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# Guilt-Free Markets? Unconscionability, Conscience, and Emotions

Hila Keren

# Guilt-Free Markets? Unconscionability, Conscience, and Emotions

*Hila Keren*[*]

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*Despite record-level economic inequalities and a vast growth in market exploitation, courts remain surprisingly reluctant to exercise their power to invalidate the resulting predatory contracts. There is no doubt that courts are authorized to invalidate predatory contracts based on their unconscionability. There is, however, an ongoing debate regarding the desirability of utilizing this judicial power in a capitalist society. This Article enters the discussion from a unique angle: it focuses less on the bottom line of jurisprudence and more on the law's expressive power—the fact that the law's impact extends beyond its ability to sanction or reward behaviors. Specifically, the Article argues that the way in which courts frame and discuss both market misbehaviors and the harms they cause may have an immense impact on other peoples' behaviors, a potential that is currently unrecognized. Judicial reviews that reach the public domain have the power to encourage or discourage future wrongful behaviors and, more broadly, to influence the social and ethical norms governing the market.*

*This Article begins with a fundamental premise that receives far too little consideration in traditional, economic, and even behavioral legal analyses: that emotions play a leading role in shaping moral judgments and altering actions. Considering the impact of law in the domain of the emotions is key to understanding how unconscionability-based messages may curb exploitative behavior by fostering self-restraint. Drawing on studies in psychology and the neurosciences, the Article first explains how the operation of human conscience depends on two emotions—guilt and empathy. Next, it juxtaposes the discourse of two recent cases, both involving wrongful market behaviors, to demonstrate courts' ability to either evoke or suppress these emotions. Generalizing those examples, the Article then proposes three viable strategies that courts can use to enhance the operation of the emotions most necessary for self-restraint: a framework that welcomes, rather than ostracizes the moral emotions; a rhetoric that clarifies the pertinent social norms; and a content that thoughtfully portrays the harm caused to the exploited party.*

*Notably, the Article's conclusion is different from existing approaches to unconscionability. Instead of joining those who recommend more or less use of the unconscionability principle by the judiciary, the Article emphasizes the content of judicial decisions. With an understanding of the emotions that shape human behavior, courts*

*can better direct their expressive powers. They can successfully evoke the emotions that facilitate conscience-based self-restraint of market actors. In this way the legal system can help people internalize a norm against market exploitation, thereby fostering a more ethical market environment. Importantly, using the law to support individuals' conscience may eventually decrease the need for future interventions in the market's operation.*

*People tend to do what they think is morally correct, and to avoid what they think is immoral.*[1]

*Rightness and wrongness . . . are things we feel.*[2]

## INTRODUCTION

In a market society characterized by record-level socio-economic inequalities, many business opportunities for exploitation arise. Greed competes with conscience; to exploit or not to exploit becomes a pressing question. Each time greed wins, an oppressive contract is born, depriving the exploited party of limited resources, further enriching the exploiter, and increasing the ever-growing gap between the powerful and powerless.

Such was the case of Henrietta Charley as described in a 2014 decision of the Supreme Court of New Mexico.[3] Ms. Charley worked hard to make ends meet. A mother of three and a medical assistant earning $10.71 per hour working in a medical center, she found herself under financial distress and had to take out a loan of $200 "to buy groceries and gas."[4] Although she had never done this before,[5] taking the loan was easy. The lender's storefront was one of many similar businesses crowding Farmington's Main Street, only a few minutes' drive from Ms. Charley's workplace.[6] Inside, employees

1. Paul Rozin, *Freedom, Choice and Public Well-Being: Some Psychological Perspectives*, 51 SOC. SCI. & MOD. SOC'Y 237, 243 (2014) [hereinafter *Freedom, Choice and Public Well-Being*].

2. JESSE J. PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS 13 (2007).

3. State *ex rel.* King v. B & B Inv. Grp., 329 P.3d 658 (N.M. 2014).

4. *Id.* at 664.

5. *Id.* at 666–67.

6. This conclusion relies on a Google Maps search of the area of Ms. Charley's workplace, the San Juan Regional Medical Center at Farmington, New Mexico.

of "Cash Loan Now" were trained to offer a swift ten-minute lending process to anyone with a job.[7] They were instructed to misrepresent the interest rate in daily terms ranging "between $1.00 and $1.50 per day" for every one hundred dollars borrowed.[8] The lender's manuals further scripted the interactions with the borrowers, requiring employees to conceal the payment schedule and never explain that the loan was interest-only.[9] It was only much later that Ms. Charley realized that "she would have to make sixteen biweekly payments of $90.68 each before any of her payments would be allocated toward her principal."[10] The terms of the schedule had been purposely buried in her file.[11] Misleading Ms. Charley and taking advantage of her financial distress and lack of experience, the lender awarded her a $200 loan that in reality carried a total finance charge of $2,160.04, equal to a 1,147.14 APR (annual percentage rate).[12] When sued, the lender cited a loophole, arguing that since it intentionally converted its loan products from payday loans to "signature" loans,[13] Ms. Charley's loan agreement was legal and therefore should not be invalidated by courts.[14]

Unfortunately, Ms. Charley's loan agreement is by no means rare. In the world of fringe banking—the exploding industry of high-cost loans such as payday and auto-title loans—borrowers can only get credit under predatory terms, at sky-high costs that worsen their vulnerable financial state. Despite borrowers' seeming consent to such loan agreements, the marks of exploitation[15] are obvious:

7. *King*, 329 P.3d at 666. "Borrowers also testified that loan origination at Defendants' stores took about 10 minutes and was a hurried 'sign here, sign there' process," *id*., explaining the lender's policy to "lend exclusively to people who provide proof of steady employment but who, by definition, are either unbanked or underbanked." *Id*. at 663.

8. *Id*. at 667.

9. *Id*. at 667–68 (describing the lenders policy).

10. *Id*. at 667.

11. *Id*. ("The store manual instructed, 'PRINT OUT THE AMORTIZATION SCHEDULE FOR THE FILE, BUT NEVER GIVE ONE TO A CUSTOMER!'").

12. *Id*. at 664.

13. *Id*. at 663–64.

14. *Id*. at 673–75.

15. Efforts to define exploitation in general and contractual exploitation in particular are abundant and have occupied full-length monographs. *See, e.g.*, RICK BIGWOOD, EXPLOITATIVE CONTRACTS (2004); MARK R. REIFF, EXPLOITATION AND ECONOMIC JUSTICE IN THE LIBERAL CAPITALIST STATE (2013); ALAN WERTHEIMER, EXPLOITATION (1996) . While mapping out the variety of definitions far accedes the format of an article, it is important

intentional targeting,[16] calculated misrepresentation,[17] callous taking advantage of others' distress,[18] and the imposition of egregious interests and fees.[19]

How should the law respond to exploitative market behaviors that yield predatory contracts? By and large, our legal system delegates the problem to the judiciary. Admittedly, many greed-born contracts slip under the legal radar because the exploited parties

to emphasize that most theorists agree that the existence of the consent of the exploited subject is *not* negating the existence of exploitation. On this point, see the discussion of "consensual exploitation" in *Exploitation*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 20, 2001), http://plato.stanford.edu/entries/exploitation/#2. For the purposes of this Article, I adopt one of the many definitions that agree on this point. Professor Mark R. Reiff defines economic exploitation "as 'the unjust extraction of value from another as part of a voluntary exchange transaction not otherwise prohibited by law.'" REIFF, *supra* at 27. This choice is motivated by two important points. First, what seems to be a voluntary exchange can be exploitative due to an inequality of bargaining power that allows the stronger party to gain an extra value from taking advantage of the weaker party. Second, exploitation exists beyond illegality in a manner that supports the importance of the unconscionability principle in fighting exploitation.

16. Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y, 165, 168 (2010) (describing various marketing practices used by lenders to target minorities for predatory loans and citing a payday lender who "testified '[w]e [sic] seek out low-income African-American and Latino neighborhoods because we know that this is where our most profitable client base is located'."); THE PEW CHARITABLE TRUSTS, FRAUD AND ABUSE ONLINE: HARMFUL PRACTICES IN INTERNET PAYDAY LENDING 13 (2014), www.pewtrusts.org/en/research-and-analysis/reports/2014/10/fraud-and-abuse-online-harmful-practices-in-internet-payday-lending (citing a New York online borrower who said, "I'm getting texts, and I'm getting phone calls, and I'm getting emails, and I'm getting all of this stuff.").

17. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1643 (2014) (summarizing how lenders intentionally and sophisticatedly exploit borrowers' bounded rationality by misrepresenting the economic meaning of loans, for example by "lowering the price of the salient contract terms, while packing more of the overall contract cost into nonsalient, poorly understood terms").

18. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1126–27 (2008) (explaining that payday lenders target "clientele of limited means" and that "[b]y one estimate, approximately 90% of payday lending revenues are based on fees stripped from trapped borrowers").

19. Nathalie Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap*, 34 N. ILL. U. L. REV. 259, 273 (2014) (explaining that the short-term, high-cost loans offered by fringe banking are based on interest rates ranging from 300% per annum to over 1,000% per annum—rates that are sometimes 100 times higher than what is offered in the mainstream credit market); *see also* Peterson, *supra* note 18, at 1127 ("Industry observers estimate that, even after charge-offs, most payday lenders earn a return on assets between ten and twenty times greater than traditional banks.").

simply lack the means, monetary and otherwise, to seek legal help. The exploiters, on the other hand, frequently rely on the law for enforcement of their contracts. Any time litigation ensues, courts must choose between greed and conscience, exploiters and exploited, and enforcement and non-enforcement. Courts are faced with a difficult dilemma: ignore the problematic behavior of the stronger party or follow their sense of moral correctness and refuse to support unscrupulous behavior. There is no doubt that courts are *authorized* to invalidate unfair contracts. Legislation and precedents have established a variety of legal tools that the courts may use, foremost among which is the unconscionability[20] principle.[21] There is, however, a greater doubt—and an unresolved debate—on the normative question of *how* courts should utilize this principle.[22]

On one side of the debate stand those who argue for *minimal* use of the unconscionability principle. Believing that any interference in the free market is undesirable, theorists argue that judicial intervention in the name of fairness is paternalistic and harmful.[23] Courts influenced by these concerns have chosen to operate a formal version of the unconscionability principle and have often used it to raise the bar for invalidating contracts.[24] On the other side of the

20. U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2002); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

21. I use the term "principle" rather than "doctrine" to adopt Professor Eisenberg's important argument that the unconscionability idea is broader than what arises from black-letter law and is a fundamental principle of modern contract law. *See* MELVIN A. EISENBERG, BASIC PRINCIPLES OF CONTRACT LAW (forthcoming Sept. 2016)); *see also* Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 136 (2008) ("While unconscionability is a narrow doctrine in the common law, its underlying principles are of wider significance because many statutory interventions in contract law are essentially transaction-type-specific rules of unconscionability.").

22. 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, 941 (1986) ("[U]nconscionability has developed into the most controversial of the so-called policing doctrines in contract law.").

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

24. Following a suggestion by Professor Leff, many courts have adhered to a two-pronged analytical structure that requires evidence of both (1) procedural inappropriateness of the formation process and (2) substantive unfairness of the contract's terms. Both conditions must be in place in order to release a party from her seeming consent. *See* Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV.

debate stand those who argue for a *broad* use of the principle. Emphasizing the need to monitor the market, jurists have argued that judicial intervention is crucial to protect weaker parties in predatory transactions and to restrain inappropriate market behavior. Courts that follow these ideas, such as many in California, are more willing to utilize the unconscionability doctrine.[25]

This Article enters the debate from a unique angle: it considers *in what way* judges should use the unconscionability principle as opposed to *how often*. Its main goal is to find a way to effectively discourage—rather than unintentionally encourage—market exploitation. The Article departs from the conventional discourse in several important ways. Rather than critiquing the doctrinal characteristics of unconscionability, the Article illuminates its deep connection to the idea of conscience. Instead of highlighting the power of courts to sanction inappropriate behavior, it stresses the expressive power of law and its ability to incentivize people to follow their conscience and *choose* to behave appropriately. As an alternative to focusing on economic incentives, the Article discusses the possibility of creating an environment that encourages self-restraint by evoking conscience-based behavior. Such a possibility has been explored outside of the unconscionability debate by Professor Lynn Stout in her book *Cultivating Conscience: How Good Laws Make Good People*.[26] Yet, while Professor Stout stresses at the outset that her book's goal is to consider behavior and not emotions,[27] this Article adds to the discussion an understanding of the crucial role of the emotions. The Article uses the fresh approach of "law and emotions"[28] against the conventional belief in legal rationality. It

73, 75 (2006) (arguing that courts have been "increasingly rigid in their application of a two-prong unconscionability test").

25. This is particularly true in contexts where parties suffer from larger gaps in bargaining power, for example, arbitration provisions in employment and consumer contracts. *See, e.g.*, Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995) (describing and criticizing California's generous use of unconscionability).

26. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2010).

27. *Id.* at 12 ("[W]e are indeed referring to behavior, and not to emotions. We are talking about *acts*, not *feelings*.").

28. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 1998 n.1 (2010) ("'Law and emotions' scholarship explores the

introduces the power of law to impact market actors' decision making by influencing the emotions that drive conscience.

On one hand, the Article demonstrates how the law can unintentionally impair the emotions that facilitate conscience-based decision making, thus worsening socio-economic problems. On the other hand, it proposes three constructive steps that courts can take in order to evoke such emotions. Following this proposal would allow courts to support the operation of conscience and foster self-restraint in the market. Notably, the idea introduced by this Article circumvents the problem of less versus more use of unconscionability: thoughtfully crafted, judicial decisions can help market actors to *internalize* a norm against exploitation, thereby yielding more *self*-restraint and less need for judicial interventions.

Existing discussions of unconscionability have tended to stick to the question of the *economic* incentives created by judicial decisions, ignoring the possibility that people may change their behavior in response to the way such decisions frame, discuss, and evaluate questionable market behaviors. Drawing on studies in psychology and the neurosciences, this Article presents such a possible impact. Underscoring the historical and contemporary importance of conscience in unconscionability decisions, it conceptualizes the phenomenon of market exploitation as a moral dilemma and not merely a rational choice. Parties that are presented with an opportunity to profit through exploitation do not *have to* seize the moment in full. Rather, they have the equally available option to restrain themselves and contract fairly, acting less selfishly and more prosocially. One can, for example, lend another a sum of money for a variety of interest rates, all profitable to the lender, without choosing an egregious percentage. Tempting as the opportunity to exploit can be, virtually any contracting party has the ability to listen to the voice

reciprocal relations between emotions and the law. It reflects pluralism along several dimensions: (1) attributes of cognition: law and emotions scholarship values the affective dimensions of cognition as fully as the classically rational, rather than understanding them as 'other' or as potentially problematic departures from rationality; (2) cognate literatures: law and emotions scholarship may draw on economics, biological science, and more objectivist social sciences, but it also draws on literature, history, philosophy and other humanist disciplines; (3) normative goals: law and emotions scholarship engages law not simply, or even primarily, to correct the cognitive responses of legal subjects in favor of greater rationality; it aims to modify law more fully to acknowledge the role of specific emotions, or to use law to produce particular emotional effects.").

of conscience and exercise self-restraint. How, then, can the law work to support and encourage such self-restraint? What legal response to abusive market behavior might yield less future abuse?

Having framed those new questions, the Article responds to them by proposing that judicial decisions condemning exploitative bargaining practices have important, unrecognized potential: to galvanize self-restraint by participating in the social cueing of conscience. The Article conceptualizes conscience as a metaphor for the dynamic interaction between changing social norms and shifting individual beliefs. It is here that we form personal normative judgments.[29] Within this framework the Article envisions law as an important mediator between society and the self. If conscience is perceived "[a]s a voice straddling the inner and the outer,"[30] law can operate to amplify this voice. It can assist market actors in exercising self-restraint in the face of temptation to profit from exploitation.[31] As argued in this Article, the law can, for example, discourage transgression by a clear articulation of the relevant social norm, thereby reminding us that misbehavior may come with a price: the painful experience of guilt. Such a legal reminder of the prospect of guilt draws on the deep connection between conscience and the moral emotions. To appeal to the conscience is by definition not merely or even mainly a cognitive exercise. Rather, conscience, as an inner judge, reflects a dialog with our environment in which emotions are the leading form of communication. To use the words of the second epigraph, "[r]ightness and wrongness . . . are things we feel."[32]

Expanding and deepening the conversation to include the moral emotions is imperative for two main reasons. First, since emotions dictate the operation of conscience and thus the probability of self-restraint, we must understand the impact of law on the affective domain in order to fully assess how legal decisions may influence future behaviors. Second, the emotions have a normative value for

29. *See, e.g.*, PAUL STROHM, CONSCIENCE: A VERY SHORT INTRODUCTION (2011) (discussing the many meanings of conscience while covering a vast variety of approaches, periods, cultures, and languages).

30. *Id.* at 11.

31. *See id.* at 94 ("[T]hrough the conscience we judge that something should be done or not done.") (quoting AQUINAS, SUMMA THEOLOGICA 1.79.13).

32. PRINZ, *supra* note 2, at 13.

anyone interested in curbing greed.[33] Even those who ideologically support the free market may appreciate the opportunity to decrease exploitation, not by increasing the frequency of intervention, but rather by creating the ethical and affective conditions that would encourage individuals to regulate their own behavior. Indeed, lab studies of human behavior in transactional contexts have shown that most people expect fairness of exchanges and strongly condemn greedy behavior.[34]

The Article unfolds in four parts. Part I is dedicated to the relationship between the unconscionability principle and the concept of conscience. It explores the rise and fall of the bond between the two, how the principle was born joined to concerns of conscience but increasingly broke away from them and has reached a point when many believe unconscionability has little to do with conscience or morality. Part II explores the connection between conscience and emotions. It draws on interdisciplinary studies to explain the impact of moral emotions on self-restraint and on choices between selfish and prosocial behaviors. This Part focuses on the human ability to anticipate feelings of guilt as a key to self-restraint. Part III applies the understanding developed in Part II to the debate concerning the way courts use the unconscionability principle. It illustrates how the framing, content, and rhetoric of judicial reviews of exploitive contracts can influence the moral emotions of people and thus shape their future behavior. Part III does so by offering a careful textual analysis juxtaposing two contemporary decisions: one that has the power to disable the moral emotions required for the operation of conscience and one that can induce those emotions and support conscience-based decisions. Part IV generalizes these examples and proposes a normative argument: if courts have the ability to either discourage or encourage conscience-based and emotionally-informed decision making they should aim at fostering rather than suppressing non-exploitative behavior. To achieve such a goal, this Part proposes a concrete model for applying the unconscionability principle effectively. This model is clear and easy to implement and is

33. *See* Eric A. Posner, *The Jurisprudence of Greed*, 151 U. PA. L. REV. 1097 (2002).

34. Shaun Nichols, *Emotions, Norms, and the Genealogy of Fairness*, 9 POL. PHIL. & ECON. 275, 287 (2010) (discussing lab-based evidence of an equal-division norm in an ultimatum game setting including explicit anti-greed responses such as writing a note to the exploiters saying "you greedy bastard").

comprised of three characteristics: framing that welcomes, rather than ostracizes, the moral emotions; rhetoric that clarifies, rather than clouds, pertinent social norms; and content that thoughtfully portrays the harm caused to the exploited party.

Overall the Article calls for a renewed and redefined linkage between the judicial employment of the unconscionability principle and the concept of conscience. Given the power of law and the authority of judges, the review of market behavior in the manner proposed below has the power to encourage the operation of the moral emotions, facilitate the working of conscience, support self-restraint, and improve the fairness of the market.

Furthermore, the Article's contribution is not limited to the context of market exploitation. It suggests more broadly that in many other contexts, judicial decisions, as well as other legal signals, could and should be evaluated in terms of their impact on human emotions. Despite the fact that emotions drive behavior, such impact is currently under-acknowledged—a status that this Article seeks to change by marking a path for a more nuanced understanding of the operation of law and a better use of its given power.

## I. CONTRACTS AND CONSCIENCE

Many others have described the development of the unconscionability doctrine and reviewed its success with approval or with different shades of criticism.[35] My goal in this Part is not to recap this important scholarship. Rather, in what follows, I trace the voice of conscience in the legal unfolding of the unconscionability principle. I emphasize the adoption and rejection of the notion of conscience in judicial decisions to enforce or invalidate predatory contracts and by theorists. At the same time, I set aside decisions and works that offer doctrinal analyses but do not illuminate the role of morality. Admittedly, the focus on conscience presupposes that there is something morally wrong about the exploitation of others via the mechanism of contracts: the intentional use of one human being as a tool for the advancement of another's interests, in violation of the dignity of the exploited.[36]

35. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor*," 102 GEO. L.J. 1383, 1422–24 (2014).

36. BIGWOOD, *supra* note 15, at 489–90.

### *A. Contracts in the Courts of Conscience*

The unconscionability principle is tied to the idea of conscience in its roots. It was most famously articulated by the "courts of conscience"—England's courts of equity.[37] In 1751, Lord Chancellor Hardwicke explained that courts of conscience would not enforce agreements 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."[38] Importantly, he also described those undeserving agreements by directly referring to conscience, naming them "unequitable and *unconscientious* bargains."[39] And, although it was not the first time that courts have refused enforcement of unfair contracts,[40] it was certainly one of the first times the refusal was theorized in conscience-oriented terms. Lord Hardwicke's words—which emphasize the potential conflict between contract and conscience—have proven appealing to generations of judges and legal commentators on both sides of the pond.[41] For over a several centuries those words have been cited numerous times,[42] thus transferring an idea born in the "courts of conscience" to all courts, regardless of their operation under equity or law.[43] As the

37. *See, e.g.*, Dennis R. Klinck, *The Nebulous Equitable Duty of Conscience*, 31 QUEEN'S L.J. 206, 208 n.9 (2005) (citing the case of *Ewing v. Orr*, (1883) 9 App. Cas. 34 (HL) 40, in which the court said, "The courts of equity in England are, and always have been, courts of conscience."); *see also id.* at 211 (stating that "no doubt historically conscience and equity were intimately allied, even synonymous").

38. Earl of Chesterfield v. Janssen, (1751) 28 Eng. Rep. 82 (Ch) 100.

39. *Id.* (emphasis added).

40. For an example of the "ancient roots" of unconscionability, see Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 334–43 (2010) (citing sources which connect the idea to ancient Jewish and Roman law); *see also* Schmitz, *supra* note 24, at 80–82.

41. The first American case to refer to the words of Lord Hardwicke in *Earl of Chesterfield* is *Powell v. Spaulding*, 3 Greene 443, 465 (Iowa 1852). The Supreme Court has adopted the full definition in *Hume v. United States*, 132 U.S. 406 (1889).

42. To date the latest case citing the definition in full (including the archaic term "unconscientious bargains" as opposed to only referring to the *Earl of Chesterfield* case) is *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 678–80 (2011), *vacated*, Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).

43. See the decision of the U.S. Supreme Court in *Hume*, 132 U.S. at 410, citing Lord Hardwicke's definition and other cases that had followed it, and affirming the lower court's finding that "[t]hese citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement."

idea came to be known as "unconscionability," alluding to Lord Hardwickes' "unconscientious bargains," conscience has remained a central part of the decision to enforce a contract or not. As early as 1889 the U.S. Supreme Court referred to "unconscionable" contracts, opening its decision with the celebrated judgment of Lord Hardwicke.[44] Even earlier, albeit without reference to its English origins, the term "unconscionability" was already in use by American courts as a defined legal reason for unenforceability.[45] It can be contended, therefore, without much risk, that the link between the linguistic rhetoric of the unconscionability principle and the idea of conscience is an important core concept, reflecting a tradition of hundreds of years. The following section will investigate this link more closely.

### *B. Contracts that Shock the Conscience*

Courts' recurrent use of phrases that encompass the word "conscience" in enforcement discussions is another marker of the importance of ethics in the context of invalidating unconscionable contracts. Courts repeatedly explain that enforcement is to be denied when the contract, or one of its terms, "shocks the conscience" or is "conscience-shocking." Significantly, this conscience test has been used for centuries. My research found that the test was already in use in an early case from 1816,[46] and in 1836 it was reported and analyzed as a leading test by Judge Story in his highly influential book *Commentaries on Equity Jurisprudence as Administrated in England and America*. Stating the rules of equity of his time, Judge Story wrote:

> [T]here may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases Courts of Equity ought to

44. *Id.* at 411.

45. *See* Morris & Essex R.R. v. Sussex R.R., 20 N.J. Eq. 542, 563 (1869) ("To the full extent of these powers this contract could be made, and was to that extent within their scope, (that is, apart from any question of illegality, or want of consideration, or *unconscionability*, or want of authority of the directors to make it, against the stockholders) . . . .") (emhasis added).

46. Osgood v. Franklin, 2 Johns. Ch. 1, 23 (N.Y. Ch. 1816) ("[T]he inequality amounting to fraud, must be so strong and manifest as to *shock the conscience* and confound the judgment of any man of common sense.") (emphasis added).

> interfere . . . . [S]uch unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) *shock the conscience*.[47]

Judge Story's words have gained much eminence throughout the years and have been quoted, with or without adequate reference, by numerous judges and scholars.[48] The shocks-the-conscience test has not only been in constant and frequent use, it has also survived many modern attacks on the doctrine of unconscionability. In fact, it is still utilized today by judges and scholars who are greatly aware of its historical origins.[49]

Certainly, the ongoing legal reference to conscience when unconscionability is argued and discussed is in and of itself of great importance to this Article's argument. However, beyond this rhetorical phenomenon, some more nuanced observations are in order to lay the groundwork for a later focus on the emotions that impact the conscience.

First, it is often unclear whose "conscience" is at stake and who exactly should be shocked by the behavior of the stronger party, the harm to the weaker party, or the predatory terms of the contract. Frequently, courts have overlooked the question altogether, phrasing the test so abstractly that it ignores the possibility that people's

47. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 256 (13th ed. 1886) (emphasis added).

48. Since Judge Story's words were quoted in full in the known case of *Eyre v. Potter*, 56 U.S. 42 (1853), some have attributed them to the U.S. Supreme Court. *See, e.g.*, Friedman, *supra* note 40, at 339 (citing *Eyre*, 56 U.S. at 60) ("The 'unconscionableness or inadequacy' must be such as would 'shock the conscience'–an 'expressive phrase' that retains a hold on the current unconscionability doctrine.").

49. For an example of a court decision, see *Rudman v. Rudman*, No. 200789-03, 2013 WL 3336829, at *8 (N.Y. Sup. Ct. June 28, 2013) ("An unconscionable bargain has been regarded as one 'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other.' While the inequality of said bargain has been described as being 'so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense.'") (citations omitted). It is noteworthy that the court cited modern cases which themselves cited the words discussed here from *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82 (Ch) 100, and *Osgood*, 2 Johns. Ch. 1, respectively. For an example of a scholarly work, see Philip Cantwell, *Relevant "Material": Importing the Principles of Informed Consent and Unconscionability to Analyze Consensual Medical Repatriations*, 6 HARV. L. & POL'Y REV. 249, 257 (2012) (stating, with reference to *Osgood*, 2 Johns. Ch. 1, that "[u]nconscionability is a tool originally used in courts of equity to prevent the enforcement of contracts that are so unreasonable as to 'shock the conscience'").

perception of conscience may differ. For example, in one discussion of an arbitration term the court said, "It is *self-evident* that such a provision [which] is unduly harsh and one-sided, defeats the expectations of the nondrafting party, and shocks the conscience."[50] Other courts and commentators have linked the test to the conscience of the reasonable person, explaining that to prove unconscionability one should show "the type of inequality that would shock the conscience of *a person of common sense*."[51] This approach clearly attempts to justify unenforceability by suggesting that conscience is an objective perspective shared by people of common sense.

However, by and large, courts using this test have suggested that it is the conscience of the court itself that should be shocked. As one commentator stated, "The court should . . . ask whether the provision was so unfair at the time of execution that it would shock *the conscience of the court*."[52] From this perspective, enforcement of unconscionable contracts necessarily means judges' participation in something that is against their conscience. Interestingly, while most judges who use this approach have referred rather generally to the "conscience of the court,"[53] others have acknowledged the differences between individual judges. As one judge candidly stated: "Although the exorbitant rates on a fully secured loan, under the circumstances of this case, do not shock the conscience of the majority, it [sic] does mine."[54] Notably, this judiciary-based version of the shock-the-conscience test adds a new justification for non-enforcement. Not only would enforcement conflict with the conscience of many people of common sense, it may also risk the reputation and reliability of courts.

Second, despite hundreds of years of use, it remains unclear what definition of conscience courts and scholars of all generations have

50. Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 202 (Cal. 2013) (emphasis added).

51. Santini v. Robinson, 2006 N.Y. Misc. LEXIS 2878, 13–14 (N.Y. Sup. Ct. 2006) (emphasis added), *modified*, 891 N.Y.S.2d 100 (2009).

52. Prince, *supra* note 25, at 484 (emphasis added).

53. *See* Simar Holding Corp. v. GSC, No. 2645/04, 2010 WL 1855760, at *10 (N.Y. Sup. Ct. May 10, 2010), *rev'd*, 982 N.Y.S.2d 592 (2011).

54. Cheshire Mortg. Serv., Inc. v. Montes, 612 A.2d 1130, 1150 (Conn. 1992) (Berdon, J., dissenting).

(or had) in mind while applying the test. In some cases, "conscience" was used synonymously with the word "moral."[55] Most importantly to the argument made hereafter, other courts have pointed out that the question of whether a contractual arrangement is unconscionable or not may depend on varying external circumstances, including the norms dictated by law, culture, and religion. For example, in an interesting early nineteenth-century case, an American court expressed reluctance to follow the rules of England and refused to find a loan agreement unconscionable due to the high interest rates charged by the lenders.[56] Highlighting the differences between the countries, the American court stated, "It is true that, in conformity to the canons of the church, all interest whatever upon money loaned was long prohibited in England."[57] However, due to historical, ideological, and political variations, the court emphasized its commitment to independent decision-making regarding "what rate of interest should be deemed contrary to good conscience"[58] and refused to blindly follow norms produced at other times and in other societies.

Third, it seems that over the years the application of the shock-the-conscience test has gone through significant changes. Traditionally, until the late 1970s, the fact that a contract (or the behavior that led up to a contract) was conscience-shocking had served as a justification to refuse enforcement, especially if the litigation took place in the courts of conscience. A judge who was morally revolted by an abusive contract was "shocked," and therefore, had to avoid participating in what the judge found to be immoral. Still, for at least the last few decades, it seems that the role of this test has been changing in accordance with the decline of the unconscionability principle. By and large, the conscience test's function has changed from a reason for unenforceability to a justification of enforceability. In other words, the test has turned into a way to raise the bar required for non-enforcement. Increasingly,

55. *See, e.g.*, Thomas v. T & T Straw, Inc., 561 S.E.2d 495, 497 (Ga. Ct. App. 2002) (quoting F.N. Roberts Pest Control Co. v. McDonald, 132 Ga. App. 257, 260 (1974)) ("An unconscionable contract is one abhorrent to good morals and conscience. It is one where one of the parties take a fraudulent advantage of another.").

56. Houghton v. Page, 2 N.H. 42 (1819).

57. *Id.* at 43.

58. *Id.* at 44.

courts apply the test with more emphasis on the aspect of "shock" than on the component of "conscience". Unsurprisingly, the court's insistence on shock, more often than not, ends in an enforcement of contracts that might very well be immoral but are nevertheless not extreme enough to cause a shock.[59] For example, in one case, the court reflected explicitly: "Needless to say, a 'shocks the conscience' standard *is a high bar*."[60] And, although some exceptions exist,[61] as the years pass, it does seem as if more and more is required to justify a refusal to enforce a contract on the basis of a shock to the conscience.[62]

Finally, it is important to admit the limits of rhetoric. In the cases at hand, even if courts reference conscience while deciding enforcement issues, it does not necessarily follow that one can find a significant review of moral dilemmas in the court's discussion. Indeed, many courts simply quote earlier cases in a traditionalist

59. *See, e.g.*, Friedman, *supra* note 40, at 347 & n.164 (arguing that "[t]here are countless recent examples of courts using either or both of these standards, or variations thereof, in assessing-and frequently rejecting-claims of unconscionability," and citing many recent cases to support the argument).

60. *In re* DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig., 810 F. Supp. 2d 1060, 1070 (C.D. Cal. 2011) (emphasis added).

61. In early times a judge said that the test requires a gross inadequacy of the valued exchanges. Wiest v. Garman, 3 Del. Ch. 422, 442 (Del. Ch. 1870) (citing the "shock the conscience" test and adding that "[i]n all the cases in which inadequacy of price or value has been treated as a material consideration, it has been of this gross character" and that "[t]he inequality has not been less than half the value"). When a mentally limited buyer asked for relief for paying much more than market value for a farm, the court used its interpretation of the "shock the conscience" test to decide that, although they "appeal strongly to [the court's] personal sympathies," the circumstances do not justify relief as the undisputed inadequacy was not large enough to meet the required threshold. *Id.* at 444. For an exception in recent times, see *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 638–39 (Wash. 2013) (citing the shocks-the-conscience test and immediately after finding the shortening of a limitation period of employees from three years to fourteen days unconscionable).

62. My focus here is on tracing the changes of the use of the "shock the conscience" test, and I am therefore less concerned with the emergence of the formal test of procedural and substantive unconscionability. Although some have argued that it is the formality of this test that made unconscionability a relic, I believe that theoretically such formal framework can equally allow a narrow or a broad understanding of the unconscionability *principle*. This two-prong test can be filled with conscience-based content or deny such content altogether. In other words, I am not concerned here with the formalistic framework but with its deeper substance. For a rich description of the formalistic framework see Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012) (offering a detailed description of the procedural and substantial prongs and their interaction under the case law of different jurisdictions).

manner and do not truly engage in an inquiry of the appropriateness of the behavior that led to a predatory contract. These courts acknowledge the existence of the unconscionability principle without actually participating in shaping its content. It is mainly for this reason that despite the evident rhetorical link between unconscionability and conscience there is a need for additional theoretical inquiry. As the two following sections will demonstrate, the place of conscience in deciding enforceability questions has long been disputed, not only among judges, but also among scholars.

### *C. The Anti-Conscience Approach*

The long tradition of judicial refusals to enforce contracts on the grounds of their conflict with the commands of conscience has provoked strong opposition. For example, in the one and only case I was able to find in which the Seventh Circuit mentioned the shock-the-conscience test, it did so to dismiss the test, as well as condemn the mixture of contracts and morals it represents more generally. "It is a strength rather than a weakness of contract law," declared Judge Posner, "that it generally eschews a moral conception of transactions."[63] It is therefore better, according to Judge Posner, to discuss real contractual issues rather than "[r]uminating on the meaning of 'unjust' and 'unconscionable.'"[64]

Generally, the call to separate law, particularly the law of contracts, from questions of conscience and morality, is neither unique to the Seventh Circuit nor new.[65] Oliver Wendell Holmes was the most influential modern jurist to speak against the integration of law and morality. As early as the end of the nineteenth century, he wrote that "[n]owhere is the confusion between legal and moral ideas more manifest than in the law of contract."[66] However, Holmes's theory did not seem to stop courts from using and developing the unconscionability principle. Nor did it trigger a

63. Classic Cheesecake Co. v. JPMorgan Chase Bank, 546 F.3d 839, 845–46 (7th Cir. 2008).

64. *Id.* at 846.

65. Judge Posner's words echo an earlier influential manifestation of a similar idea by Justice Oliver Wendell Holmes who famously wrote, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether." *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

66. *Id.* at 462.

scholarly attack on the principle. It was much after, in 1965 and following the watershed unconscionability case of *Williams v. Walker-Thomas Furniture Company*[67] that things began to change.

The most influential attacks on the *Williams* decision, and the power of the unconscionability principle for which it stands, came from legal scholars drawing on an economic analysis of the law. Out of their many arguments, I will emphasize only the arguments central to the concept of conscience.[68] First, the opponents challenged the framework of the unconscionability principle. Law and economics commentators, as well as judges who apply the law and economic analysis to their decisions, use market, not moral terms, to frame the limits of enforceability. To these legal thinkers there is no moral dilemma of fairness or justice, but rather a question that solely depends on the operation of the free market. They believe that competition is necessary for the market to operate optimally and therefore resist legal interventions in the course of such competition. In other words, for the market players to succeed, they need to be free to pursue their own self-interests and should not be, nor should they be expected to be, their "brother's keeper."[69] Indeed, from this market-centric perspective, acting out of greed and driving a hard bargain are not flaws but rather valuable market skills.[70] And, as long as the other party consents, there is no possible outcome that can be immoral. Put differently, where consent appears to exist, it is not appropriate for courts to ask whether market behaviors are wrong or right. Instead, contractual terms are detached from the very human context that brings them into existence; they are merely a product of

67. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

68. In doing so, I am setting aside several other objections to unconscionability, such as on the basis of uncertainty or paternalism. *See, e.g.*, Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 287–89 (2000) (noting the uncertainty surrounding courts' applications of the unconscionability doctrine); Fleming, *supra* note 35, at 1431 & n.314 (pointing out that "[c]ritics of the doctrine labeled it paternalistic" and discussing such objections).

69. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) [hereinafter *Chocolate Chip Cookie Co.*] (Posner, J.) ("Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother's keeper.").

70. *See* Wilkow v. Forbes, Inc., 241 F.3d 552, 557 (7th Cir. 2001) (Easterbrook, J.) (reasoning that "an allegation of greed is not defamatory" because "sedulous pursuit of self-interest is the engine that propels a market economy").

risk allocation and pricing. Such a market-based framework directly rejects conscience and morality's place in the context of contracts. Indeed most, if not all, who strongly believe in a free-market ideology would further reject a conscience-based impulse to protect exploited parties.

Second, scholars and judges in the law and economics camp also disagree that courts' refusals to enforce contracts may have a positive impact, helping people draw the line between conscionable and unconscionable market behaviors. While the drafters of the UCC who codified the unconscionability principle believed that formalizing this principle would help to "inhibit the businessman or attorney from automatically asserting all conceivable rights in all transactions,"[71] legal economists foretold the exact opposite response. They criticized decisions such as *Williams v. Walker-Thomas*, not for their outcome, but for their hypothetical, prospective impact on the market. They predicted that unenforceability would neither deter powerful market players from taking advantage of powerless people, nor decrease the amount of unconscionable contracts.

Commentators, such as Richard Epstein and Richard Posner, are influential examples of the aforementioned critique. They argue that stronger parties will respond to unenforceability by using even harsher terms the next time around, choosing to further raise their prices, or refraining from dealing with weaker parties altogether.[72] They caution that utilizing unconscionability (or any other fairness-based scrutiny for that matter) will ultimately damage the same

71. Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism,* 91 OR. L. REV. 129, 158 (2012) (citing John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 941 (1969)).

72. *See* Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983) (Posner, J.) ("It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding commitment."); *Chocolate Chip Cookie Co.*, 970 F.2d at 282 (Posner, J.) ("The more difficult it is to cancel a franchise, the higher the price that franchisors will charge for franchises. So in the end the franchisees will pay for judicial liberty and everyone will pay for the loss of legal certainty that ensues when legal principles are bent however futilely to redistributive ends."); *see also* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 421 (2009) (analyzing Judge Posner's decision in *Chocolate Chip Cookie Co.* and concluding that "[i]n essence, Judge Posner asserted that any judicial favoring of the weaker party for redistributive reasons would fail because it would be undone through overriding provisions dictated by the stronger party in the contract."); Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306–08 (1975).

powerless parties it purported to help. Judge Posner, who apparently has never accepted an unconscionability claim in his entire judicial career,[73] explained that it is only for the benefit of the party seeking relief because this party "may actually be made worse off by a rule of nonenforcement of hard bargains; for, knowing that a contract with him will not be enforced, merchants may be unwilling to buy his clothes or lend him money."[74] Or, as Robin West has tartly paraphrased the conclusion of such anti-intervention admonitions: "if you want to help poor and uneducated buyers, for heaven's sake, hold them to their contracts."[75]

The gloomy hypothesis that using unconscionability will actually make things worse has greatly impacted judges and has played a major role in the decline of the principle from the end of the twentieth century through the present day.[76] As one commentator observed, "After the newly-codified unconscionability doctrine was put to use in *Williams v. Walker-Thomas Furniture Co.*, it was largely halted by scholars, the law and economics movement, and a fear of judicial activism."[77]

Before concluding the discussion of the impact of law and economics thinkers' rejection of conscience, it is very important to note that this seemingly amoral approach actually reflects a distinctive perception of morality. Just because it draws heavily on money and numbers as a basis for its argument, it is not, as some

73. This is based on a search in the "ALLCASES" database on WestlawNext, conducted on July 1, 2013, using the following query: "ADV: JU(POSNER) & UNCONSCION!." The result was 51 cases, which presumably captured all of Judge Posner's opinions containing the root "unconscion-."

74. Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 522 (7th Cir. 1986).

75. Robin L. West, *The Anti-Empathic Turn, in* NOMOS LIII: PASSIONS AND EMOTIONS 243, 258 (James E. Fleming ed., 2013).

76. The emergence of behavioral law and economics analysis—with its recognition of bounded rationality and the limits of the traditional law and economics approach, which relies on individuals' rationality—adds much to the general support of unconscionability. However, it changes less regarding the point made here. Although behavioral law and economics has yielded more arguments favoring the use of unconscionability, it still suggests to do so based on bounded rationality and not due to moralistic concerns. For a pioneering analysis from this perspective see Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Co., 26 HAW. L. REV. 441 (2004).

77. Preston, supra note 71, at 159; *see also* Susan Landrum, *Much Ado About Nothing? What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 779 (2014) (reporting a success in 23% of the cases in which unconscionability was discussed).

tend to think, more objective or more scientific than approaches which do assign power to judges to draw lines between right and wrong behaviors. For the most part, the free-market attacks on the unconscionability doctrine are ideological attacks with strong moral features, and by their very existence, they put conscience at the core of the debate.

No other source proves this point better than the honest writings of Judge Posner himself. Recall that in the 1986 case of *Amoco Oil*, Judge Posner stated that vulnerable parties "may actually be made worse off by a rule of nonenforcement of hard bargains."[78] Six years later, in the 1992 case of *Chocolate Chip Cookie Co.*, he repeated this idea, contending, "Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future."[79] In a short dissent, Judge Cudahy sarcastically depicted Judge Posner's thesis that helping weaker parties will hurt them as an "exhilarating alchemy of economic theory."[80] Two decades later Judge Posner reflected on this squabble, describing it as a debate grounded in deep ideological and political differences. He explained that his opinion stems from conservative ideology while Judge Cudahy's dissent represents his liberal beliefs.[81] Importantly, Judge Posner further explained that disagreements of this kind "are more likely to reflect ideological differences than differences in 'legal' analysis narrowly defined."[82]

Put more broadly, the decline of unconscionability should be contextualized as a trend that is "chronologically in sync with the political triumph of neo-liberalism."[83] Moreover, it is evident from the rhetoric used by those who challenge the unconscionability principle that it touches moral nerves even for those who contest its

78. *Amoco Oil Co.*, 791 F.2d at 522.

79. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992).

80. *Id.* at 283 ("Apparently, the legislators had not read enough scholarly musings to realize that any efforts to protect the weak against the strong would, through the exhilarating alchemy of economic theory, increase rather than diminish the burden upon the powerless.").

81. *See* Richard A. Posner, *A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy*, 29 YALE J. ON REG. 355 (2012).

82. *Id.* at 363.

83. Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 667 (2007).

role as setting moral limits on market behavior. From admitting that certain jurisdictions are "unfriendly to the defense of unconscionability"[84] to declaring that unconscionability is the free market's "covert enemy,"[85] the intense resistance reveals the depth of the debate. It also further demonstrates that even calls for an amoral application of the law are themselves far from being moral-free and represent a specific set of values.

### *D. The Pro-Conscience Approach*

Several leading scholars offer theoretical support for the idea that conscience should limit enforceability and that courts should utilize the unconscionability principle to that end. In light of my current focus, I will call their arguments the "pro-conscience approach." These scholars, with Seana Shiffrin and Robin West at the forefront, have compellingly responded to Holmes and the later legal economists' arguments that law and morality should be kept separate and a moralistic understanding of unconscionability should be avoided.

Pro-conscience commentators usually begin their discussion of unconscionability by highlighting a tenet similar to the one I outlined earlier: that—by its own name, history, and conventional understanding—the standard of unconscionability both must and does incorporate a concern with morality.[86] Next, they argue that ethical content *requires* judges to apply moral standards such as unconscionability, routinely drawing on their moral sense or "moral conscience."[87] Indeed, writing in the UK—at the birthplace of the unconscionability principle—one scholar argued that "Private law should prevent people, by force if necessary, from acting in ways that

84. Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 522 (7th Cir. 1986).

85. Arthur Allen Leff, *Thomist Unconscionability*, 4 CAN. BUS. L.J. 424, 427 (1979).

86. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222 (2010); West, *supra* note 75, at 252; Schmitz, *supra* note 24, at 75 (arguing that amoral approaches ignore "the history and philosophy of unconscionability," that the doctrine's role "is protecting societal values and norms of morality, fairness, and equality," and that these values and norms "rely on context, common sense, and conscience").

87. West, *supra* note 75, at 253–54.

harm their fellow humans. One good way of doing so . . . is to get them to listen to their inner guide to morality, ie their conscience."[88]

Moreover, West argues that to ignore the possibility of immoral exploitation and enforce contracts regardless of whether or not they are appropriate necessarily means that the judge is not being "true to the law."[89] It would also mean that the courts and the state are publicly demonstrating "complicity with exploitation," a possibility that Shiffrin has both argued and demonstrated to be a primary concern of many judges.[90] Being moral actors themselves, judges simply "have no business coming to the aid of immoral business practices."[91] Thus, when courts face an enforceability dilemma, they have a duty to decide whether a party's behavior "did or did not conform to norms of decency,"[92] a duty which they should not avoid or attempt to escape.

Pro-conscience commentators have also replied to specific facets of their opponents' arguments following the decline of unconscionability. For example, in response to arguments regarding unwarranted intervention and paternalism, Professor Eisenberg has recently argued that unconscionability as a basis for non-enforcement is a very mild form of intervention and the bare minimum that the state owes its citizens. "Under that doctrine," he writes, "the government forbids nothing and commands nothing. It simply says to the promisee, 'If you can accomplish your ends without our assistance, fine. But don't ask us to help you recover a pound of flesh.'"[93]

Additionally, pro-conscience literature offers several important counterarguments to legal economists' main and most deterring objection—that unenforceability would not help, and instead harm,

88. Irit Samet, *What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13, 20 (2012).

89. *Id.* at 20, 89.

90. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 229–30 (2000) [hereinafter Shiffrin, *Unconscionability Doctrine*].

91. West, *supra* note 75, at 262.

92. *Id.* at 265.

93. EISENBERG, *supra* note 21. Note that Eisenberg's words echo old words of the courts of conscience and follow the logic of the equity doctrine of "clean hands." *See also* Shiffrin, *Unconscionability Doctrine*, *supra* note 90, at 229–230 (arguing that when courts deny enforceability they do this, at least in part, not out of paternalism but as a result of self regard).

the less powerful parties who seek its protection. First, it points out that there is no evidence to support the idea that stronger parties would indeed respond to the non-enforcement of contracts as predicted by the law and economics analysis, i.e. by insisting on making even less decent contracts or not contracting at all. The question, as Shiffrin has reminded us, requires some evidence regarding human nature, which is currently lacking.[94]

Second, pro-conscience advocates suggest that even if stronger parties do respond in this manner, this should not result in courts' insistence on enforcing unconscionable contracts. The fact that this possibility exists does not alone require courts to react by "facilitating exploitative contracts."[95] And, as West has emphasized, since judges are not legislators, they should focus on the dispute immediately before them instead of *speculating* about the creation of correct incentives for the future.[96] Furthermore, while working with the unconscionability doctrine, judges should not make predictions relying on economic tools,[97] but rather focus on a morally-grounded review of the contract and the behavior which led to its creation.

Third, the pro-conscience literature counters the prediction of legal economists regarding the future impact of enforceability decisions, rejecting the assumption that unenforceability may make things worse. The literature goes so far as to argue that the opposite is conceivable: that the *enforceability* of unconscionable contracts (as opposed to their unenforceability) is itself the judicial response that would carry a negative impact.[98] In other words, if there is any future damage (or cost) coming from enforceability decisions, it is more likely to come from judges affirming wrongful behaviors that result in predatory contracts than from judges invalidating contracts. As Shiffrin has briefly mentioned, and as this Article seeks to further develop, state approval of wrongful contracts might come with a heavy price.[99] Such official endorsement of transgressions is

94. *See* Shiffrin, *Unconscionability Doctrine*, supra note 90, at 233–34.

95. *Id*. at 234.

96. *See* West, *supra* note 75, at 279.

97. *See id*. at 249–50.

98. *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, at 720 (2007).

99. *See id*.

dangerous to the environment or culture within which we all live and function.[100]

This last argument is especially promising since it uses the master's tools to challenge the master's argument. It is precisely this gloomy prophecy of negative impact that legal economists have touted as an attack on unconscionability, which should instead support its use. The legal economists' leading objection might lose its power if it were possible to explain why and how enforcement of exploitative contracts entails significant risks and heavy social costs. The remainder of this Article takes up this ambitious task.

### *E. The Dilemma of Unconscionability*

Can and should judges attempt to use unconscionability to draw a line between acceptable and unacceptable market behaviors? As this Article has so far shown, the legal tools exist. Unconscionability, as both a doctrine and a broader principle, is recognized and available for judicial use.[101] The debate, however, concerns the desirability of utilizing it to respond to contracts that shock the conscience, and, as described above, such use has become contested over the years. Nonetheless, what was recently referred to as "the rise and fall of unconscionability,"[102] is far from being a settled result. Rather, it raises the question of whether, and to what extent, judicial invalidation of unconscionable contract is desirable.

This broad question encompasses two different debates which are often combined but worth separating. The first debate is purely ideological. It focuses on the role that the law, and judges in particular, play in a capitalist society. In this debate the attack on unconscionability has less to do with conscience and much more to do with politics. As Judge Posner explained in the context of his

100. *See id.*

101. An exception was recently created by the new arbitration jurisprudence created by the Supreme Court. Under this jurisprudence courts must enforce arbitration agreement and cannot utilize the unconscionability principle to invalidate them due to a new and broad interpretation of the Federal Arbitration Act (FAA). The leading cases creating this new understanding of the FAA are *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). For an analysis of this exception see Hila Keren, *Undoing Justice: The 2nd Rise of the Freedom of Contract and the Fall of Equity*, CANADIAN J. COMP. & CONTEMP. L. (forthcoming 2016).

102. Fleming, *supra* note 35, at 1390.

debate with Judge Cudahy,[103] the different approaches to utilizing unconscionability stem from a broader disagreement between conservatives and liberals concerning interventions in the free market to conservatives who hold fast to their strong, free-market beliefs. For the most part, I would like to set this ideological controversy aside.

The other debate concerns assumptions regarding human nature and behavior. At its core lies the question of how people respond to judicial invalidation of exploitative contracts. At this junction, pro-conscience and anti-conscience thinkers sharply disagree and predict contradictory outcomes. While law and economics scholars believe that powerful parties will respond to such judicial decisions by worsening their behavior, others, such as Shiffrin and West, suggest that the opposite is true. However, the suppositions—on both sides of this debate—are very abstract and suffer from an overwhelming lack of support. As a result, judges are justifiably confused and torn between their natural wish to do justice, and the loud warning that by doing so they will only make things worse.

The current debate regarding the role of the unconscionability principle is thus severely lacking and limited. To continue the conversation more fruitfully we need to learn more, much more, about the possible impact judicial decisions regarding wrongful market behavior might have on market players conducting future transactions. We must look beyond economic impact and ask ourselves what shapes human moral decision-making and how our legal system can discourage rather than encourage market exploitation. The coming Part aims to fill the current void in the debate by focusing on the operation of emotions in the setting of moral decisions.

## II. CONSCIENCE AND EMOTIONS

How might enforcement decisions impact the moral judgment of those presented with an opportunity to exploit others in the future? This Part takes the first step towards answering this question by exploring what *in general* might encourage market actors to draw on their conscience and exercise more self-restraint in their dealings.

103. Posner, *supra* note 81.

The next step will be to connect the interdisciplinary discussion found in this Part and apply it to the legal debate regarding the unconscionability principle. In contrast to most arguments in this debate, the following discussion is free of concerns regarding paternalism and judicial activism. The focus is only on whether it is possible to encourage stronger market players to *choose* to exercise self-restraint. The more self-restraint exercised by market players, the less judicial action is needed (regardless of whether one sees such action negatively or not).

### *A. Exploitation as a Product of Moral Judgment*

Contractual exploitation is a market behavior that results from human beings making moral judgments. The stronger party in a given market situation has an opportunity not only to profit from a deal, but also to exploit the other party far beyond the fair *and profitable* terms of a similar deal made between more equal parties. But as Judge Posner once suggested, the fact that an opportunity exists does not mean one has to take full advantage of it.[104] The space between recognizing the opportunity to exploit, and the decision to do so, is a space for moral judgments.

For example, loan officers operating in the subprime market recognized that many consumers would sign any loan agreement offered to them regardless of the harmfulness of the terms. One officer was quoted saying, "When you've got an elderly black woman, you can pretty much sell them anything you want."[105] In such a moment there is a choice that needs to be made: to exploit or not to exploit. This is when moral judgment is required. Even if a *corporation* can charge an egregious interest rate on a loan or impose the kind of one-sided arbitration which would surely defeat the other party, to draw on two exploitative market practices, ultimately we call upon *human beings* to make the decision whether to take up the opportunity or to exercise self-restraint.

104. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 249 (2009) ("But the existence of an opportunity is not the same thing as the decision to exploit it.").

105. MICHAEL W. HUDSON, THE MONSTER: HOW A GANG OF PREDATORY LENDERS AND WALL STREET BANKERS FLEECED AMERICA–AND SPAWNED A GLOBAL CRISIS 88 (2010).

In highlighting this space—the moment in which one is confronted with the choice between right or wrong, possesses freedom to stand at the fork in the road, and chooses to take the less gainful path—I consciously start the discussion in a manner that deviates from legal economists' starting point. I reject the economists' leading assumption that, given a choice, people will choose the more profitable option no matter what; that is, selfishly select—regardless of context and circumstances—to make more money, suffer fewer costs, have more rights, and carry fewer duties. I will later discuss studies that refute the assumption of unyielding selfishness. However, for now the point is more modest: a belief that even if exploitation of others is possible, *some* people may *choose* the less exploitative option.

At this stage, understanding exploitation in moral terms is key to the progression of my analysis. If exploitation is an immoral behavior,[106] then the emergence of an exploitative contract is a product of a moral decision to act selfishly and without any consideration for the resulting harm to others. Similarly, refraining from exploitation, and contracting more fairly (or at least less unfairly), is a product of a moral decision to act more prosocially. Assuming that exploitation is socially and morally objectionable, a new question then must be addressed: What may encourage people to restrain themselves and choose not to take advantage of others, despite circumstances that allow them to do so? Connecting contractual exploitation with conscience—as suggested in Part I—the following sections explain what factors may help the operation of conscience and promote a decision not to exploit.

### *B. The Impact of Social Cues on Conscience*

The idea of conscience sometimes evokes an inner voice, a judge residing inside each one of us.[107] It therefore also suggests that the process of moral deliberation—between one and one's conscience—is internal and insulated from the outer world. Often, it also suggests that conscience is preset, static, and fixed. However, the above is an

106. *See supra* note 15 and accompanying text.

107. Nomi Maya Stolzenberg, *Jiminy Cricket: A Commentary on Professor Hill's Four Conceptions of Conscience*, *in* NOMOS XL: INTEGRITY AND CONSCIENCE 53, 66 (Ian Shapiro & Robert Adams eds., N.Y. Univ. Press 1998).

utterly misleading conceptualization of the human conscience, and in any case, one that would be hopelessly inoperable in the legal context.

Professor Lynn Stout has brought to law a different understanding of conscience.[108] Drawing on behavioral studies with emphasis on experimental games,[109] Stout has argued that the human conscience is influenced by ever-changing social cues, and therefore, is a product of an interactive and dynamic process between us and the various environments we occupy. Rejecting the argument attributed to Holmes that humans are inherently "bad,"[110] she has explained that people are neither always good nor constantly bad, but rather can and do shift between selfish and prosocial behaviors.[111] This understanding opens up the possibility of deliberately influencing people's moral judgments, what Stout calls "cultivat[ing] conscience."[112]

It goes without saying that in order to cultivate conscience, one needs to know more about the susceptibility of the individual conscience to social cues. We must become better at predicting which cues have the potential to decrease selfish behavior and increase prosocial behavior. Stout has initiated such a project predicated on the idea that individuals do not randomly choose between right or wrong. Instead, their choices are influenced "rather predictably, by certain noneconomic cues and variables collectively described as 'social context.'"[113]

One famous experiment demonstrated how simple changes in social context result in significant changes in moral behavior. In this study, parents who arrived late to collect their children, forcing teachers to stay after closing time, were notified of a new fine to be

108. *See* STOUT, *supra* note 26.

109. Stout is using results from mainly three types of experimental games: social dilemma, ultimatum, and dictator. *See id*. at 84–91.

110. Stout's reference to Holmes seems to assume that he believed that people are essentially bad. *See id*. at 23–26. However, some scholars have disputed such understanding of Holmes's "bad-man" theory and argue that for the most part it is misrepresented and misunderstood. *See* Marco Jimenez, *Finding the Good in Holmes' Bad Man*, 79 FORDHAM L. REV. 2069 (2011).

111. *Id.*

112. *See* STOUT, *supra* note 26, at 22; *see also id*. at 117–18, 236–37.

113. *Id*. at 236.

paid for being ten or more minutes late for pick up.[114] Instead of deterring parents from being late—as economists would predict—the new fine triggered a significant increase in parents' lateness.[115] The common understanding of the surprising results is that the fine did not deter parents because it functioned as a price, changing "the perception of people regarding the environment in which they operate."[116] Pricing the overtime care turned the once-relational issue of inconveniencing the teachers into a market situation. This in turn allowed parents to feel less concerned about the impact of their behavior on the caregivers (and their own reputation). Instead, being charged money for extra hours of care made the interaction more transactional and thus, more detached and legitimate. In the researchers' words: "No guilt or shame (depending on the degree of internalization of the social norm) can be attached to the act of buying a commodity at will."[117]

Another experiment supports the findings of the day-care centers' study in a contractual setting. This experiment offers evidence that people are more willing to breach a contract when their contract awards the other party a defined right to receive liquidated damages.[118] One important explanation for this inclination is that putting a price tag on the questionable behavior of a breach legitimizes, and therefore encourages, a selfish behavior.[119] Again, the enhanced transactional framing decreases the prospect of self restraint.

Stout's contribution to the body of work on predicting how social cues will impact moral judgments is what she calls "the three-factor model."[120] According to this model, the cultivation of conscience depends by and large on three social cues: "instructions from authority; beliefs about others' unselfishness; and perceived

114. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 1 (2000).

115. *Id.* at 1, 8.

116. *Id.* at 3.

117. *Id.* at 14.

118. Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 659 (2010).

119. *See id.* at 664–65.

120. STOUT, *supra* note 26, at 21.

benefits to others."[121] Let me (briefly) explain the first two factors that are pertinent to exploitative market behavior.[122]

First, by "instructions from authority" Stout means that most people will simply follow instructions. The more authoritative the instructors, the more likely people will follow them. This phenomenon can be negative—think, for example, about obedience to commands to commit war crimes.[123] However, as many experimental games have consistently shown, the same human inclination can also be utilized to foster prosocial behavior—many people will respond to an authoritative order to behave prosocially by obeying the order rather than by ignoring the order and acting selfishly.

In one experiment, for example, a group of players in a social dilemma game involving money transfers was told that they were going to play "the 'Community Game,'" while another group was told that they were going to play "the 'Wall Street Game.'"[124] The groups otherwise played an identical game. The outcomes, however, were significantly different. In correlation with the name of the game, players of the game under the community title demonstrated much less selfish decisions than those who played it under the Wall Street title.[125] Even though the games' contrasting names carried a somewhat implicit message, far weaker than any clear order from an authoritative source, the effect was still potent. Therefore, to foster prosocial behavior it would seem that authorities should tell people to collaborate. As Stout admits, not everyone will obey, but as long

121. *Id.*

122. Stout's third factor of "perceived benefits to others" relates to the ability to induce people to act less selfishly by increasing the positive effect of their behavior. *See id.* at 21, 110–14. However, this third factor seems to lie beyond the limits of my project. I am only interested here in the cultivation of self-restraint, i.e., the avoidance of causing harm to others, rather than in the promotion of active altruism. My focus is what Stout calls "passive altruism." *Id.* at 14.

123. *Id.* at 104 (describing examples of negative results of over-obedience, such as Millgram's known experiment and the obedience of Germans to the commands of the Nazis during World War II).

124. *Id.* at 105.

125. *Id.* (demonstrating how "people change their behavior in social dilemmas in response to mere hints about what the experimenter desires").

as most will heed these instructions, this is "a powerful force"[126] in the cultivation of conscience—and a very straightforward one.

Second, the known conformity bias can influence the operation of conscience. Experiments show that people will choose between selfish and prosocial behavior in accordance with what they believe others are doing or expected to do. Therefore, giving people information regarding the choices made by others similarly situated can influence the choices the former will make.[127] After Stout's book was published, a study entitled "Is Dishonesty Contagious?" added evidence regarding the strength of the conformity bias in the context of moral transgressions.[128] Previous studies had shown that people demonstrate "herd behavior" in deciding between selfish and fair allocations of money.[129] The dishonesty study, in contrast, gave subjects a choice to earn money, not from acting selfishly but from lying.[130] Significantly, this recent study showed that even when faced with a highly moral dilemma people will still follow the herd.[131] This recent study further supports the influence of the environment, or culture, on seemingly personal choices as it demonstrates that in making moral decisions people have "a hard-wired trait that tells them to 'do as others do' in these types of situations."[132]

Stout's behavioral model is normatively valuable and will be revisited. However, before moving to the normative arena it is important to note that the model is consciously setting aside an essential component of the issue: the role of emotions.[133] The remainder of this Part is thus dedicated to adding the missing piece

126. *See id.*

127. *Id.* at 108; *see also* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, *in* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE 339, 343 (Herbert Gintis et al. eds., 2005) ("If individuals can be made to believe that others are inclined to contribute to public goods, they can be induced to contribute in turn, even without recourse to incentives.").

128. Robert Innes & Arnab Mitra, *Is Dishonesty Contagious?*, 51 ECON. INQUIRY 722 (2013).

129. STOUT, *supra* note 26, at 108.

130. Innes & Mitra, *supra* note 128, at 725.

131. *Id.* at 727.

132. Robert Innes & Arnab Mitra, *Is Dishonesty Contagious?*, https://arefiles.ucdavis.edu/uploads/filer_public/2014/03/27/innes-honesty042810.pdf.

133. STOUT, *supra* note 26, at 12 ("[W]e are indeed referring to behavior, and not to emotions. We are talking about acts, not feelings.") (emphasis omitted).

to the puzzle, investigating the *affective* side of making moral judgments. Because our conscience-based responses are not a product of an intellectual exercise, I believe that without taking the emotions into account, no meaningful normative suggestions can be made.

### *C. The Role of Emotions*

Around the same time the unconscionability doctrine emerged, Immanuel Kant was advancing the argument that our emotions interrupt and limit our ability to engage in moral deliberation and make appropriate moral judgments.[134] Kant's profound influence has had theoretical and practical consequences for many generations. One result that is of particular interest here is the emergence and success of the metaphor of *homo economicus*—a hypothetical market player who makes decisions rationally, devoid of emotions. Following this approach, it was recommended both within and outside of the legal arena that efforts be made to put the emotions aside while making moral decisions. Such strong belief in rationality had a powerful influence on legal thinkers and played a role in the separation of the unconscionability principle from its roots in the concept of conscience. The fact that many contemporary courts apply the idea of unconscionability so formalistically and parsimoniously accords with the aversion to anything that seems to deviate from pure rationalism.

Outside of the legal world, however, things have been rapidly changing in the last two decades or so. Many researchers and theorists from a variety of disciplines—all seeking to comprehend processes related to moral judgments—have been increasingly making a counter-Kantian argument and supporting it with a growing body of evidence. As a whole, they have made a case for the salient role that emotions play in the course of moral decision making. They have argued that "[r]ightness and wrongness . . . are

134. PRINZ, *supra* note 2, at 20 (describing Kant as arguing that "in making successful moral judgments, we would generally do well to ignore our passions"). Of course Kant was not the first. As described by Jonathan Haidt, former "high priests of reason," including Plato and Aristotle, presented models of thought in which reason ruled over passions. *See* Jonathan Haidt, *The Moral Emotions*, *in* HANDBOOK OF AFFECTIVE SCIENCES 852 (Richard J. Davidson et al. eds., 2003). Such models and thoughts most certainly influenced thinkers such as Kant.

things we feel,"[135] and have followed up by suggesting emotion-based theories of moral judgments. Specifically, the Kantian account of conscience has been criticized for its narrow focus on the human intellect and portrayal of processes of moral reflection with excessive austerity. In contrast, the so-called "sociological turn in theories of conscience" advocates an alternative account of conscience that includes the cultural and psychological mechanism by which conscience arises.[136]

For a while it seemed as if the pendulum had shifted from believing, with Immanuel Kant, that reason controls our moral decision making, to believing the opposite, as did David Hume: that emotions control the moral processes, rendering reason a post-hoc phenomenon.[137] However, most recent works reject the epistemic rivalry between a cold and rational reasoning process and an emotion-laden intuitive course of action. They argue instead for a significantly more integrative process in which cognitive and affective properties work in tandem to achieve or restore a moral equilibrium and yield a moral judgment.[138] Integrative theories view emotions as *constituting* moral judgments (or moral judgments as reflecting the operation of emotions). To judge an act as wrong means to feel emotions of disapproval towards it: anger or disgust if the actor is not we, and guilt or shame if the act is our own.[139] Simultaneously, the integrative approach does not deny the role of cognitive reasoning—for example, in *regulating* the emotions.[140] Since law has generally ignored the role of moral emotions altogether, it is not necessary at this stage to choose between the emotive-dominance approach and the more integrated theory. Merely recognizing the important role that emotions play in shaping moral decision making marks a great step forward.

135. PRINZ, *supra* note 2, at 13.

136. Elizabeth Kiss, *Conscience and Moral Psychology: Reflections on Thomas Hill's "Four Conceptions of Conscience*," *in* NOMOS XL: INTEGRITY AND CONSCIENCE, *supra* note 107, at 73–75.

137. *See, e.g.*, Haidt, *supra* note 134.

138. *See* Chelsea Helion & David A. Pizarro, *Beyond Dual-Processes: The Interplay of Reason and Emotion in Moral Judgment*, *in* 1 HANDBOOK OF NEUROETHICS 109 (Jens Clausen & Neil Levy eds., 2015).

139. Jesse J. Prinz, *Constructive Sentimentalism: Legal and Political Implications*, *in* NOMOS LIII: PASSIONS AND EMOTIONS, *supra* note 75, at 8.

140. Helion & Pizarro, *supra* note 138, at 116–17.

Although there is no single definition of what constitutes the moral emotions, many agree that the term loosely captures those emotions that are most involved in the making of moral decisions. In his famous article, *The Moral Emotions*, psychologist Jonathan Haidt has defined moral emotions as "those emotions that are linked to the interests or welfare either of society as a whole or at least of persons other than the judge or agent."[141] Efforts to list the moral emotions and classify them have followed, yielding a variety of results, but no straightforward consensus. The literature includes self-blaming emotions such as guilt and shame, and other-condemning emotions such as anger and resentment. It also mentions self-praising emotions like pride and other-praising emotions such as gratitude, while compassion and empathy are discussed as other-suffering emotions.[142]

Lists and definitions aside, for many disciplines the main puzzle is how the moral emotions work to influence moral judgments. To begin answering, we can follow Robert Frank's guiding words: "If we are to think clearly about the role of moral emotions in moral choice, we must consider the problems that natural selection intended these emotions to solve."[143] As those words suggest, moral emotions serve an evolutionary goal. More specifically, their role is to keep humans together, despite the possibility of self-destruction due to individual short-term selfishness. For example, while the need to survive periods of famine may provoke an individual to steal from her friend, emotions such as guilt, shame, and regret have enabled "an effective moral system" that inhibits the selfish impulse and motivates people "to forgo self-interest for the common good."[144] In that sense, moral emotions work "in the service of socialization"[145] and civilization.

141. Haidt, *supra* note 134, at 853 (emphasis omitted).

142. The different lists and debates regarding the inclusion of specific emotions in those lists are beyond the scope of this article.

143. Robert H. Frank, *The Status of Moral Emotions in Consequentialist Moral Reasoning*, *in* MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 42, 45 (Paul J. Zak. ed., 2008) [hereinafter MORAL MARKETS].

144. *Id.* at 45–46.

145. Paul Rozin, *Moralization*, *in* MORALITY AND HEALTH 379, 384 (Allan M. Brandt & Paul Rozin eds., 1997).

The importance of moral emotions in promoting prosocial behaviors has led scholars to sort moral emotions from other emotions based on the extent to which the emotions create an active tendency to behave prosocially.[146] Feeling compassion, for example, triggers a tendency to help suffering others and contributes to the growth of social bonds.[147] Shame, in turn, helps not by motivating action but by increasing tendencies to withdraw and refrain from harm. Notably, negative emotions still serve a *positive* role: preserving social norms by increasing the cost of social deviation.[148] Moreover, as some researchers have noted, the importance of a fully functioning moral emotion system is in *balancing* selfish and prosocial inclinations.[149] Such a role can be gleaned from examining psychopaths and the mentally ill who suffer, respectively, from too little or too much prosocial emotion.[150]

Many disciplines have increasingly offered evidence that moral emotions influence moral decision making; exactly the kind of evidence currently missing from the unconscionability debate. What some have called "[t]he empirical turn in ethics" has benefited from a growing body of neurobiological and psychological work, which in turn has fueled philosophical debates regarding the meaning of the findings.[151] For example, scientists aided by new technologies (such as functional magnetic resonance imaging) have proved that subjects demonstrate higher activity in brain regions associated with emotion when presented with challenging moral dilemmas, for example, choosing whether or not killing one person to save five others is a

146. *See, e.g.*, Ilona E. de Hooge, Seger M. Breugelmans & Marcel Zeelenberg, *Not So Ugly After All: When Shame Acts as a Commitment Device*, 95 J. PERSONALITY AND SOC. PSYCHOL., 933 (2008) ("Moral emotions . . . are assumed to motivate prosocial interpersonal behaviors").

147. Haidt, *supra* note 134, at 862.

148. *See, e.g.*, de Hooge, Breugelmans & Zeelenberg, *supra* note 146 ("Moral emotions make selfish behavior less attractive, thereby promoting behavior that is beneficial to others within one's social group.").

149. Erdem Pulcu, Roland Zahn & Rebecca Elliot, *The Role of Self-blaming Moral Emotions in Major Depression and Their Impact on Social-economical Decision Making*, 4 FRONTIERS IN PSYCHOL. 1 (2013) ("Healthy functioning of a moral emotion system forms the basis of balancing selfish needs with those of other people.").

150. *See generally* Roland Zahn et al., *Moral Emotions*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN AFFECTIVE NEUROSCIENCE 491 (Jorge Armony & Patrik Vuilleumier eds., 2013).

151. *See* Prinz, *supra* note 139, at 3.

permissible act.[152] The fact that emotions not only contribute to the process, but also sway its outcomes, has been proven in many experiments that deliberately induce particular moral emotions prior to presenting subjects with a need to make moral choices.[153] Taken together, these experiments demonstrate that decisions are significantly influenced by the induced emotion.

In the wake of the growing consensus regarding the influence of the moral emotions, researchers and theorists have also started to offer specific pieces to the puzzle of *how* these emotions impact our moral decision making. Following the principal proposition that moral emotions' role is to restrain individual egoism and to support social cooperation, it has been suggested that, in general, negative moral emotions, for example regret, increase the cost of moral transgressions of a selfish nature, while positive moral emotions, such as pride, encourage people to be considerate of others.[154] Beyond this general explanation, several more concrete explanations have been offered.

First, moral emotions play an *informative* role. They offer feedback that, in hindsight, helps individuals correctly interpret the situation.[155] For example, a feeling of shame associated with finding but not returning a wallet, informs or puts us on notice that an event with *moral* salience has just occurred and thus calls for a more careful deliberation.

Second, moral emotions help us to *prioritize* and maintain moral clarity. They keep us focused on the moral significance of the event and sometimes even amplify it, thereby suppressing an inclination to

152. *See, e.g.*, Cass R. Sunstein, *Is Deontology a Heuristic? On Psychology, Neuroscience, Ethics, and Law* (2013) (unpublished manuscript), http://dash.harvard.edu/handle/1/13548959 (describing the findings of *f*MRI studies that compared brain activity in response to two classical moral dilemmas—the footbridge and the trolley—both involving the need to cause death of a person in order to save five others).

153. Luis M. F. Martinez et al., *Behavioural Consequences of Regret and Disappointment in Social Bargaining Games*, 25 COGNITION & EMOTION 351 (2011) (describing experiments with different emotion induction procedures that dictated the outcomes of different bargaining games: regret increased whereas disappointment decreased prosocial behavior).

154. Marcel Zeelenberg et al., *Moral Sentiments: A Behavioral Economics Approach*, *in* NEUROSCIENCE AND THE ECONOMICS OF DECISION MAKING 73, 73–75 (Alessandro Innocenti & Angela Sirigu eds., 2012) [hereinafter *Moral Sentiments*].

155. *See* Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion- Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473 (2000).

avoid difficult decisions.[156] In the wallet example, the anticipated emotions of shame or pride may urge us toward either decision to return the wallet or keep its content for ourselves, but nevertheless they discourage holding onto the wallet while delaying the decision.

Third, moral emotions often *accelerate* the making of moral judgments and make the decision-making process more efficient and effective. Usually emotions arise faster than the conclusion of cognitive deliberation, providing "quick intuitive cues" that can help in solving conflicts and clarifying ambiguities.[157] An emerging sense of anger at the sight of an adult hitting a child, for example, can cause us to call the police more swiftly.[158]

Finally, moral emotions have *motivational* power.[159] They can create "action tendencies"[160] and increase the chances that people will actually act (or refrain from acting) in accordance with their moral emotions. Feeling empathy toward a suffering person, for example, motivates a helping behavior to alleviate the suffering of the assisted person, as well as the distress felt by the empathizing helper. Inspired by pragmatists such as Adam Smith, several social psychologists have emphasized the value of this motivational power of the emotions by suggesting an approach called "feeling-is-for-doing."[161] According to this approach, the central role of emotions in the decision-making process is to create a specific inclination to act a certain way as opposed to another. Due to its forward-looking and goal-based qualities, the feeling-is-for-doing approach has, I argue, a special normative value. And, more generally, the

156. Elizabeth J. Horberg et al., *Emotions as Moral Amplifiers: An Appraisal Tendency Approach to the Influences of Distinct Emotions Upon Moral Judgment*, 3 EMOTION REV. 237, 238–39 (2011).

157. Marcel Zeelenberg et al., *On Emotion Specificity in Decision Making: Why Feeling is for Doing*, 3 JUDGMENT & DECISION MAKING 18, 24 (2008).

158. *See* David Pizarro, *Nothing More than Feelings? The Role of Emotions in Moral Judgment*, 30 J. FOR THE THEORY OF SOC. BEHAV. 355, 366–67 (2000); *see also* Mary Frances Luce et al., *The Impact of Emotional Tradeoff Difficulty on Decision Behavior*, *in* CONFLICT AND TRADEOFFS IN DECISION MAKING 86 (Elke U. Weber et al. eds., 2001).

159. Giuseppe Ugazio, et. al., *The Role of Emotions for Moral Judgments Depends on the Type of Emotion and Moral Scenario,* 12 EMOTION 579, 579 (2012) (presenting a study that demonstrates that "emotions influence moral judgments based on their motivational dimension").

160. Haidt, *supra* note 134, at 853.

161. *Moral Sentiments*, *supra* note 154, at 76–77, 79, 81 (explaining the feeling-is-for-doing approach).

motivational power of the moral emotions is of remarkable importance to jurists and policy makers who are interested in fostering moral behavior. It is thus particularly valuable when attempting to foster self-restraint in the face of greed.

Understanding the specific motivational power of a given emotion can allow us to predict its influence on behavioral decisions. The opposite seems true as well: once a desired way of behavior is defined (here, refraining from exploitative acts) enabling or even eliciting the particular emotion that motivates such behavior is key to enhancing the probability that such behavior will occur. I will revisit this last point in the normative part of this Article, but first I would like to highlight the special role of one extremely important moralemotion: guilt.

### *D. Guilt and Its Special Role*

Defined by many as the central moral emotion,[162] guilt is of utmost significance in the discussion of conscience and the possibility of motivating self-restraint.[163] As we know all too well, it is a very unpleasant negative emotion. And yet it is precisely the taxing nature of guilt that creates its leading positive role in shaping our social life. As philosophers have pointed out, guilt carries "the voice of conscience" and signifies one's painful awareness of a transgression of the internalized moral norms of the "moral community."[164] As such, guilt is not only "a common form of emotional distress" but also "a common factor in behavioral decisions."[165] As this section seeks to explain, guilt has a proven, uncontested, and distinct ability

162. *See, e.g.*, Haidt, *supra* note 134, at 861; *Moral Sentiments*, *supra* note 154, at 74.

163. *See Moral Sentiments*, *supra* note 154, at 75, 80. In her influential studies of guilt and shame, Professor Tangney has continuously theorized those two neighboring emotions. Despite their seeming similarity as moral emotions that are based on self-consciousness and are classified as negative emotions, Tangney's work focuses on their dissimilarity. Her studies emphasize that guilt relates to a negative judgment of a behavior while shame is associated with negative judgment of the self. Tangney has concluded that guilt motivates prosocial behavior while shame tends to make people withdraw from social participation altogether. *See e.g.*, JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT 14, 24, 34 (2003) (referring directly to conscience).

164. CHARLES L. GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION 52 (2007).

165. Roy F. Baumeister et al., *Guilt: An Interpersonal Approach*, 115 PSYCHOL. BULL. 243, 243 (1994).

to keep selfish behavior in check and even promote prosocial behavior.[166]

As a leading moral emotion, guilt functions along the lines described in the previous section. Not only does it call our attention to the occurrence of morally significant events, it prompts us to focus on these events. Most importantly, it encourages action that might alleviate the negative feeling such as compensating the people hurt by the transgression or asking for their forgiveness.

Efforts to alleviate existing guilt are of immense importance to the conservation of communities and offer an evolutionary explanation for the existence and survival of guilt. They account for the ability of humans to restore their relationships with each other and take reparative actions aimed at sustaining the ties of their community *after* a moral crisis has taken place.[167] Studies have repeatedly demonstrated that actual feelings of guilt limit selfish or unfair behavior and instead enhance prosocial behavior, such as enhanced donation to charities.[168] One of those studies, for example, found that when people witnessed a student cheating and were made to feel guilty because they did not report it to the instructor, their subsequent willingness to agree to help others increased, leading to a reduced feeling of guilt.[169]

### *1. Guilt aversion*

Guilt also plays a role in directing future behavior, even when specific harm has not yet occurred: the anticipated painfulness of

166. *See generally*, Christian B. Miller, MORAL CHARACTER: AN EMPIRICAL THEORY 29–56 (2013) (discussing how guilt is associated with prosocial behavior, including an increased inclination to help others); *see also* Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059 (2003) (applying this idea to the legal context of the fiduciary duty of loyalty).

167. *See, e.g.*, June P. Tangney et al., *Communicative Functions of Shame and Guilt, in* COOPERATION AND ITS EVOLUTION 485, 496 (Kim Sterelny et al. eds., 2013) (explaining how "feeling guilt leads to positive intrapersonal and interpersonal processes" and "[e]xpressions of guilt can strengthen relationships in a number of ways, especially in contexts requiring cooperation and interpersonal trust and based on assumptions of equity and fairness").

168. *See* Sally Hibbert et al., *Guilt Appeals: Persuasion Knowledge and Charitable Giving*, 24 PSYCHOL. & MARKETING 723 (2007) (demonstrating that guilt arousal is positively related to donation intention).

169. *See* Franklin J. Boster et al., *The Impact of Guilt and Type of Compliance-Gaining Message on Compliance*, 66 COMM. MONOGRAPHS 168 (1999).

guilt seems to suffice.[170] Anticipating the guilt that might follow from engaging in a particular behavior creates in most humans a strong motivation to escape the predicted emotional distress, producing what theorists call "guilt-aversion:" an inclination to avoid actions (or defaults) that might cause feelings of guilt.[171] Thanks to individuals' ability to contemplate the probable emotional consequences when considering future behavioral alternatives, the effects of anticipated guilt do not depend on the existence of a transgression.[172]

In fact, studies show that anticipated guilt may be more significant than its experienced variation in guiding one's behavioral intentions. First, anticipated emotions in general have greater long-term influence than experienced emotions, which tend to dissipate over time, and therefore are limited in their ability to direct future decision making.[173] Second, the power of anticipated emotion, not experienced emotion, is sometimes amplified by a process of mental stimulation.[174] Third, at least in the case of guilt and other emotions that involve emotional distress, the experienced emotion may interrupt the higher order of thinking required for ethical decision making.[175] In its anticipated form, however, the operation of this emotion is not tied to stressful conditions and thus, "anticipating future emotional outcomes can help individuals make better

170. Generally, the focus on the behavioral effects of *anticipated* emotions, as opposed to the impact of experienced emotions, is a recent development in the study of emotions. *See* Richard P. Bagozzi et al., *How Effortful Decisions Get Enacted: The Motivating Role of Decision Processes, Desires, and Anticipated Emotions,* 16 J. OF BEHAV. DECISION MAKING 273 (2003).

171. *See* Luke J. Chang et al., *Triangulating the Neural, Psychological, and Economic Bases of Guilt Aversion*, 70 NEURON 560, 560 (2011), www.sciencedirect.com/science/article/pii/S0896627311002996 [hereinafter *Bases of Guilt Aversion*] (explaining the guilt-aversion model and reviewing studies demonstrating that "people are indeed guilt averse and in fact often do make decisions to minimize their anticipated guilt regarding a social interaction").

172. *See* June Price Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOL. 345, 347 (2007).

173. See Roy F. Baumeister et al., *How Emotion Shapes Behavior: Feedback, Anticipation, and Reflection, Rather Than Direct Causation*, 11 PERSONALITY & SOC. PSYCHOL. REV. 167, 190–91 (2007).

174. *See* Leaf Van Boven & Laurence Ashworth, *Looking Forward, Looking Back: Anticipation Is More Evocative Than Retrospection*, 136 J. OF EXPERIMENTAL PSYCHOL. 289, 293–94 (2007).

175. Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679 (2013) (explaining how distress interferes with processes of decision making).

decisions."[176] For the aforementioned reasons, it is now an accepted wisdom that anticipated emotions function as a guide to our prospective decisions and behaviors.

After long years of focusing on the cognitive aspects of decision making, recent experimental studies have started to explore the role of anticipated emotions. As part of this development, much attention has been paid to the role that anticipated guilt plays in shaping individuals' decisions regarding moral dilemmas. For example, in the context of deciding whether or not to register as an organ donor, several different studies have revealed that anticipated guilt is *directly* and *positively* associated with a willingness to donate.[177] Of most relevance to contractual situations, similar findings regarding the cooperative impact of anticipated guilt were repeatedly reported in experiments structured around economic transactions.

In a 2011 interdisciplinary study, researchers asked participants to engage in a trust game while mapping their brain activity.[178] One of the study's goals was to document how anticipated guilt operates and impacts the decision-making process.[179] Participants were engaged in real social interactions with actual monetary consequences.[180] Similar to other trust games, trustees who received money from investors had to decide whether to act selfishly or in accordance with their partner's expectations.[181] They could abuse their partner's trust and keep for themselves all or most of an enlarged endowment or cooperatively return the original investment

176. Xiao Wang, *The Role of Anticipated Guilt in Intentions to Register as Organ Donors and to Discuss Organ Donation with Family*, 26 HEALTH COMM. 683, 684 (2011).

177. Lisa L. Massi Lindsey, *Anticipated Guilt as Behavioral Motivation: An Examination of Appeals to Help Unknown Others Through Bone Marrow Donation*, 31 HUM. COMM. RES. 453 (2005); Wang, *supra* note 176.

178. *Bases of Guilt Aversion*, *supra* note 171, at 561.

179. *Id.* at 561–62.

180. *Id.* at 562.

181. *See id.* at 561 ("In [a typical trust] game, a player (the Investor) must decide how much of an endowment to invest with a partner (the Trustee . . . ). Once transferred, this money is multiplied by some factor (often 3 or 4), and then the Trustee has the opportunity to return money back to the Investor. If the Trustee honors trust, and returns money, both players end up with a higher monetary payoff than originally endowed. However, if the Trustee abuses trust and keeps the entire amount, the Investor takes a loss. The standard economic solution to this game uses backward induction and predicts that a rational and selfish Trustee will never honor the trust given by the Investor, and the Investor realizing this, should never place trust in the first place, and will invest zero in the transaction.").

and some of its surplus.[182] The guilt-aversion model predicts, counter to traditional economic presumptions, that players will refrain from selfish decisions (not returning any money or enough money to the investor) because they seek to not only maximize their profits, but also to minimize the feelings of guilt that they expect will arise from an abuse of their partner's trust.[183] The 2011 study supported this model and offered compelling evidence that "avoidance of a predicted negative affective state" motivates cooperative behavior even in the context of economic exchange.[184] More specifically, findings showed that trustees indeed sought to avoid guilt stemming from disappointing their investors' expectations.[185] They did that by first conceiving those expectations and then by making an effort to match them.[186] Further linking their decisions to a guilt-aversion mechanism, participants later reported that they would have felt more guilt had they returned less money in the game.[187]

Perhaps the most important accomplishment of this study was to illuminate the neural basis of anticipated guilt. It showed that participants who engaged in avoiding anticipated guilt exhibited patterns of brain activity distinct from those of participants who decided to ignore their conscience, maximize their profits, and knowingly disappoint their partners.[188] Observing and defining the specific neural network involved in making decisions that minimize anticipated guilt allowed the researchers in this study to offer a better understanding of the mechanism of anticipated guilt.

First, the researchers observed that the guilt-related brain activity was similar to the one associated, not only with other negative emotions such as anger and disgust, but also with negative experiences such as physical pain and social distress.[189] This resemblance supports the theory that anticipated guilt functions as a

182. *Id.* at 561–62.
183. *Id.*
184. *Id.* at 566.
185. *Id.* at 561–62.
186. *Id.*
187. *Id.* at 566.
188. *Id.* at 563–66.
189. *See id.* at 567.

disutility, adding the cost of letting a partner down to one's effort to maximize utility.[190]

Second, supplementing the growing literature about the role of emotional decision making,[191] the observed network also has given rise to an explanation for *how* anticipated guilt works. To wit, the guilt-related brain activity may operate neurologically to "override the competing motivation to maximize financial gain."[192]

Third, the guilt-related network is also remarkably similar to other networks that are active while making decisions to conform to perceived social norms. The researchers, therefore, concluded that at least one social function of anticipated guilt may be "to track deviations" from shared social expectations and to motivate adherence to moral rules and social norms.[193]

The guilt-aversion model offers an important emotion-based explanation to the puzzle that is the existence of unselfish behavior. As opposed to other models that theorists have discussed,[194] it highlights interpersonal and social dynamics and assumes neither that people are selfish by nature nor that they are purely altruistic. Underscoring the role of emotions in sustaining social norms, the model is especially promising for a legal project. It also offers evidence currently missing from the unconscionability debate regarding possible consequences of inducing anticipated guilt.

### *2. Two kinds of guilt*

Both actual and anticipated guilt raise the question of what typifies the transgressions that trigger the emotion. Notably, recent

190. *See id*.; *see also* Pierpaolo Battigalli & Martin Dufwenberg, *Guilt in Games*, 97 AM. ECON. REV. 170 (2007).

191. *See Bases of Guilt Aversion*, *supra* note 171, at 568.

192. *See id*.

193. *Id*. at 567.

194. *Id*. ("The guilt-aversion model explored here is distinct to other models of social preference as it posits that participants can mentalize about their partner's expectations and that they then use this information to avoid disappointing the partner. In contrast, other models conjecture that people are (1) motivated by a "warm glow" feeling and find cooperation inherently rewarding, (2) motivated to minimize the discrepancy between self and others' payoffs, or (3) motivated to reciprocate good intentions and punish bad intentions. The guilt-aversion model thus provides a different psychological account of cooperation than other models because it incorporates both social reasoning and social emotional processing.") (citations omitted).

studies of guilt have pointed out that this emotion encompasses two different kinds of affective reactions, or that two different kinds of guilt exist.[195]

The first, called "deontological guilt" or, as I will call it here, "self-guilt," typically arises out of the self-consciousness of having affronted the commands of moral authorities or infringed internalized moral norms.[196] It stems from conflict with social norms, is aimed at the preservation of social order, and is tightly linked to sentiments of fear and shame.[197] The second, named "altruistic guilt," or as I will call it here, "other-guilt," is the feeling that accompanies the realization that others were, are, or will be hurt due to our behavior.[198] It stems from harm to others, is aimed at preserving interpersonal relationships, and is deeply connected to the ability to feel empathy.[199]

Notably, self-guilt and other-guilt are not mutually exclusive, but rather may converge or jointly emerge from the occurrence of one moral event.[200] For example, in the context of exploitative contracts, if one believes that promoting self-interests at the expense of others is not only forbidden by the authorities and immoral according to existing social norms (deontological guilt) but is also hurting weaker parties (altruistic guilt), then both kinds of guilt may be anticipated. Yet this distinction is instrumental. It can aid in understanding how each kind of guilt can be elicited or repressed by various different external factors. Specifically, factors that clarify or obscure the social norms regarding a given behavior are relevant to the inducement of self-guilt. Factors that highlight or conceal the harm to others caused by certain behaviors are relevant to the inducement of other-guilt. Recognizing that two separate kinds of guilt are at play is, therefore, imperative to developing an effective way to support them both in

195. *See* Amelia Gangemi & Francesco Mancini, *Guilt and Guilts*, *in* RECONSTRUCTING EMOTIONAL SPACES 169 (Radek Trnka et al. eds., 2011) (explaining the distinction between the two kinds of guilt); Barbara Basile et al., *Deontological and Altruistic Guilt: Evidence for Distinct Neurobiological Substrates*, 32 HUMAN BRAIN MAPPING 229, 229 (2011) (providing "evidence for the existence of distinct neural circuits involved" in the two different guilt feelings).

196. Gangemi & Mancini, *supra* note 195, at 170–71.

197. *Id*.

198. *Id*.

199. *Id*. at 170.

200. *Id*. at 169, 183.

moral decision making. It will later prove useful in framing two distinct paths by which legal actors can facilitate the operation of anticipated guilt.

*3. Guilt and social cues*

In a final point essential for transitioning to the normative discussion: guilt is not an insulated emotion that either emerges in individuals or not based on the power of their personal conscience. Guilt is susceptible to external influences, can be induced by others, and is highly dependent on circumstantial, social, and cultural contexts. This characteristic of guilt is especially relevant to deontological guilt due to the dynamic and ever-changing nature of morality. According to the known theory of moralization introduced by psychologist Paul Rozin, individuals' morality is not fixed but rather dynamic.[201] People internalize the changing norms around them.[202] Rozin's theory defines moralization as "the transformation of a morally neutral activity into one with significant moral weight."[203]

To briefly demonstrate this point, consider the changes in moral judgment ascribed to smoking in public. Whether or not one should and would feel guilty for smoking next to others does not only depend on preset personal values. Time matters. In the past, as reflected in television series like "Mad Men," such activity was fashionable and thus a source of pride rather than guilt or shame. However, the reverse is true today, when the anti-secondhand-smoking attitude prevails. As Rozin has pointed out, some marks of the moralization of smoking over time are the disgust it triggers in non-smokers, as well as the inclination to censure smokers and make broader judgment calls about their character.[204] Geography and local culture matter too. In some places, such as areas in Europe, Asia, and the Middle East, smoking in public is still somewhat legitimate and

201. *See, e.g.*, Paul Rozin, *The Process of Moralization*, 10 PSYCHOL. SCI. 218 (1999).

202. *Id.*

203. BRANDT & ROZIN, *supra* note 145, at 10.

204. *See* Rozin, *Freedom, Choice and Public Well-Being*, *supra* note 1, at 244*; see also* Steven Pinker, *The Moral Instinct*, N.Y. TIMES, Jan. 13, 2008, www.nytimes.com/2008/01/13/magazine/13Psychology-t.html?pagewanted=all ("Smokers are ostracized; images of people smoking are censored; and entities touched by smoke are felt to be contaminated (so hotels have not only nonsmoking rooms but nonsmoking *floors*).").

entails less guilt. Moreover, individualist cultures, such as America, tend to assume less responsibility for others and more privacy rights compared to collectivist societies, such as Korea. Public smoking, therefore, is reported to induce more guilt in Korea than in America.[205] Biology matters as well, lending more taboo to smoking next to children or pregnant women than smoking next to resilient adults. Many other types of social cues also matter, especially when they are intentionally designed to appeal to individuals' moral emotions and to sway their decisions; for example, signs aimed at reminding people of the damages caused by smokers and their second-hand smoke. Similarly, architectural designs of the public sphere, from buildings to airports, assign smokers designated and often stigmatized spaces, sending a clear message about the immorality of public smoking.[206]

Finally, and most pertinent to the current discussion, *law* matters. As a powerful social mechanism, it has a recognizable impact on the process of moralization. With its unique ability to articulate norms, publish them, enforce them broadly, and, most importantly, change them over time, the law is a dynamic and forceful supplier of social cues that influence our emotions and behaviors. The impact of the legal regulation on public smoking is one known example. Legal bans on sexual harassment in the workplace and anti-discrimination laws operate similarly and participate in transforming a morally neutral behavior into an immoral one. Interestingly, the law also plays a significant role in the opposite process of amoralization: transforming behaviors that had been considered as immoral into morally neutral behaviors.[207] As demonstrated by legal reforms concerning divorce, interracial marriage, same-sex marriage, and the use of marijuana, the law has the power to legitimize formerly morally controversial behaviors. Notably, in both moralization and amoralization processes, the updated legal norms are not only acts that reflect and formalize an earlier change of the social norms. Rather, they are influential tools

205. Hyegyu Lee & Hye-Jin Paek, *Roles of Guilt and Culture in Normative Influence: Testing Moderated Mediation in the Anti-Secondhand Smoking Context*, 19 PSYCHOL., HEALTH & MED. 14 (2014).

206. *Id.*

207. Rozin, *supra* note 145, at 380.

that *create* and *shape* such modifications of the social norms. It is this expressive power of the law—and its consequences—that will occupy the coming Part.

## III. THE IMPACT OF LAW ON MORAL EMOTIONS

The legal decision to enforce, or to refuse enforcement of a predatory contract, can serve as a powerful social cue to readers of the original decision. It can also have a powerful influence on the many other market actors who will be exposed to such legal messages in other ways, for example via legal counsel and the media. Unquestionably, a refusal to enforce a contract while declaring its unconscionability sends out a strong message of disapproval of both the behavior that led to the formation of such a contract and its unfair content. The power of the message comes from the expressive power of the law: its ability to make individuals internalize the values embodied in the legal message, or at least adjust their behavior in accordance with those values to avoid conflicts.[208] Furthermore, when evaluating the ability of the law to offer influential social cues that shape emotions and behaviors, it is important to take into account more than the practical result of a case. The content is of utmost significance. In framing the question and context before them, and in articulating the reasoning for their final decision, judges can thus further enhance the message coming from their decision. Altogether, they can encourage or discourage self-restrained behavior by market players who face an opportunity to exploit.

Given the deeper understanding of the affective component of self-restraint, and of the more nuanced operation of guilt, *how* can legal decisions impact the affective dimension of human conscience-based judgments? To cope with this broad question in a concrete and practical way, let me draw on two examples. The two cases discussed in detail below demonstrate how the manner of adjudicating disputes regarding predatory contracts may impact the

208. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 607–08 (1998); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000).

emotions that are necessary for the operation of conscience in market situations.

It is worth noting that I discuss and compare these two decisions not only, or even mainly, due to their opposing outcomes. Rather, the inquiry focuses on the process—namely the judicial discourse that led to the final decision. Careful analysis of the components of each of the decisions may offer important insights regarding the potential impact of each decision on the emotions and moral judgments of those exposed to it. Both examples are recent and therefore reflect judicial approaches to the unconscionability principle that are similarly possible at present time. I will start with a decision that has the potential to discourage future self-restraint and continue with one that has the opposite potential—to facilitate the operation of conscience in market actors.

### *A. Suppressing Anticipated Guilt:* Riggins (2013)[209]

#### *1. The contract and the litigation*

In December 2006, Robert Riggins contracted with Countrywide to borrow $642,000 to buy a property in Costa Mesa, California.[210] According to the very short factual description in the case, Riggins' loan application was completed via telephone based on a short conversation in which the lenders' agent reviewed Riggins' financial information and recommended a loan that would fit Riggins' needs.[211] In 2009, Riggins defaulted and, after a notice of default was filed, he filed a complaint seeking to avoid the enforcement of the loan agreement.[212] One of Riggins' main allegations against the validity of the loan agreement was that, during the application process, Countrywide's agent falsely filled out the application form, listing—without Riggins' knowledge—an inflated monthly income of $15,000.[213] In reality, and known to the interviewer, Riggins "had little if any income at all."[214] Notably, the

209. Riggins v. Bank of Am., No. SACV 12-0033 DOC (MLGx), 2013 WL 319285 (C.D. Cal. 2013).

210. *Id.* at *1.

211. See *id.*

212. *Id.* at *2.

213. *Id.* at *1.

214. *Id.*

decision did not include a denial of the alleged forgery of documents. Instead, the judge specifically mentioned that neither party presented the signed application forms.[215] Despite the mutual reference, however, it seems that the lender, and not Mr. Riggins, had access to those forms, given the fact that the process was undeniably completed by phone, and it was the lender who both created the application form *and* filled it out on behalf of the borrower.[216]

Moreover, the decision was written in 2013, when accumulating evidence regarding Countrywide's mishandling of documents was widely available.[217] In 2010, for example, Countrywide agreed to pay borrowers $108 million dollars to settle a complaint of the Federal Trade Commission regarding the predatory lending, including "loans made with little or no income or asset documentation."[218] Eventually, it became clear from SEC allegations, which were neither admitted nor denied by Countrywide, that between 2005 and 2007—the period relevant to Riggins' 2006 loan—"Countrywide was writing riskier and risker loans."[219] Countrywide cared so little about the quality of loans of this kind because it had relied on selling them to the government-sponsored enterprises Fannie Mae and Freddie Mac, thereby harming not only the immediate victims but also "the financial system as a whole."[220]

In an effort to stop foreclosure proceedings, Riggins raised the argument of unconscionability. Dismissing this argument with prejudice, the judge relied on the formal two-prong test of

215. *Id.*

216. *See id.*

217. *See, e.g.*, *60 Minutes: Prosecuting Wall Street*, CBS (Dec. 5, 2011), www.cbsnews.com/news/prosecuting-wall-street/ (interviewing Eileen Foster, a former senior executive at Countrywide Financial who reported that "Countrywide loan officers were forging and manipulating borrowers' income and asset statements to help them get loans they weren't qualified for and couldn't afford").

218. Press Release, Fed. Trade Comm'n, Countrywide Will Pay $108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy (June 7, 2010) (FTC File No. 0823205), www.ftc.gov/news-events/press-releases/2010/06/countrywide-will-pay-108-million-overcharging-struggling.

219. U.S. *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 33 F. Supp. 3d 494, 496–97 (S.D.N.Y. 2014).

220. *Id.* at 503.

unconscionability.[221] He explained that Riggins did "not allege any facts that establish[ed] the procedural unconscionability element."[222]

*2. Crowding out the moral emotions*

Recall the parents from the day-care centers study: once the researchers changed the framework from relational to rational and from care-based to market-like, self-restraint actually decreased and more parents allowed themselves to be late at the expense of the caregivers.[223] Similar outcomes were demonstrated by the liquidated damages experiment,[224] showing again that adopting a market framework tends to elicit less moral emotion, which in turn makes people care less about the interests of the other party.

In *Riggins*, like in most contractual litigations, the context is commercial to begin with. However, the court enhanced the market effect and further distanced the moral emotions by its analysis of the nature of the relationship between the parties. Discussing the lending contract, the judge clarified that "lenders do not owe a fiduciary duty to borrowers."[225] With that, the court wiped the relationship between the parties clean of legitimate expectation of trust, loyalty, or honesty and denied any social ties between them. Indeed, after reading these words, one might wonder what exactly comprises the nature of the relationship between lenders and borrowers. The denial of the existence of fiduciary duty without defining any other prevailing duties, especially combined with the impersonal reference to "lenders" and "borrowers," places the relationship at the core of the cold commercial market where people interact at arm's length and do not have to be considerate of each other. In general, such judicial discourse, with its minimalist portrayal of the duties in the market sphere, has the ability to crowd out moral emotions. But for such framing, moral emotions would have been more easily evoked as a common response to an act of falsifying documents.

221. *Riggins*, 2013 WL 319285, at *12–13 (explaining the two-prong test).
222. *Id.* at *12.
223. *See supra* Part II.
224. *See id.*
225. *Riggins*, 2013 WL 319285, at *10.

*3. Hindering anticipated self-guilt*

As explained earlier, feelings of self-guilt arise from awareness that one has transgressed a social norm (actual guilt), or is about to do so (anticipated guilt).[226] This valuable social mechanism depends on the clarity of the existing social norms. The clearer the norm, the easier it is for self-guilt to emerge or be anticipated. However, to the extent that a social norm against forging documents exists, the *Riggins* decision does much to obscure this norm. The most glaring feature of the decision is its willful neglect of the allegation that Countrywide's representative listed a fake income on the application form he was filling out (and filing) on behalf of Mr. Riggins. The judge does not express even a doubt regarding such behavior, thereby creating an impression that such behavior is normal and socially acceptable.

If this sound of silence is not loud enough, the court makes extra effort to clarify that whatever happened during the application process is meaningless in the eyes of the law. To that effect, a significant part of the analysis is aimed at drawing a bright dividing line between the forged loan application form and the actual loan agreement that followed it. In the court's words: "[W]hile [Riggins] asserts that he did not know that Countrywide used an inflated income on his loan *application*, this was not a term of the *agreement*."[227] This distinction results in an enforcement of the loan agreement irrespective of the dubious behavior that facilitated its formation. Divorcing what may matter morally (falsified application) from what matters legally (only the agreement) works here to shift the focus away from Countrywide's transgression. After all, it follows from the court's analysis that even if the lender did behave inappropriately, this behavior relates to the application and not to the agreement and, thus, would not make any legal difference. The court even supports its analysis by referring to other cases in which lenders fabricated applications by inflating borrowers' incomes.[228] Such reference both further normalizes this problematic behavior

226. *See supra* Section II.D.

227. *Riggins*, 2013 WL 319285, at *12 (emphasis added).

228. *See id.* at *5; *see, e.g.*, Perlas v. GMAC Mortg., LLC., 113 Cal. Rptr. 790 (Cal. Ct. App. 2010).

and enhances the risk that more lenders will follow the herd due to the conformity bias.

The fact that the court's decision ignores the lender's fraudulent behavior significantly decreases the visibility of social norms against faking documents and offering loans that are too risky to be repaid. Thus, it hinders the emergence of the type of guilt that may arise from the clash between such behavior and the pertaining social norms. If future business people are wondering whether to cross the lines of truth in order to increase their volume of transactions, or to exercise self-restraint, the *Riggins* decision certainly sends them the wrong message.

Judicial decisions such as *Riggins* participate in the broader social process of amoralization; they work to disconnect a behavior that would otherwise be considered immoral from its moral qualities and transform it into a morally neutral activity.[229] Amoralization of contractual manipulations occurs when the law—with all its authoritative and expressive powers—validates and enforces contracts that result from market misbehavior. It is even more so when judges explicitly celebrate amoralism, explaining that "[i]t is a strength rather than a weakness of contract law that it generally eschews a moral conception of transactions."[230]

In an amoral environment, when contracts are framed as merely a market game that is aimed at promoting self-interests, there is little to no social or moral expectation of self-restraint. Indeed, in some judges' perspectives, greedy and unconstrained behavior is not only morally neutral but is also "the engine that propels a market economy."[231] Accordingly, when courts ignore, accept, or even appreciate acts of unrestrained selfishness, they increase the uncertainty regarding the social norms that govern the market. Such ambiguity, in turn, further inhibits the possible emergence of anticipated deontological guilt in those who consider driving "the hardest possible bargain."[232]

229. *See* Rozin, *supra* note 145, at 380.

230. Classic Cheesecake Co. v. JPMorgan Chase Bank, 546 F.3d 839, 845–46 (7th Cir. 2008).

231. Wilkow v. Forbes, Inc., 241 F.3d 552, 557 (7th Cir. 2001).

232. Posner, *supra* note 12, at 1104.

*4. Impeding anticipated other-guilt*

As seen earlier, there are two kinds of guilt.[233] In addition to self-guilt, deriving from transgression of social norms, guilty feelings may also emerge from realizing that one's behavior has harmed others or has the potential to do so.[234] To experience such actual or anticipated emotion, the harm caused by the misbehavior should be recognized and appreciated as having a significant negative impact on others. To facilitate this mechanism, it is necessary to feel a certain degree of empathy toward the harmed party.

And yet, in *Riggins* the court blames the victim and makes it harder to feel empathy towards him. Specifically, the court more than hints that Riggins should have been more responsible, and even implies that he alone is at fault for his inability to pay the loan (after several years of payments). Indeed, in response to Riggins' complaint regarding the falsification of his loan application, the court suggests that Riggins "is conflating [Countrywide's] misrepresentation that he qualified for the loan based on 'little to no income' with the idea that [Countrywide] misrepresented that [Riggins] could afford the loan with 'little to no income.'"[235] This suggests that Riggins is both incapable of high-level thinking (conflating ideas) and unproductive (has no income without a justification).

Further, following this unsympathetic description, the court declares the reliance of the borrower on the approval of his loan application by the lender as "unjustifiable."[236] Checking the borrower's creditworthiness during the application process, the court explains, is a measure the lender takes for its own protection, and as such, it means nothing for the borrower. Hence, the court concludes that "borrowers rely on their own judgment and risk assessment in deciding whether to accept a loan."[237] In assigning the responsibility solely to the borrower, irrespective of the lender's defective approval of the loan, the court effectively blames Riggins (the victim) for not giving up a loan after it has received the lender's approval.

233. *See supra* Section II.D.2.

234. *See id.*

235. Riggins v. Bank of Am., No. SACV 12-0033 DOC (MLGx), 2013 WL 319285 *5 (C.D. Cal. 2013).

236. *Id.*

237. *Id.*

Significant to the operation of other-guilt, we know nothing about Riggins as a person or his ability to appropriately comprehend the meaning of Countrywide's confirmation of his application. Even after reading the decision several times, one has no clue, for example, who Riggins is, how financially savvy he is, or even why he needed a loan. More generally, there is not even a single empathetic sentence in the case, and no reference is made to the obvious gap in bargaining power between the parties. Under such a thin description, the harm suffered by Riggins becomes invisible—a fact that further conceals the wrongfulness of Countrywide's behavior and instead invites a harsh judgment of Riggins. Thus, it becomes more difficult for future similarly positioned parties to anticipate that using false information with the goal of misleading the other party may cause that party severe harm and yield guilty feelings.

The judge in *Riggins* is not alone in exhibiting a lack of empathy toward the borrower and attributing the harm exclusively to his lack of caution. Research shows that many people have an inclination to evaluate cases of wrongdoing along those lines.[238] Professor Wilkinson-Ryan has recently studied and explained the psychology of the inclination to blame the victim, instead of the wrongdoer, in the commercial setting.[239] Her studies focus on the common situation in which a consumer signs a contract of adhesion without reading the fine print (the boilerplate). The studies expose a puzzle: on the one hand, subjects strongly believe that drafters should not impose unfair terms on consumers via the fine print that is almost never read, and on the other hand, they also believe that "the non-reading consumer consented to the contract and *bears the blame* for the resulting transactional harm."[240] How can such contradiction be explained? Wilkinson-Ryan offers several psychological accounts, and one that is particularly relevant to the judicial analysis in *Riggins*.

238. *See, e.g.*, Adam Benforado, *Don't Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business and Government*, 5 ENTREPRENEURIAL BUS. L.J. 509, 540–41 (2010) (arguing that the tendency to blame the victim explains much of the popular rhetoric blaming underwater homeowners or borrowers in bankruptcy for their fates). For an example of the existing inclination to blame the victims in the context of sexual assaults such as rape and sexual harassment, see Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1998).

239. Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014) [hereinafter *A Psychological Account*].

240. *Id.* at 1765 (emphasis added).

Holding consumers, and not corporate-drafters, responsible for the harm caused by unfair terms, is a product of "motivated cognition" (or "motivated reasoning")—a psychological phenomenon in which people's preferred outcomes inadvertently drive their judgment.[241] Since people seek to minimize their psychological discomfort, their inclination is to attribute the blame in a manner that would accomplish this goal.[242] When harm occurs it threatens the preferable belief of most people: that the world is a just place and the system that controls their life is fair.[243] While holding this belief people tend to blame the victims because it mitigates the threat, confirming how orderly the world is: people "get what they deserve and deserve what they get."[244]

Additionally, the belief that the victim's behavior caused the harm that followed, offers people a sense that they can avoid similar harm. For example, in one study, Professor Wilkinson-Ryan showed that even with the knowledge that most people don't read contracts and cannot fully understand the risks they entail, people still believe that *they* would have read and understood their own contracts and, by doing so, would have avoided harm.[245] As Wilkinson-Ryan explains, manifesting the known "overconfidence bias," people blame the victim while convincing themselves that under similar conditions they would have made better judgments ("it is your fault—and I am not like you").[246] Ultimately, attribution of blame to the victim helps people restore their faith that their environment is controllable.

Returning to *Riggins*, cognitive psychology can explain why the judge was inclined to find Riggins responsible for not realizing he could not afford the loan that Countrywide approved. We have many reasons to assume that judges—as part of the justice system—

241. Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. OF L. & SOC. SCI. 307, 311 (2013).

242. *See id*.

243. See Yael Idisis et al., *Attribution of Blame to Rape Victims Among Therapists and Non-Therapists*, 25 BEHAV. SCI. & THE L. 103, 104 (2007).

244. *Id*.

245. *A Psychological Account*, *supra* note 239, at 1773–74.

246. *Id*. at 1771. In one of her studies designed to examine this point, "subjects reported that they would spend more time, and read enough to 'get the gist' of a greater fraction of the contract, than the average consumer reading the same contract." *Id*. at 1773.

are subject to motivated cognition, believe in a just world, and accordingly prefer to view and portray the contractual game as occurring in a "fair and orderly marketplace."[247] Similarly, judges—with their high education, years of experience, and superior status—are surely sharing the overconfidence bias that allows them to blame victims, like Riggins, while believing that they would have never fallen into such a trap.

*5. Summary*

The *Riggins* decision is by no means an exceptional one, but rather a common representation of many other disputes around contracts that were drafted and formed while transgressing basic norms of behavior. The decision itself cites similar past decisions and was followed by other courts shortly after its publication.[248] Shifting the focus onto emotions allows us, however, to notice something new about this line of cases. It helps us understand how decisions of this sort may unintentionally have a long-term negative impact on people's ability to exercise self-restraint. In a market setting, when the existence of moral and social norms is unacknowledged, and when the resulting harm to others remains unrecognized, the emergence of anticipated guilt—the main motivator of conscience-based self-restraint—simply becomes less probable.

### *B. Evoking Anticipated Guilt:* Stoll (2010)[249]

*1. The contract and the litigation*

The decision in *Stoll* offers a counter example to *Riggins*. In this judicial review of unrestrained market behavior, the court enables, rather than impedes, the possible emergence of anticipated guilt, thereby encouraging the operation of conscience.

The disputed contract was a land purchase contract relating to sixty acres of farmland in Oklahoma.[250] A few years after the sale was completed, the seller, Ronald Stoll, sued the buyers, Xiong and

247. *See id*. at 1768. For studies showing that judges are probably subject to similar biases as all other people, see review of literature in Sood, *supra* note 241, at 318–19.

248. *See e.g*., Graham v. Bank of Am., N.A., 172 Cal. Rptr. 3d 218 (Ct. App. 2014).

249. Stoll v. Chong Lor Xiong, 241 P.3d 301 (Okla. Civ. App. 2010).

250. *Id*. at 302–03.

Yang, who were husband and wife.[251] Stoll argued that they had breached a term in the contact and requested the term's enforcement.[252] The contract, drafted by Stoll, included a term which entitled Stoll not only to the price of the land (some $130,000) but also to a free thirty-year supply of chicken litter accumulated in the farm.[253] The worth of such free supply was later conservatively estimated by the court, based on Stoll's minimized valuation of the price per ton of chicken litter, to be $216,000[254]—166 percent above the consideration under the contract.

When Stoll learned that Xiong and Yang sold chicken litter to another person, he sued and demanded the enforcement of the free-supply term.[255] Xiong and Yang defended themselves, arguing that the term was inserted into the contract without their knowledge or understanding and that enforcing it would mean that they would end up paying the seller (in litter) much more than the worth of the land itself.[256] The court of appeals agreed with the trial court, accepting those factual arguments and deciding that the free-supply term was procedurally and substantively unconscionable.[257]

*2. Inviting moral emotions*

The decision in *Stoll* allows and even invites affective response in general and triggers the moral emotions in particular. Although, like *Riggins* and many other contractual disputes, the case is set in the commercial sphere, human beings take center stage in the presentation of facts. The very first thing the decision's readers learn is that the buyers are a married couple and are both immigrants from Laos. Additional personal facts about the couple's limited education and lingual difficulties follow and will be discussed separately below in the context of the ability to anticipate other-guilt. For now, however, the point is more general: the narrative in *Stoll* is emotions-

251. *Id.*
252. *Id.* at 303.
253. *Id.* at 303–04.
254. *Id.* at 305.
255. *Id.* at 303.
256. *See id.* at 304–06.
257. *Id.* at 304, 306.

friendly because it reveals, rather than conceals, the humanity of the parties to the questionable contract.

Next, there is a true invitation to feel *moral* emotions as the court highlights the moral dimension of the dispute in several ways. First, it does so by making significant rhetorical choices. In a short decision (about half the length of *Riggins*), the court uses the forceful expression "shock the conscience" three times, while the idea of fairness (fair behavior or fair terms) is mentioned six times.[258] As a result, readers are placed at the core of a moral dilemma and not only at the heart of the market.

Second, in applying the unconscionability doctrine, the court avoids technical language and instead emphasizes the doctrine's ethical core. Associating the doctrine with other prime examples of moral transgressions, the court's words remind readers that "[u]nconscionability is directly related to fraud and deceit."[259]

Third, to more precisely define unconscionability, the court chooses the traditional English definition with its emphasis on human morality, rather than Professor Leff's modern version with its formal structure—two neatly defined prongs of procedural and substantive unconscionability.[260] Albeit without mentioning the historical *Earl of Chesterfield* case,[261] the court cites the morality-oriented explanation according to which "[a]n unconscionable contract is one which no person in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept on the other."[262] Defining an unconscionable contract in that way has the power to bring readers to examine contractual behavior with morality in mind, against the yardstick of how a "fair and honest man" would have behaved. This in turn facilitates the anticipation of moral emotions.

### *3. Facilitating anticipated self-guilt*

Again, to anticipate self-guilt, social norms have to be well defined and consistently regarded by people and institutions with

258. *Id.* at 304–06.

259. *Id.* at 305 (citing Barnes v. Helfenbein, 548 P.2d 1014, 1020 (Okla. 1976)).

260. *See supra* note 24 (explaining Leff's two-prong analysis).

261. *See supra* Part I.

262. *Stoll*, 241 P.3d at 305 (citing *Barnes*, 548 P.2d at 1020).

social authority.[263] The decision in *Stoll* demonstrates how courts can offer such support of the social norms. It both crystalizes and clarifies the wrongfulness of Stoll's behavior. The court explains that to insert a predatory term into a contract without the full awareness of the other party is against acceptable social norms.[264] It further elucidates more generally that the same social norms forbid the stronger party to include clauses that "are so one-sided as to oppress or unfairly surprise one of the parties."[265]

Moreover, the same norms against inserting unfair terms into a contract specifically include "contractual terms which are unreasonably favorable to the other party."[266] Accordingly, after reading the court's analysis, one is left with no remaining doubt that, even in a purely commercial setting and highly capitalist society, a seller cannot impose "additional payment to him over and above the stated price."[267] There is also no question that it is wrong to take advantage of the fact that the other party was not savvy enough to grasp the financial mechanism that creates such a hidden increase of the consideration. Here, as the court lucidly determines, "the land sale contract is onerous to one side of the contracting parties while solely benefitting the other, and the parties to be surcharged with the extra expense were, due to language and education, unable to understand the nature of the contract."[268]

Importantly, the court highlights rather than denies the ties between law, social norms, and the morality of the market. To that effect, the power evoked by judicial clarification of the prevalent social norms is enhanced through this explicit reminder of the court's authority to enforce social norms. Accordingly, the court explains that the question of whether a contract (or one of its terms) is unfair "is one of law for the Court to decide,"[269] but at the same time, the law itself (here the doctrine of unconscionability) is based

263. *See supra* Section II.D.2.

264. *Stoll*, 241 P.3d at 305.

265. *Id.*

266. *Id.*

267. *Id.* at 305–06.

268. *Id.* at 306.

269. *Id.* at 305 (citing Phillips Machinery Co. v. LeBlond, Inc., 494 F. Supp. 318, 322 (N.D. Okla. 1980)).

on "a generally accepted social attitude of fairness."[270] In other words, the court in *Stoll* defines and enforces with much authority the red lines governing market players' behavior, thus facilitating the anticipation of guilt if those lines are crossed.

Finally, in condemning Stoll's behavior, the court utilizes another moral emotion to support the operation of self-guilt: disgust.[271] On appeal, the court repeats an expression of disgust used by the trial court, confirming the validity and importance of such a passionate judicial response. In the trial court's words:

> I've read this and reread this and reread this. And I have tried to think of an example that I think was more unconscionable than the situation [that] I find to have been here as far as that clause. And to be real honest with you, I can't think of one. And if unconscionability has any meaning in the law at all, if that is a viable theory at all, then I think this is a prime example of it.[272]

Such verbal expression of disgust,[273] especially when expressed by people who are in a position of power, is one of society's ways of marking a behavior as immoral; it is an integral part of Rozin's model of moralization. What theorists call "moral disgust"[274] functions here to add affective dimension to the protection of social norms. The idea was explained by one theorist via the following formula: "Normative prohibitions against action X will be more likely to survive if action X elicits (or is easily led to elicit) negative affect."[275] Applying the formula, the negative emotion of disgust, as expressed by the trial judge and endorsed by the appellate court,

270. *Id.* at 305 (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (AM. LAW INST. 1981)).

271. *See* WILLIAM MILLER, THE ANATOMY OF DISGUST 179–205 (1997) (discussing the moral power of disgust).

272. *Stoll*, 241 P.3d at 304 (citing the trial court).

273. *See* Joshua Tybur & Debra Lieberman, *Animal Reminders, Pathogens, and Sex: Evaluating Distinct Evolutionary Theories of Disgust*, EMOTION RESEARCHER (March 2014), http://emotionresearcher.com/wp-content/uploads/2014/04/Understanding-Disgust-Issue-March-2014-Unformatted-PDFs.pdf (discussing the fact that disgust may be expressed verbally "to communicate moral condemnation").

274. *See, e.g.*, Hana A. Chapman, & Adam K. Anderson, *Things Rank and Gross in Nature: A Review and Synthesis of Moral Disgust*, 139 PSYCHOL. BULL. 300 (2013); Jason A. Clark & Daniel M. T. Fessler, *The Role of Disgust in Norms, and of Norms in Disgust Research: Why Liberals Shouldn't be Morally Disgusted by Moral Disgust*, 34 TOPOI 483 (2014).

275. SHAUN NICHOLS, SENTIMENTAL RULES 129 (2004).

works to signify the immorality of Stoll's behavior. It thus emphasizes and supports the existence of a social norm against such behavior. In that sense, disgust's social and moral role is to support important values.[276]

By pointing out the tone used by the trial judge and echoed by the court of appeals, I don't mean to suggest that such expression of disgust was purposefully chosen in order to fortify a norm against Stoll's exploitation of his buyers. I do believe, however, that the strong language reflects affective response of the involved judges, and as such, has greater potential to elicit moral emotions in others. Indeed, in responding with disgust to acts of greed that come at the expense of others, judges are not alone. Experiments using new technologies of brain imaging have shown brain activity in areas associated with disgust (the insula) in response to a significantly unfair division of money between participants in a bargaining game.[277] And so, with or without awareness, the judges in *Stoll* expressed their own condemnation of Stoll's behavior in a manner that supports the view that such behavior is immoral and should be avoided.

*4. Enabling anticipated other-guilt*

In contrast to *Riggins*, the *Stoll* court emphasizes the harm caused by Stoll and assigns the blame solely to the wrongdoer while raising empathy for his victims. First, as to the harm, the court calculates in detail the severe economic damage that the free-supply term was designed to cause. The court takes the time to do the math and set concrete numbers on the range of harm—a loss of hundreds of thousands of dollars, with the exact amount (between $216,000 and $450,000) depending on the value per ton of chicken litter. Then, beyond prices, the court also makes an effort to illustrate and communicate the severity of the harm. It does so by comparing the

276. *See* Jason A. Clark & Philip A. Powell, *Defending Disgust: Why Disgust Is Morally Beneficial*, EMOTION RESEARCHER (Mar. 2014), http://emotionresearcher.com/wp-content/uploads/2014/04/Understanding-Disgust-Issue-March-2014-Unformatted-PDFs.pdf; *see also* Kathryn Abrams, *The Progress of Passion,* 100 MICH. L. REV. 1602, 1603–04 (2002) (discussing the debate regarding the role of disgust in criminal law).

277. *See* Nichols, *supra* note 34.

value of the free litter supply term to the value of the purchase transaction, thereby exposing how unreasonable Stoll's term was.

Second, the court explicitly and exclusively assigns blame to Stoll. Readers are reminded twice that "it was [Stoll's] idea to include the chicken litter paragraph in the land purchase contract."[278] Moreover, the court even includes a hint regarding Stoll's possible economic motive, explaining that just before the formation of the contract "rising oil prices drove up the cost of commercial fertilizer"[279]—a fact that would make a free supply of chicken litter especially attractive.

At the same time, the court makes sure to clarify that the buyers were not blameworthy. Despite Stoll's express argument that the buyers had a duty to read and understand the term he added (note the similarity to Riggins), the court concludes that the victims did not have the ability to do so. Referring again to the buyers' personal information that had opened the decision (discussed below), the court rejects these arguments, stating: "the parties to be surcharged with the extra expense were, due to language and education, unable to understand the nature of the contract."[280] It is worth noting that the studies on the inclination to blame the victim support the court's analysis because they demonstrate that people's general inclination to blame the victims for failure to read their contracts declines when they are reminded that reading contracts does not necessarily mean understanding them due to overwhelming levels of complex information.[281]

Finally, the court's description of the facts opens with a detailed portrayal of the buyers that highlights their humanity and facilitates feelings of empathy. As mentioned before, at the very start readers learn that Xiong and Yang are husband and wife and originally from Laos.[282] To explain much of what happened next, the court also describes their limited English and minimal education. However, the

278. Stoll v. Chong Lor Xiong, 241 P.3d 301, 305 (Okla. Civ. App. 2010). Just a few paragraphs later the court mentions this again. *See id.* at 306 ("Under Stoll's interpretation of paragraph 10 (which was his "idea"), the land sale contract is onerous to one side of the contracting parties.").

279. *Id.* at 305.

280. *Id.* at 306.

281. *See A Psychological Account*, *supra* note 239, at 1779–81.

282. *Stoll*, 241 P.3d at 302.

court does not leave it at that, but rather avoids describing Xiong and Yang as victims. By adding some background details that at first glance may seem irrelevant to the dispute, the court facilitates understanding of the couple's bounded capabilities while fostering appreciation for their agency, resilience, determination, and progress in life. For example, readers learn that Xiong "became a refugee due to the Vietnam War" and then spent three years of his life in a refugee camp in Thailand.[283] Yang, too, arrived in the U.S. as a young adult after receiving no education in Laos. And yet, despite this challenging beginning, they both attended adult school in the U.S., and, as this case shows, became owners of farmland in Oklahoma and productive growers of poultry.

Having learned all this information about Xiong and Yang, it becomes easier to understand how easy (but wrong) it was for Stoll to have them sign a purchase contract in which the actual price was, in fact, much higher than the one clearly stated as the land's price under the contract. As a result of the judiciary's empathetic presentation, it is much harder to blame Xiong and Yang for what happened to them. It is also clearer—and more predictable—that behaving as Stoll did against people like Xiong and Yang, may yield guilty feelings—guilt for harming others without any justification.

*5. Summary*

In *Stoll*, the court utilized the doctrine of unconscionability in a manner that can assist others in anticipating the two different kinds of guilt that may stem from exploitative behavior. At every relevant point, the *Stoll* court did the opposite of the court in *Riggins*: it emphasized the issue of conscience, explained exactly what was wrong with Stoll's behavior, and highlighted the harm that was caused by such behavior. And, although there are currently many more courts that tend to use a *Riggins*-like, amoral approach, at least the editors of one important treatise have found *Stoll's* moral approach to be an instructive example of courts' use of the unconscionability doctrine.[284]

283. *Id.*

284. *See* 12 ARTHUR LINTON CORBIN ET AL., CORBIN ON CONTRACTS § 64.3, LEXIS (database updated 2015) ("Unconscionability has both a procedural (means of arriving at a

## IV. FOSTERING SELF-RESTRAINT

Drawing on the *Riggins* and *Stoll* examples, what can courts do more generally to foster self-restraint in the market and discourage exploitation?

### *A. Applying Stout's Model*

From Stout we have already gained two recommendations regarding the behavioral cultivation of conscience. Applying them to the unconscionability context will thus be an apt starting point. The first lies in the power that authority has in encouraging people to behave prosocially. Applied to the contractual context, the courts—as powerful and respected sources of authority in our society—should explicitly insist that greedy market players restrain their behavior and refrain from taking advantage of others' vulnerability. As Stout predicts, and as many studies make clear, most people would simply obey such a clear message. Indeed, contract law has an important role in educating market actors. It "serves a type of expressive function by communicating to tradesmen that certain standards of decency will be required of their conduct."[285] In this respect, it is interesting to note that while the court in *Riggins* remained silent regarding the lenders' behavior, the court in *Stoll* did exactly what Stout recommends by expressing a strong demand for fairness and a direct condemnation of exploitation.

The second of Stout's recommendations relates to the conformity bias: people will do what they believe most others are doing. Applied to contract law, courts should evoke their power to cultivate self-restraint by emphasizing the atypicality of market exploitation, and the prosocial behavior of most reasonable members of society. In *Stoll,* for example, the court reflects such a view by responding intensely to the seller's behavior, expressing a sense of shock and disgust that underscores the abnormality of the behavior. In contrast, treating transgressions as normal and common in the market—as the *Riggins* court does when dealing with forged

contract) and a substantive (oppression, harshness) aspect. To illustrate both these aspects take the case [of] *Stoll v. Chong Lor Xiong*.")

285. Erin Ann O'Hara, *Trustworthiness and Contract, in* MORAL MARKETS, *supra* note 143, at 186.

documents—has the opposite effect. It creates the dangerous impression that the herd behaves deceitfully and selfishly, thereby inviting others to follow. Such a message can hinder, rather than foster, self-restraint due to the strength of the conformity bias and the contagious nature of immoral behavior.[286]

### *B. Proposal: Fostering Self-Restraint via the Emotions*

And yet, applying Stout's recommendations is not enough. As I have argued in Part II, emotions play a critical role in shaping people's moral judgments and behaviors. Given the connection between moral emotions and moral judgments, the question then becomes: what can be learned from reading *Riggins* and *Stoll* about the ability of judicial decisions to impact self-restraint via their influence over relevant affective processes? This question is not discussed by Stout.

To begin with, it seems that this question should be distinguished from the traditional debate, which asks whether courts should intervene in contractual relationships or not. Taking affective consequences into account calls for a focus on *how* courts should discuss inappropriate market acts that are exposed during the litigation, regardless of the outcome of the case.

For the operation of the moral emotions, the content of the analysis may matter *more* than its final enforcement decision. On one hand, even a decision to invalidate a contract due to its unconscionability can evoke very minimal affective response and thus offer very limited encouragement of future self-restraint. On the other hand, decisions that eventually enforce the contract (or part of it) can still enable others to experience moral emotions and particularly to anticipate the two kinds of guilt that may yield self-restraint. For purposes of facilitating self-restraint and supporting the ethics of the market, I suggest that the framing, reasoning, and rhetoric of judicial decisions can have significant impact. In contrast, a hyper-rational discourse that avoids moral questions is likely to result in the unintended cost of impairing the operation of emotions, thereby fostering greedy and exploitative behavior. Therefore, judges can play an important positive social role by being mindful of the

286. *See supra* Part II and especially the dishonesty experiment.

moral component of the dispute and by utilizing unconscionability in a manner that would support, rather than hinder, the workings of the emotions that bring about self-restraint. Toward achieving this broad goal, I draw the proposal into three concrete steps, each grounded in years of studies of human behavior and human emotions.

The *first* step is to welcome, rather than ostracize, the moral emotions. It is important that judges clarify that social norms and questions of morality do not stop at the gates of the market. Neither are they foreign concepts before the law. Both the interaction of parties in the market and the formation of contracts are human behaviors, framed by interpersonal relationships. As such, they are intertwined with ethical questions and replete with emotions. Decisions that have the ability to encourage future self-restraint start, as demonstrated in *Stoll*, from a discourse that reflects the human and moral aspects of the dispute, creating an environment within which ethical concerns and moral emotions are both natural and welcome.

The *second* step is to clarify rather than cloud pertinent social norms. This step is necessary to support the workings of one type of guilt: self-guilt. Judges are capable of highlighting a norm that has been transgressed by articulating it with the judiciary's unique power and authority. Significantly, the process of defining transgressions and condemning them can be effective even if eventually—due to narrower legal reasons (such as burdens of proof)—the contract that resulted from the disreputable behavior has to be enforced. In contrast, ignoring wrongful behaviors makes the relevant social norms hazy and interrupts the emergence of anticipated self-guilt by blurring the lines between intolerable and acceptable behaviors.

The *third* step is to portray the damage that results from the misbehavior and to do this with empathy to the harmed party. To achieve this, judges must resist the human inclination to blame the victims for their sufferings, an effort similar to judicial efforts in the contexts of rape and sexual harassment. An empathetic emphasis on the fact that one party's behavior had dire influence on other members of society can facilitate the operation of the second type of guilt: other-guilt. It is important to note that judicial treatment of the exploited party with empathy is the appropriate approach for another reason. Courts are part of a broad, state-based system that impacts distributive justice in multiple ways. This system is

responsible for at least some of the vulnerabilities of weaker parties, leaving them with inferior bargaining power and subject to exploitation. As such, courts ought to put exploitation in its social context rather than framing it merely as a matter of flawed individual choice of the exploited party. In other words, judges may have more than an ability to portray the exploited party with empathy: they may have a duty to do so.[287]

Before concluding my proposal, it is worth recognizing and explaining the special importance of the last step, namely the salient role of highlighting the harm to others caused by the exploiters. Much of the heated debate regarding the use of unconscionability originates from the power assigned to individualism and private autonomy in our culture. Judicial use of unconscionability is often criticized for entailing an undesired intervention in the freedom of contract—one of the leading symbols of neoliberal western societies. In this regime, establishing harm to others is the most effective way, if not the only way, to justify intervention and limitation of freedom. Indeed, as morality theorists have noted, "Our moral system . . . focuses on harm to others."[288] The third step in my proposal is, therefore, critical not only to the ability to anticipate other-guilt, but also more generally to justify judicial decisions that utilize the unconscionability principle to invalidate predatory contracts.

### *C. A Comment about the Role of the Judiciary*

Some may criticize my proposal for its reliance on a doctrine that is implemented by courts and is distanced from the legislator's control.[289] One may argue that predatory contracts should be regulated in a more democratic and predictable way via state or federal legislation. I would like to briefly address this concern by revisiting the problematic issue of payday loans that opened this Article.

287. Hila Keren, *Law and Economic Exploitation in an Anti-Classification Age*, 42 FLA. ST. U. L. REV. 313 (2015).

288. Rozin, *Freedom, Choice and Public Well-Being*, *supra* note 1, at 241.

289. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 353 (1969) (opposing the promotion of fairness "via the judicial bureaucracy, on an *ad hoc* case-by-case basis essentially unrestrained by legislative or administrative guidance").

The rich and those with reasonably paying jobs do not need payday loans; only those who are economically vulnerable use them. As a result, the gap in bargaining power between the lenders and the borrowers in those transactions is immense and, and as demonstrated by the case of Ms. Charley, opens boundless opportunities for predatory interest rates and other oppressive terms. Regulators at all levels have tried to control the resulting exploitation in a variety of ways. However, as ingeniously illustrated by John Oliver,[290] regulations always suffer from loopholes which greedy market players are quick to identify and use in order to continue profiting from others' vulnerability. For example, lenders have started to lend via the Internet to escape state-based regulations.[291] More than that, at times lenders take intentional technical steps that put them out of the reach of a particular regulation altogether, and then feel that they have done no wrong just because the specific regulation does not apply to them.[292] Such was the case with the lender that exploited Ms. Charley: having realized that payday loans are becoming increasingly policed, the lender converted its loans to a similar product with another name and argued that under this new name the egregious interest was legitimate. This difficulty of any rule-based regulative method was captured by Professor Henry Smith who wrote "[p]lugging nine out of ten loopholes is useless if all the evaders can rush through the tenth."[293] Furthermore, in such cases, the ability to escape the regulatory limitations merely offers an

290. *Last Week Tonight with John Oliver*, YOUTUBE (HBO television broadcast Aug. 10, 2014), https://www.youtube.com/watch?v=PDylgzybWAw.

291. Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 38 (2011). For another example see William M. Woodyard & Chad G. Marzen, *Is Greed Good? A Catholic Perspective on Modern Usury*, 27 BYU J. PUB. L. 185, 216 (describing a "Texas loophole that allows title-loan lenders to be classified as a 'credit service organization' rather than as a lender" and explaining that this "loophole allows Texas title-loan 'credit service organizations' to charge triple-digit interest rates").

292. For example, when Ohio banned interest above 28% charged by short term lenders, the lawyer of one pay day loan company explained to a judge that the ban does not apply to his client, Cashland, because it never registered as a short term lender. *See Last Week Tonight with John Oliver*, *supra* note 290. Apparently no other company in Ohio has registered as a short term lender. *Id*. Instead, the same lenders registered themselves as mortgage lenders and have thus seen themselves free of the limitation of interest. *Id*.

293. Henry E. Smith, *Property, Equity, and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW 233 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

artificial way to clear the conscience, or at least escape its judgment. Indeed, at least one state has explained the special value of the judicial unconscionability doctrine as a blanket rule: "The legislative process is too slow to keep up with market practices, so the courts must have power to monitor the market for the protection of all participants."[294]

More generally, although the law cannot totally stop people from trying to profit from taking advantage of others, it can make it harder for them to succeed while encouraging them to refrain from further attempts. As proposed here, this goal can be best achieved by crystalizing a legal norm against exploitation. Ideally, legislators can announce such a norm—as done by other Western legal systems.[295] Until such reform occurs in a Common Law legal system, however, utilizing the concept of unconscionability can send a clear and general message that any form of exploitation is wrong and forbidden, regardless of the concrete method used. Indeed, in Ms. Charley's case the courts have used a legislated version of the unconscionability doctrine to do just that, explaining that such legislation is "leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who

294. JOHN L. COSTELLO, VIRGINIA REMEDIES § 10.11, LEXIS (database updated 2015); *see also* David Ray Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure to Reform*, 16 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 223, 225 (2014) ("The business models and concomitant contractual agreements of rent-to-own outlets, payday lenders, and title pawns are so sophisticated and adjustable as to make them virtually *impervious to regulation*. As a result, rent-to-own outlets, payday lenders, and title pawns continue not only to exploit the urban poor, but also to socioeconomically subjugate the urban poor by trapping them into a ceaseless debt cycle. *A blanket proscription* of these tawdry businesses might be the only way to drive them from our midst and to eliminate their active role in the perpetuation of urban poverty.") (emphasis added).

295. For example, Article 51 of the European Commission's Proposal for a Common European Sales Law focuses on "unfair exploitation." The article reads as follows:

> "A party may avoid a contract if, at the time of the conclusion of the contract: (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage."

*Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, EUROPEAN COMMISSION 52 (Nov. 10, 2011), http://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0635.

prey on the desperation of others. . . ."[296] This 2014 decision fits the understanding that three decades earlier, in the most famous unconscionability decision (*Williams*): "[j]udges and legislators did not advance competing regulatory visions."[297] Phrased differently, courts and legislators are part of the same system and can work in tandem to discourage oppressive market behavior.

And last, once presented with a dispute, courts have no choice but to rule, a fact that makes their impact on market norms unavoidable, whether they enforce or refuse to enforce predatory contracts. Given the immorality of exploitation, courts should attempt to mitigate injustice rather than to participate in its perpetuation. And, in doing so, on a case-by-case basis, courts have a special impact that no legislature is able to achieve. The human narratives that occupy judicial decisions have a unique ability to spread an anti-exploitation message by effectively evoking in readers' moral emotions.

## CONCLUSION

For many years, scholars have argued both for and against using the unconscionability doctrine. They have done so, however, without taking the emotions that impact people's behavior into account. This Article has sought to change that by focusing on the *affective* consequences of decisions that either use or refrain from using unconscionability to respond to wrongful contractual behavior and cope with predatory contracts.

Modern courts' reluctance to invalidate contracts for unconscionability impedes affective mechanisms that enable self-restraint. Many judicial decisions, most significantly those written in the last decades of the post-*Williams* neoliberal era, demonstrate how law might impair the workings of conscience and limit the human ability to resist the temptation to take advantage of others. Law may unintentionally discourage self-restraint by creating an environment that is unwelcoming to moral self-reflection, by treating transgressions as if they were normal, and especially by blaming the victims of exploitation rather than their exploiters. In a legal environment that is

296. State *ex rel.* King v. B&B Inv. Grp., 329 P.3d 658, 671 (N.M. 2014).

297. Fleming, *supra* note 35, at 1388.

amoral and in which the unconscionability principle is underused, people are more likely to act out of greed at the expense of others.

Normatively, it is necessary to change such unintended consequences. It is time to recognize the price society pays for legally ignoring exploitation and other immoral market behaviors. It is time to revive the idea of "courts of conscience" while filling it up with new content based on contemporary scientific knowledge. Outside of law, new studies and advanced technologies have improved our understanding of the operation of the moral emotions and their importance in shaping social behavior. Particularly, as discussed in this Article, the ability to anticipate feelings of guilt is key to the operation of conscience and to the execution of self-restraint. Given courts' unique social power, such new knowledge ought to be utilized in the legal realm. Instead of avoiding questions of conscience, as proposed by some critics of the unconscionability principle, courts can utilize this principle and their expressive power to influence society in a positive manner. They can foster self-restraint by emphasizing the question of conscience and enabling people to better anticipate the guilt they may feel from breaking social norms and hurting others. Ultimately, judicial work that denounces exploitation of vulnerability can not only facilitate more self-restraint, it can also strengthen the social norms against such behavior.

To be sure, even in periods dominated by the logic of the market, some courts, such as in *Stoll,* have wielded unconscionability with conscience in mind. This approach has the potential to enable rather than impair the operation of the moral emotions and it thus can promote self-restraint. This Article's analysis and particularly its final proposal offer historical, scientific, and theoretical support for the work of those fewer courts. To counter the calls for judicial amoralism, this Article has offered a reasoned justification for strengthening the place of those courts that have never stopped functioning as "courts of conscience."

Given the constant growth of economic inequalities, and the abundance of exploitative behaviors in the market, the task of utilizing the unconscionability principle to encourage self-restraint seems more urgent than ever. Significantly, even those concerned with judicial interventions in market activities may see value in the long-term potential of this Article's thesis: the more market players will learn to act with self-restraint, the less courts will need to intervene and impose norms of fairness.