and virtue ethics theory. These theories provide a framework for examining obligations, and more fully realizing the observation of the New Jersey Supreme Court that the doctrine of unconscionable contracts is aimed at establishing "a broad business ethic."[151] This essay next utilizes these theories of business ethics to develop a pluralistic framework for examining purportedly unconscionable contracts.

V. A PLURALISTIC APPROACH TO UNCONSCIONABILITY

The preceding theories of business ethics provide the basis for a pluralistic framework for examining purportedly unconscionable contracts. In this section is an elaborate sketch of this pluralistic framework which may be used to determine if a contract or provision should be deemed unconscionable. The framework consists of three levels, each of which incorporates three stages, and a final legitimizing test that follows the three level/stage analysis. These levels, stages, and the test are summarized in diagram 5.1. For the purposes of developing this framework, it is assumed that pluralism is a viable philosophical position that, at a minimum, provides a pragmatic or instrumental approach to analyzing questions of morality. The three levels of moral obligation are: the individual level, the local level, and the global level. This is not to say that there are not additional levels of moral obligation (there very well may be), but these three levels are utilized in this model because they are the levels most examined in the writings of contemporary business ethics theorists. The three stages are: the process of contracting, the terms of the contract, and the morality of the enforcer. These three stages, respectively, incorporate procedural unconscionability, substantive unconscionability, and the ethics of enforcement. The final test considers the legitimacy of deeming a purported immoral contract as unconscionable. This model is detailed in the following paragraphs.[152]

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[150] ROBERT C. SOLOMON, ETHICS AND EXCELLENCE 21 (1993).

[151] Kugler v. Romain, 58 N.J. 522, 543, 279 A.2d 640, 651 (1971).

[152] Although purportedly the levels and stages could be analyzed in any order, for ease of flow, this model presents the levels in a smaller to larger spectrum, and the stages in a chronological spectrum.

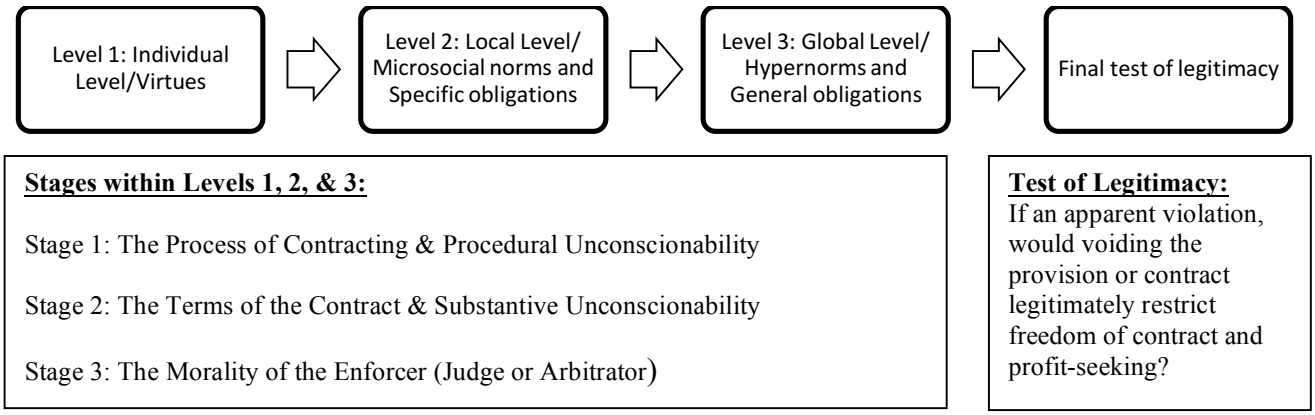

Diagram 5.1: A Pluralistic Model of Unconscionability

A. Three Stages of the Pluralistic Analysis

The stages of pluralistic analysis are aimed at working through the relevant evidence associated with an unconscionable contract, both the procedural and substantive aspects of unconscionability, and providing an analysis of the morality of the individual or individuals tasked with deciphering unconscionability ("the enforcer"). In most cases, the enforcer is a judge or arbitrator. Each stage is briefly explained in the following paragraphs; the application of the stages within each level is further explicated in the next section.

1. Stage 1: The Process of Contracting & Procedural Unconscionability

The first stage of the analysis is devoted to identifying potential moral breaches within the process of contracting, thus deciphering if a contract may be deemed procedurally unconscionable. In stage one, the process of contracting is examined to decipher if any moral obligations are breached in the process of contract formation. The process of contract formation is analyzed within each of the three levels of morality. All relevant facts concerning how the contract came into being, including facts relating to the equality of bargaining power, unfair surprise, or other aspects of the contracting process should be examined for moral breaches.[153]

2. Stage 2: The Terms of the Contract & Substantive Unconscionability

The second stage of the analysis involves examining potential moral breaches that are reflected within the terms of the contract itself, thus deciphering if a contract may be deemed substantively unconscionable. In stage two, the terms of the contract are examined to decipher if any breaches of moral obligation are reflected in the contract itself (or its specific provisions). The terms of the contract are analyzed within each of the three levels of morality. All terms of the

[153] *See* Willie v. Southwest Bell Company 549 P.2d 903, 907 (Kan. 1976) (providing a list of factors to consider in the context of procedural unconscionability, which also relate to the relevant facts one should consider in stage 1. These include: if the contract is standard form, if the relevant clause is boilerplate, if the clause is not conspicuous, if the language is comprehensible to a lay person, if there was inequality of bargaining power, or if there were exploitation of a vulnerable party). *See also* Johnson v. Mobil Oil Corp. 415 F.Supp. 264, 268 (E.D. Mich. 1976) (for a list of factors of procedural unconscionability including: meeting of the minds, vulnerability of the parties, bargaining power, who drafted the contract, if the terms were discussed or explained to the weaker party, if alterations were possible, or alternatives for supply).

contract, but particularly overly harsh, grossly unfair, or other unusual or inequitable contract terms should be examined for moral breaches.[154]

3. Stage 3: The Morality of the Enforcer (Judge or Arbitrator)

The third stage of the analysis involves an examination by the enforcers, of the enforcers and enforcement of the contract, to decipher if there are any moral obligations that may influence the decision of enforceability or a finding of unconscionability. The enforcers examine themselves from all three levels of morality. The enforcers' moral preconceptions, the context of the enforcement, and the totality of all facts relevant to enforcement should be examined for moral breaches.[155] As explained in the following section, each stage is analyzed within all three levels of moral obligation.

B. Three Levels of Moral Obligation

The three levels of moral obligation correspond to the different types of obligations examined by the leading theories of business ethics. The first level, the individual level, analyzes the virtues. The second level, the local level, analyzes microsocial contracts and specific stakeholder obligations. The third level, the global level, analyzes hypernorms and general stakeholder obligations. Each level is detailed in the following paragraphs.

1. Level 1: The Individual Level

Within the individual level, the enforcer should examine virtues in the process of contracting, virtues in the contract terms, and virtues associated with the enforcement of the contract. All three of these stages should be examined for violations and fulfillment of relevant virtues, if any are reflected in the individual circumstances of the case-at-hand. The enforcer may wish to examine integrity, trust, honesty, proper pride, humility, courage, tenacity, frugality, community, mercy, responsibility, and respectability, to the extent that they are relevant to the case.[156] Although virtues may not be apparent in every circumstance, when they are, the circumstances should be analyzed for potential violations of virtues. The fulfillment of virtues could, in some cases, also be relevant.

2. Level 2: The Local Level

Within the local level, the enforcer should examine microsocial norms and specific stakeholder obligations, within the process of contracting, contract terms, and enforcement of the contract. All three stages should be examined for violations of microsocial norms and specific stakeholder obligations, if any are reflected in the individual circumstances of the case-at-hand. The enforcer should examine the particular moral norms of business generally, the industry, company, locality, trade, vocation, profession, region, or other locality-specific norms that are

[154] *See* Willie v. Southwest Bell Company 549 P.2d 903, 907 (Kan. 1976) (providing some substantive factors, that may be relevant to examination of this stage, including: the disparity between cost and price, a clause that undermines basic remedies and rights, penalty clauses, or overall bargaining imbalances).

[155] This stage is significant because it involves a reflective process by the enforcer, of the current circumstances of the enforcer and enforcement. Relevant considerations may include the enforcer's religious preconceptions, the current economic climate at the time the case is heard, and other factors unique to the circumstances of enforcement of the contract at the time that avoidance via unconscionability is sought.

[156] *See* ARISTOTLE, supra note 4. *See* also ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS (1992) (for the application of virtue ethics to business).

relevant to the case, to decipher if they were followed or violated.[157] Attorneys' rules of professional conduct, judges' professional rules, professional codes, ethics codes, and other local level norms should be analyzed for potential violations. The fulfillment of microsocial norms and specific stakeholder obligations may also be relevant in some cases.

3. Level 3: The Global Level

Within the global level, the enforcer should examine hypernorms and general stakeholder obligations, within the process of contracting, contract terms, and enforcement of the contract. All three stages should be examined for violations of hypernorms and general stakeholder obligations, if any are reflected in the individual circumstances of the case-at-hand. The enforcer should examine generally applicable ethical norms such as rights, justice (including protecting the vulnerable and equality), utilitarian principles, necessary social efficiency, and human dignity, to the extent they are relevant, to decipher if these norms were adhered to or not.[158]

C. The Final Test of Legitimacy

The final step of the analysis is a stockholder theory-inspired screening test aimed at deciphering if an apparent moral breach should result in a finding of unconscionability and thus the avoidance of a contract or provision. This final test is to inquire into whether the moral breach is sufficiently severe so as to legitimately form a basis for restricting the far-reaching public policies of freedom of contract and reasonable profit-seeking. There is reasonable discretion built into this final test of legitimacy, which acts as a sliding scale, to decipher the degree and severity of the moral breach, and if it merits avoidance of the contract or provision at issue. The necessary implication of this legitimacy test is that not all moral breaches are sufficient to constitute avoidance of a contract on the basis of unconscionability. In applying this final test, the enforcer should examine judicial precedent, all of the stages and levels, the severity of the identified moral breaches, and the underpinning facts in combination, weighing them as necessary, to determine if the contract should be avoided.[159]

D. Application of the Pluralistic Framework

To illustrate how the pluralistic framework functions, this section provides two example cases, and applies the framework to these cases. The framework is a fact-specific framework, and not all virtues, norms, or principles will be relevant to each case. To the contrary, in most cases, only a few moral virtues, norms, or principles will be relevant. Through examining all stages and levels, the enforcer can ensure a detailed examination of unconscionability, and articulate, in the language of ethics, whether or not there are moral breaches.

EXAMPLE CASE 1: Phyllis and her husband owned a waterfront property in Brielle, New Jersey which they utilized as their principal residence. Her husband suddenly died on January 3, 2000. Immediately after his death, Phyllis (then, 81 years old), while stricken with grief, took several steps in a very short time period to attempt to sell the Brielle property. Among them, in a

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[157] *See, e.g.*, THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999) (for a discussion of microsocial norms and their application).

[158] *See* WILLIAM C. FREDERICK, VALUES, NATURE, AND CULTURE IN THE AMERICAN CORPORATION 251-276 (1995) (for an explanation of justice, rights, and utilitarianism in the context of natural and sociocultural processes). *See* also THOMAS DONALDSON & THOMAS DUNFEE, THE TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999) (for an explanation of hypernorms).

[159] *See* Keith William Diener, *The Restricted Nature of the Profit Motive: Perspectives from Law, Business, and Economics*, 30 NOTRE DAME J. OF LAW, ETHICS, & PUB. POL'Y 225 (2016) (for an analysis of the theoretical restrictions upon permissible profit-seeking).

three-week period, she executed three powers-of-attorney. One attorney-in-fact entered into an option agreement on behalf of Phyllis with Sitogum (an entity which would not be incorporated for another six days). The January 2000 option agreement gave Sitogum the right to purchase, within eight months, the Brielle property, for the amount of $800,000, so long as Sitogum paid $1000 per month to keep the option open. In February 2000, an appraisal of the property valued it at between $1.5 million and $1.75 million. Sitogum, on February 28, prepaid six months of options ($6000) to attempt to reserve its right to buy for the next six months. Nevertheless, on April 13, 2000, Phyllis contracted to sell the property to another party for $1.5 million. Upon learning of this sale, Sitogum attempted to exercise its option to buy on April 28, 2000. Phyllis informed Sitogum she would not sell to them. Consequently, Sitogum brought a lawsuit seeking to compel specific performance from Phyllis, and Phyllis claimed the option agreement was unconscionable.[160]

1. Application of the Pluralistic Framework to Example Case 1

The Individual Level/Level 1: Within level 1, all three stages should be considered, but all stages will not always be relevant. In this case, stage 1 is particularly relevant to the analysis of virtue. Within the process of contracting, three virtues may have been violated. First, are the virtues of responsibility and trust which may have been violated by the attorney-in-fact who entered into the option agreement for Phyllis. From the facts, it is apparent that this attorney-in-fact entered into an agreement to sell a property (which had not been appraised) for substantially less than its fair market value. The failure by this attorney-in-fact to fulfill her responsibilities as a diligent agent also reflects a breach of trust between the attorney-in-fact and Phyllis. Second, is a breach of the virtue of mercy by Sitogum, an entity which should have had mercy upon the grieving widow, and understood the difficult time she was going through when the option agreement was executed. The lack of mercy led to a lawsuit to enforce the option agreement despite the grieving circumstances of the widow.

The Local Level/Level 2: On the local level, moral norms of the real estate industry in the locality should be considered, as well as any other moral norms of other relevant communities within any of the 3 stages (to the extent any are identifiable). For example, if Sitogum maintained a code of ethics, which was breached in this case, such a breach would be relevant to the local level. Within the facts-at-hand, there is potential that a moral norm based in fairness, of permitting a seller to attain an appraisal prior to buying a property, may be present and violated. The presence of such a moral norm depends on the real estate industry of the locality at issue. While such a norm exists in most areas, evidence would be needed to support this moral norm in the locality of Brielle, New Jersey.

The Global Level/Level 3: The global level presents many questions in the context of Phyllis's case, as to stages 1 and 2. In the process of contracting, the moral principle of justice, and particularly the need to protect the vulnerable (here an 81 year-old grieving widow), has been violated. Moreover, the stage 2 contract terms, which reflect a gross disparity between contract price and market price, reflect violations of respect for human dignity, justice, and moral rights to fair exchanges in the marketplace.

Test of Legitimacy: The final test of legitimacy requires that the enforcer consider if avoiding this contract is a legitimate restriction upon freedom of contract. In this case, there are many ethical violations both in the process of contracting and in the terms of the contract itself, and many are quite severe violations, so avoiding this contract appears a legitimate restriction

[160] The facts from "Example Case 1" are adapted from Sitogum Holdings, Inc. v. Ropes, 352 N.J.Super. 555 (2002).

upon profit-seeking and freedom of contract. If the violations were fewer and minor, the result would be different.

EXAMPLE CASE 2: In 1917, a young, black, and relatively uneducated girl who had inherited property, entered into a contract with two attorneys. Stella, a resident of the District of Columbia, on her eighteenth birthday, inherited valuable land in Oklahoma which contained deposits of oil and gas. This land was held with a guardian, also in Oklahoma, until her eighteenth birthday, when she was due to take possession and control over her inheritance. In a devious and intricate plot to separate Stella from her wealth, Stella was induced to go to the offices of two attorneys to sign a contract for their representation shortly after midnight on her eighteenth birthday. They convinced her that she needed their services to protect her newly acquired wealth, which they said was threatened despite that no litigations or legal issues were pending regarding the property or wealth. The contract was for employment of the two attorneys for a period of five years, with payment for all years required in advance, and the $25,000 prepayment to come from the oil producing lands that Stella inherited moments before signing this contract, thus putting cloud upon the title of her land.[161]

2. Application of the Pluralistic Framework to Example Case 2

The Individual Level/Level 1: The violations of virtues are particularly apparent in stage 1, but there are also virtue violations in stage 2. Within stage 1, the process of contracting, the attorneys deceived Stella and took advantage of her by convincing her she required their legal representation, thus violating the virtues of honesty, trust, and integrity. Within stage 2, the contract reflects a $25,000 prepayment for services for the next five years, which reflects a violation of the virtue of liberality in the pricing of the attorneys' contract. For illustrative purposes, a stage 3 consideration would include whether the enforcer of the agreement maintains any racial prejudices (common in the 1920s), and whether such prejudice might impugn the integrity of the enforcer's decision.

The Local Level/Level 2: The norms of level 2, the local level may involve stage 1 and 2 norms pertaining to local ethics rules and the local practices for attorney fee agreements. The stage 1 violation is reflected in the violation of the attorney ethics rules, which at the time of this case, required attorneys to act always in the utmost good faith and not attain their own advantage at the expense of their client.[162] This may also involve stage 2 violations, depending on the terms of the contract. For example, in contemporary times, rarely would an attorney require a five-year prepayment for services, and this was also likely the case in the early 1900s in Oklahoma. This may go to the attorneys' advantageous behavior. For illustrative purposes, an example of a stage 3 local consideration would be if the attorneys had engaged in this type of conduct on other occasions.

The Global Level/Level 3: The global level violations are reflected in both stages 1 and 2. The advantageous behavior of the attorneys, in their attempts to deceive the young and uneducated Stella out of her wealth, violates the requirement of justice, that the vulnerable be protected. The substantive terms of the contract, including the cloud of title which would be caused to form over Stella's property, also violates this requirement. Moreover, this behavior violates human dignity, insofar as it requires abidance to the second formulation of the Kantian categorical imperative, *viz.*, that we treat others always as an end in themselves and not solely as a means. For illustrative purposes, a stage 3 consideration, for example, would be if there were a

[161] These facts from "Example Case 2" are adapted from State v. Vernor, 191 P. 729 (Okl. 1920).

[162] *Vernor*, 191 P. at 736-737 (the attorneys in this case were suspended from the practice of law for six months).

national or global economic crisis at the time of enforcement, that might impact the policies underpinning the enforcer's decision.

Test of Legitimacy: In this case as well, there are multiple severe ethics violations in both stages 1 and 2 which result in a determination, upon weighing the evidence, that the contract can legitimately be avoided on the grounds of unconscionability without undermining the far reaching public policies of freedom of contract and reasonable profit-seeking.

Example cases 1 and 2 are illustrations of how the pluralistic framework functions. As with any illustrations, they are limited in their usefulness, as the factual circumstances of each case will inevitably vary. The variation in facts correlates to the identification of different moral virtues, norms, and principles, for each individual case. Nevertheless, with conscientious application, the pluralistic framework provides a detailed methodology for identifying moral breaches in contractual settings which extends beyond the bounds of contemporary substantive/procedural unconscionability analyses.

VI. CONCLUSION

The doctrine of unconscionability developed in equity to provide a judicial procedure for avoiding grossly immoral contractual bargains. Over time, the necessity of the doctrine has become ever more apparent as courts continue to strike down contractual terms that seek to improperly advantage one party over a more vulnerable party. The imprecision of the doctrine of unconscionability spurs from the lack of a common understanding regarding the morals of the marketplace, coinciding with the distinct factual circumstances of each case. Business ethics theory provides a means of better defining the amorphous doctrine of unconscionability, a lens by which the doctrine of unconscionability may be viewed, and a pluralistic approach to identifying immoral actions in the process of contracting and immoral contractual terms. The pluralistic framework suggested in this article may be utilized to ensure that moral breaches are identified and weighed against public policy interests. This framework advances the historic doctrine of unconscionable contracts by infusing it with theories of business ethics and thereby ensuring a minimal baseline of ethics in contracting.