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A Consent Theory of Unconscionability: An Empirical Study of Law in Action

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A CONSENT THEORY OF UNCONSCIONABILITY: AN EMPIRICAL STUDY OF LAW IN ACTION

LARRY A. DIMATTEO* & BRUCE LOUIS RICH**

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“There seems to me to be some possibility that these provisions may lead appellate courts into a machinery for striking down where striking down is needed”¹

Karl N. Llewellyn

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1. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 369 (1960). An alternative quote considered: “[I]t is essential that we address the problem which we caricature as the contract between the rabbits and foxes, in which the foxes impose the clause that all disputes will be resolved by a panel of foxes, or by a panel of wolves.” *Bd. of Ed. of Berkeley County v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 447 (W. Va. 1977).

I. INTRODUCTION

Karl Llewellyn² saw section 2-302, the doctrine of unconscionability, as providing a mandate for courts to police contracts.³ He did not see it as providing the machinery for accomplishing or guiding this grant of judicial power.⁴ The doctrine of unconscionability and the best “machinery” for its implementation has been the source of scholarly discussion ever since.⁵ This Article attempts to provide empirical evidence, through the statistical analysis of cases, of how courts have applied this mandate and whether a discrete machinery has been developed in its implementation. Ultimately, the Article assesses whether a coherent machinery or analytical framework has been fabricated through forty years of jurisprudence.⁶

2. Karl Nickerson Llewellyn was the Chief Reporter for the Uniform Commercial Code (U.C.C.) and the principal drafter of Articles I (General Provisions) and II (Sales). He is also famous for his works in commercial and contract law, jurisprudence, legal education, sociology and law, and anthropology and law. Llewellyn is most famous for his part in the U.C.C. project and as a principal of the Legal Realist Movement of the 1930s.

3. For a brief history of the U.C.C. project, see William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967). For a history of unconscionability as it pertains to the U.C.C. and its subsequent development in California, see Harry G. Prince, *Unconscionability in California: A Need for Restraint and Certainty*, 46 HASTINGS L.J. 459 (1995).

4. Professor Murray expressed this view in his 1969 article: “Llewellyn completely understood . . . that the statute is nothing more than a catalyst for the development of the analytical structure of unconscionability.” John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 38 (1969).

5. A Lexis search of the word “unconscionability,” limited to the most recent two years of legal literature, yielded 504 entries (search performed on Mar. 10, 2005).

6. In 1970, Robert Braucher, the principal author of section 2-302, stated that “we are probably not much more ready now than we were twenty years ago to arrive at comprehensive reasoned elaboration of what is unconscionable.” Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 347 (1970). A more recent article notes that “the judiciary has not been able to clearly delineate comprehensive rules.” Paul Bennett Marrow, *The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 29 (2001). Some commentators have argued that the failure of the courts to fabricate a coherent analytical framework suggests that some form of further legislative or regulatory intervention through the use of mandatory terms is needed. See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003). Professor Korobkin concludes that behavioral economics suggests that the best technique for policing the market place for one-sided or unconscionable terms is a combination of legislative-mandated regulation through the use of mandatory terms and judicial oversight through the doctrine of unconscionability on a case-by-case basis:

When the costs and benefits of particular terms are substantially similar across the range of contractual contexts in which the term will appear, legislatures and/or agencies mandating terms ex ante have a competitive advantage over courts; when costs and benefits are highly context specific, the advantage is reversed. In the latter circumstance, a judicial review process based upon a modified application of the unconscionability doctrine can improve upon the status quo and can be accomplished legitimately within the legislated boundaries of that doctrine.

This Article provides the findings of an empirical study of 187 court cases (case coding project) in which the issue of the unconscionability of a contract or a contract term was addressed by the courts. The cases were drawn from two time periods. The first set of cases can be viewed as the first generation of Uniform Commercial Code (U.C.C.)-style⁷ unconscionability cases from 1968-1980.⁸ The second generation of unconscionability cases were from the time period of 1991-2003. The two groups of cases allow us to not only analyze a series of questions and factors, but also to make intergenerational or longitudinal observations. The analysis is directed at answering four questions: (1) What are the standards used by courts in making unconscionability decisions?, (2) What type of evidence is considered by courts in making their decisions?, (3) What are the operative facts or factors that are most predictive of unconscionability decisions?, and (4) How do these findings inform us on the doctrine of unconscionability both as to its reflection in the law (expressed doctrine) and in application (law in fact)?

Using actual court cases involving unconscionability claims, the purpose of this study is to empirically examine the effects of selected case characteristics on the outcomes of cases. Studies such as these have led Nagel and Neef⁹ to conclude that the empirical analysis of legal cases is useful for identifying variables that are predictive of case decisions. In developing a matrix of factors and variables to be studied, we reviewed the law of unconscionability, the extensive legal literature on the doctrine of unconscionability, and selected cases from the two different time frames discussed above. Part II provides a brief review of the law of unconscionability and analyzes some es-

Id. at 1294; cf. Robert A. Hillman, *Debunking Some Myths about Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981) (“[L]egislators cannot successfully draft legislation to encompass unforeseen circumstances.”).

7. U.C.C. § 2-302 (2005) states in its entirety:

Unconscionable Contract or Clause:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Id.

8. The U.C.C. was enacted in New York in 1963 and was quickly followed by other states. Therefore, the initial U.C.C. unconscionability cases began to reach a critical mass by the end of the 1960s.

9. STUART S. NAGEL & MARIAN G. NEEF, *DECISION THEORY AND THE LEGAL PROCESS* (1979).

pecially illuminating judicial opinions. Part III examines the unconscionability scholarship.

The analysis presented in Parts II and III serves two purposes. First, it allows for a better understanding of the issues, both practical and theoretical, that have been discussed in the debate over the role of unconscionability in a supposedly free contract law regime. Second, the generally-accepted, bifurcated analysis—procedural and substantive unconscionability—discussed in the literature¹⁰ and case law¹¹ is mined to isolate factors perceived to be important to the unconscionability determination. Statistical analysis of the coded cases allowed us to measure the relative importance of substantive and procedural unconscionability. More specifically, it allowed for the weighing of the relative importance of factors, both procedurally and substantively related, in the finding of unconscionability.

The factors revealed in the literature and case review were used to create a matrix of factors. This matrix was then used to code a randomly selected set of cases. Part IV presents the methodology of the coding exercise, which includes how the cases were selected, the dependent and independent variables, and the hypotheses posed. Part V presents the findings of the coding project. A logistic regression model is used to analyze the relative importance of the selected factors to unconscionability decisions. The relative predictive power of the factors distilled from the literature and case law is presented. These findings allow us to offer answers to some of the questions posed by the scholarly literature and case law.

Ultimately, in isolating the operative factors in judicial decisions, some insight into the underlying themes or reasons for unconscionability findings will be revealed. It is the hope that the empirical analysis of the law, represented by the current study, will provide the basis for a better theoretical understanding of the doctrine of unconscionability and contract law. At the least, such findings can be used to support or debunk the theoretical constructs offered in the scholarly literature. Finally, insights gleaned from the coding project are used to support a new theory of unconscionability. Part VI offers a consent theory of unconscionability that best explains the cases and the relative predictive power of the factors measured.

II. DOCTRINE OF UNCONSCIONABILITY: LAW IN THE BOOKS

The counterpoise to absolute freedom of contract is found in contract law's limiting or policing doctrines. The New York Court of Appeals, in *Rowe v. Great Atlantic & Pacific Tea Co.*,¹² provides a

10. See *infra* Part III.

11. See *infra* Part IV.A.

12. 385 N.E.2d 566 (N.Y. 1978).

statement highlighting the inherent tension between freedom of contract in the enforcement of contracts and freedom of bargaining in the formation of contract:

It is, of course, far too late in the day to seriously suggest that the law has not made substantial inroads into such freedom of private contracts. There exists an unavoidable tension between the concept of freedom to contract, which has long been basic to our socio-economic system, and the equally fundamental belief that an enlightened society must to some extent protect its members from the potentially harsh effects of an unchecked free market system . . . [T]he law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power.¹³

Section 2-302's broad mandate to strike or modify any unconscionable clause or contract makes it potentially the most freedom-limiting device available to the courts.¹⁴ Of course, freedom can mean different things depending on one's perspective. Freedom of contract here relates to the strict enforcement of the written contract. Unconscionability, along with more particular limiting doctrines such as duress, undue influence, fraud and misrepresentation, question the freedom of the bargaining.

An assessment that unconscionability was the creation of Karl Llewellyn and embedded into the U.C.C. would be a misunderstanding. In fact, unconscionability has a long history in the common law¹⁵ and the law of equity.¹⁶ The criticism leveled at section 2-302 as be-

13. *Id.* at 569.

14. Because of its anti-freedom of contract potential, courts have generally been cautious in its application. *See, e.g.*, E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990). Professor Farnsworth described the law of unconscionability as one of "arrested development." *Id.* at 222-25. In comparing the doctrine of unconscionability with similar principles in England, Germany, and France, a commentator noted that despite the grant of judicial discretion, "an undercurrent of caution runs through the decisions." A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States*, 14 LOY. L.A. INT'L & COMP. L. REV. 455, 498 (1992).

15. "Though unconscionability, as an element in the enforcement of contracts, is equitable in origin, there is evidence to sustain the conclusion that the common-law courts as well were moved by the doctrine to invalidate contracts under certain circumstances." *Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 396 N.Y.S.2d 427, 431 (N.Y. App. Div. 1977). *See generally* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 128, at 188 (1952).

16. Often cited for the principle of unconscionability is the English case of *Earl of Chesterfield v. Janssen*, [1750] 28 Eng. Rep. 82 (Ch.). The court set the general parameters for nonenforceability as the bargain being "such as no man in his sense and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law take notice." *Id.* at 100. The equity avenue for unconscionability was again acknowledged by the California Supreme Court in *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981). The en-

ing overly vague and indeterminate equally applies to equitable unconscionability. Moreover, “[b]ecause barring relief was a matter of the chancellor’s discretion, equity never developed a clear set of rules for analyzing claims of unconscionability.”¹⁷ Another court noted that “[t]he common law doctrine of unconscionability has proved difficult to define and has been rarely invoked undoubtedly because, other than in exceptional cases, it has been largely viewed as grossly interfering with the freedom of contract.”¹⁸ The major impact of the codification of unconscionability in Article 2 was its transformation from a remedy-limiting device to a substantive doctrine.¹⁹ By inserting it into the Code, Llewellyn sensitized jurists to the necessity to police bad faith bargaining and overreaching.

Ever since unconscionability’s enactment in Article 2, the courts have grappled with finding the appropriate means of implementation. The following parts will analyze the widely accepted procedural-substantive bifurcation framework for determining unconscionability and the development of a factors analysis used within this framework. A number of court decisions have been selected to identify some of the more common approaches and variables (factors) discussed by judges. Part II.A reviews cases attempting to deal with the procedural-substantive bifurcation. The possible approaches posed include the need to find a threshold level of both, the need only to find substantial evidence of one, and the use of a *sliding scale* approach. Part II.B examines cases where the courts have attempted to isolate factors to be used in making the unconscionability determination. These factors were subsequently applied in our coding of cases.

A. *The Procedural-Substantive Bifurcation*

The courts soon responded to the skeletal nature of section 2-302 by focusing on the procedural and substantive elements of unconscionability. The distinction between process and substance has a long history in the law.²⁰ The real task for the courts was to provide a functional approach or analysis to the abstract bifurcation of uncon-

forcement of contracts of adhesion are limited by “a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or ‘unconscionable.’” *Id.* at 623; *see also* Cal. Grocers Ass’n v. Bank of Am., 27 Cal. Rptr. 2d 396 (Cal. Ct. App. 1994) (fee provision in a bank’s signature card).

17. Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51, 57 (Ariz. 1995).

18. Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 916 (N.J. Super. Ct. Ch. Div. 2002).

19. *Id.*

20. An example was the evolution of the English writ system beginning in the twelfth century. “In contemporary language the common law was therefore a law of procedure; whatever substantive law existed was hidden by it Gradually, the great writs began to fill entire fields of human activity, which other lawyers recognized as fields of substantive law.” H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 228, 230 (2d ed. 2004).

scionability. The seminal case in this regard was delivered in 1965 in *Williams v. Walker-Thomas Furniture Co.*²¹ Its precedential power was restated in a 2002 case:

For the most part, the unconscionability cases follow *Williams v. Walker-Thomas* and look for two factors: (1) unfairness in the formation of the contract, and (2) excessively disproportionate terms . . . Most courts have looked for a sufficient showing of both factors in finding a contract unconscionable.²²

The labels substantive and procedural unconscionability were made famous in Leff's seminal article.²³ Since the Leff article, the use of a procedural-substantive matrix in determining unconscionability has been widely accepted. The great majority of courts have felt obligated to support an unconscionability determination through a two-step analysis of substantive and procedural unconscionability. The most troubling cases are those in which there is overwhelming evidence of one form of unconscionability and little evidence of the other form. Is a harshly one-sided clause insulated from attack when there is no evidence of procedural naughtiness? Is a contract in which there is no truly unconscionable component, but is one-sided as a whole, insulated from attack even though there is overwhelming evidence of procedural unconscionability? Or can the doctrine of unconscionability be applied where, despite the lack of an individual unconscionable term, the contract is substantially unbalanced and there is no evidence of bargaining naughtiness?²⁴ One answer is that the party challenging a clause or contract as unconscionable must meet a threshold burden on both forms of unconscionability. An al-

21. 350 F.2d 445 (D.C. Cir. 1965). A Lexis search found ninety-one district court, twenty-one court of appeals, and two Supreme Court cases citing *Williams v. Walker-Thomas Furniture Co.* (last searched Oct. 25, 2004). Justice Stevens stated that "Judge J. Skelly Wright set out the state of the law succinctly in *Williams v. Walker-Thomas Furniture Co.*" *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting). As recently as 2003, the 6th Circuit cited *Williams* as authority: "The crucial question is whether 'each party to the contract, considering his obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print . . . ?'" *Ohio Univ. Bd. of Trs. v. Smith*, 724 N.E.2d 1155, 1161 (Ohio Ct. App. 1999) (quoting *Williams*, 350 F.2d at 449). *See also Morrison v. Circuit City Stores, Inc.*, 313 F.3d 646, 666 (6th Cir. 2003). *See generally* Prince, *supra* note 3, at 477 ("[T]he *Williams* formulation has gone on to become probably the most often-cited definition of unconscionability . . .").

22. *Sitogum Holdings, Inc.*, 800 A.2d at 921.

23. Arthur Allen Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

24. Robert Braucher posed this question in the following manner: "Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable." Braucher, *supra* note 6, at 340. A common sense response would be that in a free market, survival of the fittest economy, such imbalanced contracts are not uncommon. Braucher's response was that such contracts devoid of procedural weakness were not common. "Ordinarily, however, an unconscionable contract involves other factors as well as an overall imbalance." *Id.*

ternative approach would sustain a claim where there is overwhelming evidence of one form of unconscionability.

Some courts have questioned the aforementioned approach of requiring findings of both forms of unconscionability. The Arizona Supreme Court noted that “perhaps a majority [of courts] have held that there must be some quantum of *both* procedural and substantive unconscionability to establish a claim, and take a balancing approach in applying them.”²⁵ By using a balancing approach, it implies that a minimum of one type of unconscionability will suffice when there is overwhelming evidence of the other type. The issue then becomes what is the quantum or minimum threshold?

The Arizona Supreme Court also noted that “[o]ther courts have held that it is sufficient if *either* is shown.”²⁶ The court ultimately concluded that “a claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies.”²⁷ The coding project will determine the frequency of cases in which a finding of unconscionability was based solely on the existence of one type of unconscionability.²⁸

A middle ground, as discussed above, would adopt a *sliding scale* in which greater levels of one form lowers the threshold of evidence needed for the other form of unconscionability. The coding project measures the degree in which both forms of unconscionability are discussed and are required by the courts.²⁹ As noted above, the cases illustrate the overwhelming judicial belief that evidence of both procedural and substantive unconscionability is required to sustain a claim.³⁰ However, a number of cases have expressly recognized that the threshold needed to prove both forms of unconscionability is not fixed but may vary based upon a balancing or sliding scale. The two forms are negatively related in that the greater the degree of substantive unconscionability the lesser the degree of procedural unconscionability is needed. This was the approach adopted in *Funding Systems Leasing Corp. v. King Louie International, Inc.*³¹ The case

25. *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995).

26. *Id.* (citing *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824 (N.Y. 1988)). The *Gillman* court made it clear that cases based solely upon substantive unconscionability were “exceptional.” *Gillman*, 534 N.E.2d at 831.

27. *Maxwell*, 907 P.2d at 59.

28. *See infra* Part IV.D.1-2.

29. *Id.*

30. *Id.*

31. 597 S.W.2d 624 (Mo. Ct. App. 1979); *see also* *Ilkhchooyi v. Best*, 45 Cal. Rptr. 2d 766, 775 (Cal. Ct. App. 1995) (“[T]he greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required . . .”). It is interesting to note that California’s unconscionability doctrine is codified as a part of its general contract law and not just its law of sales. “The established doctrine that a court may refuse to enforce an uncon-

involved the enforceability of a disclaimer clause in a lease-purchase installment contract. The court described the case as an easy one in that it found the particular clause to be fair and found no evidence of procedural unconscionability. The court noted that the parties were all merchants and that the disclaimer clause was conspicuously presented. The disclaimer clause appeared “on the front page in capital letters and in red color.”³²

The court acknowledged the acceptance of the “Leff test”³³ that distinguishes between procedural and substantive unconscionability. But, despite this being an *easy* case, the court felt compelled to make a “[s]liding [s]cale [e]valuation.”³⁴ It concluded that “[a]pplying a sliding scale balancing of all factors, there has been an insufficient proof of such unfairness as would justify declaring invalid an express provision of the written contract” Two of the factors that weighed in the court’s reasoning were that “equipment leasing carries great advantages for the buyer-lessee” and “[t]he disclaimer of warranty by the financing party is universal in the commercial world.”³⁵ These factors could easily weigh in the opposite direction. First, the great advantages factor transforms such a leasing-financing contract into one of necessity. Second, the fact that the clause is universal can support a claim that the buyer had no alternative but to accept the clause. Instead, the court reasoned that it was evidence of the clause’s reasonableness.

B. *Developing a Factors Analysis*

As in most cases of judicial application of legal standards, the courts will often enumerate a number of factors that they use in applying the standard to the novelty of real world disputes. This has been the case in the application of the doctrine of unconscionability. A review of the case law was undertaken to uncover, and to better understand, the factors used by the courts. These factors were then used to code cases to determine their predictive power or level of commonality among a pool of cases. Alternatively stated, the review of the cases revealed a matrix of factors weighed by courts in making decisions. Many of these factors were then tested in the case coding project. The purpose of coding cases based upon a factors analysis was to see if there were specific factors or groups of factors that were more predictive of a judicial outcome than others. If such factors are present, then the development of a theory or analytical framework

scionable provision in *any* contract was codified in 1979 in section 1670.5” *Id.* at 774 (emphasis added).

32. *Funding Systems Leasing Corp.*, 597 S.W.2d at 627.

33. *Id.* at 634.

34. *Id.* at 635.

35. *Id.* at 635-36.

for unconscionability may be constructed based upon such findings. The factors emanating from the case review are grouped and analyzed below between procedural and substantive factors.

1. Procedural Factors

The role of a factors analysis is represented well in *Willie v. Southwestern Bell Telephone Co.*³⁶ The case involved the enforceability of an exculpatory clause in a contract between a telephone company that had inadvertently deleted the advertisement of a business customer from its phonebook. The court formulated a ten-factor test to be used in applying the unconscionability doctrine. These factors went to both procedure and substance. In the area of procedure, it listed whether the contract was a standard form, whether the clause at issue was boilerplate, whether the clause was hidden (nonconspicuous), whether the language used was incomprehensible to a layperson, whether there was an inequality of bargaining power, and whether there was an exploitation of the “underprivileged, unsophisticated, uneducated and the illiterate.”³⁷

Courts are more at ease in recognizing factors indicative of procedural unconscionability than substantive unconscionability. The court in *Johnson v. Mobil Oil Corp.*³⁸ provides a typical listing of procedural factors:

Under the “procedural” rubric come those factors bearing upon . . . the “real and voluntary meeting of the minds” of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply . . .³⁹

The enumeration of such factors has helped courts flush out the key operative facts on a case-by-case basis. The court in *Nasco, Inc. v. Public Storage, Inc.*⁴⁰ provides another example when it stated the following:

36. 549 P.2d 903 (Kan. 1976).

37. *Id.* at 907. One commentator notes that judges often focus on the facts that one of the parties to a contract is poor or uneducated. “However, these judges do not explain how any of these characteristics are connected with the ability to make rational economic decisions.” Philip Bridwell, Comment, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1525 (2003); cf. Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977) (arguing that there is no evidence that poverty is related to incompetence).

38. 415 F. Supp. 264 (E.D. Mich. 1976).

39. *Id.* at 268.

40. No. 92-12731-RCL, 1995 WL 337072 (D. Mass. 1995).

[A] court may take into account a myriad of factors, such as the commercial sophistication of the party claiming unconscionability; whether such party was represented by counsel; whether the clause was obscure or buried in fine print, or conversely, whether it was out on the table and the subject of active negotiation.⁴¹

The case coding project measures the predictive power of conspicuousness, negotiation, and legal representation.⁴²

One meta-factor that underlies most of the unconscionability cases is the merchant-consumer distinction.⁴³ The fact that an unconscionable clause was inserted in a merchant form contract in a merchant-consumer transaction has been a common factor in successful unconscionability cases.⁴⁴ There are few cases that have found unconscionability to the benefit of a merchant. In one case involving a “merchant” farmer and a grain elevator company, the court acknowledges that “[a]lthough courts have been receptive to pleas of unconscionability raised by consumers, they have been reluctant to do so in commercial transactions.”⁴⁵

The courts have generally failed to adequately define merchant in relationship to the unconscionability doctrine. However, some courts have recognized that not all merchants are equal in sophistication or bargaining power.⁴⁶ They recognize that in merchant-to-merchant transactions, the lack of sophistication of one of the merchant parties renders that party susceptible to the type of overreaching found in consumer unconscionability cases. For example, the court in *Sosik v.*

41. *Id.* at *5.

42. *See infra* Parts IV-V.

43. *See* *Am. Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964). This was one of the first cases applying section 2-302, and it symbolizes the use of unconscionability as a device to protect consumers.

44. *See infra* Part IV.D.1-2.

45. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47, 50 (N.D. 1975).

46. *A & M Produce Co. v. FMC Corp.*, 135 Cal. Rptr. 473 (Cal. Ct. App. 1982) (holding that a contract between enormous diversified corporation and relatively small but experienced farming company found to be unconscionable); *Weaver v. Am. Oil Co.*, 276 N.E.2d 144 (Ind. 1971) (holding as unconscionable clauses in a service station lease that exculpated the oil company from any liability for its negligence, and obliged the lessee to indemnify the oil company for any loss); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976) (holding that although the notion of unconscionability is most frequently employed to shield disadvantaged and uneducated consumers from overreaching merchants and although findings of unconscionability are rare in commercial settings, commercial contracts are not immune from a finding of unconscionability under proper circumstances); *Allen v. Mich. Bell Tel. Co.*, 171 N.W.2d 689 (Mich. Ct. App. 1969) (holding as unconscionable a clause exculpating Bell from any liability to yellow page advertisers for failure to include advertising); *Shell Oil Co. v. Marinello*, 307 A.2d 598 (N.J. 1973) (provision in dealer agreement giving Shell absolute right to terminate on ten days' notice void as against public policy); *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976) (holding that a ten-day cancellation clause in dealer agreement, available only to company, unconscionable on its face).

*Albin Marine, Inc.*⁴⁷ focused on the level of sophistication of one of the merchant parties. The court noted that the party was a merchant or businessperson in the conduct of his business, but not a merchant for the transaction in question. In that case, a charter service company purchased a boat from a boat seller. The proprietor of the charter service company had previously operated a failed construction company and then a credit card processing company. The court noted that the boat seller was “a large, experienced boat retailer [and] on the other hand, [the purchaser was] a relatively inexperienced individual, particularly in the area of purchasing boats to be used commercially.”⁴⁸ The court found a disclaimer clause in the sale contract to be unconscionable citing the facts that the parties were “not of equal commercial sophistication” and the purchaser was “particularly unsophisticated.”⁴⁹

Courts have sometimes isolated particular factors as most relevant. The Washington Supreme Court singled out conspicuousness and negotiations as especially strong evidence against a finding of unconscionability, noting that “[i]t is readily apparent that both ‘conspicuousness’ and ‘negotiations’ are factors, albeit not conclusive, which are certainly relevant when determining the issue of conscionability”⁵⁰ The court recognized the importance of prior dealings and trade practice as additional factors.⁵¹

Finally, the courts have not felt restrained by the sales-nonsales contract distinction.⁵² They have liberally applied section 2-302 methodology to nonsale contract disputes, especially in real property⁵³ and financial transactions.⁵⁴ Twenty-five years ago, the Su-

47. No. 020539B, 2003 WL 21500516 (Mass. Super. Ct. 2003); *see also* *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 396 N.Y.S.2d 427 (N.Y. App. Div. 1977) (merchant-to-merchant transaction). In *Industrialease*, the court held a disclaimer clause to be unconscionable. Regarding the fact that a merchant party was claiming unconscionability, the court stated that the “term ‘unconscionable’ is thus flexible, to be applied within the framework of the transaction under scrutiny, and considered in light of the commercial climate then existing and the common law.” *Id.* at 431.

48. *Sosik*, 2003 WL 21500516, at *7.

49. *Id.*

50. *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20, 23 (Wash. 1975).

51. *Id.*

52. *See infra* Part IV.D.1-4.

53. *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915 (N.J. 2002) (holding option contract for the transfer of property was unconscionable); *Weidman v. Tomaselli*, 365 N.Y.S.2d 681 (N.Y. Co. Ct. 1975) (holding attorneys’ fees that were disproportionate at law in a real property lease were unconscionable); *Seabrook v. Commuter Housing Co., Inc.*, 338 N.Y.S.2d 67 (N.Y. Civ. Ct. 1972) (holding apartment lease unconscionable and unenforceable); *see also* Jeffrey L. Licht, *The Clog on the Equity of Redemption and Its Effect on Modern Real Estate Finance*, 60 ST. JOHN’S L. REV. 452 (1986) (documenting the increased use of the principle of unconscionability in mortgage law).

54. *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002) (holding credit card company’s cardholder agreements were procedurally and substantively unconscionable); *Carboni v. Arrosipide*, 2 Cal. Rptr. 2d 845 (Cal. Ct. App. 1991) (holding secured

preme Court of Washington acknowledged that “[o]f growing importance is the tendency of courts to find the Section on unconscionability, Section 2-302, appropriate to nonsales deals.”⁵⁵ This is a clear example of the importance the Code has played in influencing the common law of contracts.

2. Substantive Factors

The “ten-factor test” provided by the court in *Willie v. Southwestern Bell Telephone Co.*,⁵⁶ and discussed in the previous section, included a number of substantive factors. They include the existence of an excessive price or “significant cost-price disparity,” a clause that amounts to a “denial of basic rights and remedies,” penalty clauses, and an overall imbalance in the bargain.⁵⁷ The court’s listing of penalty and limitation of remedy clauses alerts us to the fact that certain types of clauses have historically received heightened judicial scrutiny. These include the following: liquidated damages (penalty), exculpatory damages, disclaimer, covenants not to compete, limitation of liability, limitation of remedy clauses, and arbitration clauses.⁵⁸ One court acknowledged that cases involving price disparity and

loan at rate of 200% per annum on principal that rose to \$99,000 was both substantively and procedurally unconscionable); *Ed. Beneficial, Inc. v. Reynolds*, 324 N.Y.S.2d 813 (N.Y. Civ. Ct. 1971) (contract covering enrollment in school and financing); *David v. Mfrs. Hanover Trust Co.*, 287 N.Y.S.2d 503 (N.Y. Civ. Ct. 1968) (holding jury waiver clauses on signature cards were unconscionable and inoperative in depositor’s action against bank); see Alvin C. Harrell, *Basic Choices in the Law of Auto Finance: Contract Versus Regulation*, 7 CHAP. L. REV. 107 (2004).

55. *Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1312 (Wash. 1979); *Baker v. Seattle*, 484 P.2d 405 (Wash. 1971) (equipment leasing); see also *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69 (Fla. 4th DCA 1975) (bailment); Martha Shaffer, *Domestic Contracts, Part II: The Supreme Court’s Decision in Hartshorne v. Hartshorne*, 20 CAN. J. FAM. L. 261 (2004) (Canadian Supreme Court’s decision in *Hartshorne v. Hartshorne*, 2004 S.C.R. 22, adopts a hard line on marital contracting, leaving little scope for courts to examine the substantive fairness of the contracts); Joline F. Sikaitis, Comment, *A New Form of Family Planning? The Enforceability of No-Child Provisions in Prenuptial Agreements*, 54 CATH. U. L. REV. 335, 357 (2004) (questioning the enforceability of no-child provisions in prenuptial agreements, saying “[i]n assessing the enforceability of the agreement, a court will consider the procedural and substantive unconscionability . . .”).

56. 549 P.2d 903 (Kan. 1976). Other courts have applied the *Willie v. Southwestern Bell Telephone Co.* ten-factor matrix. See, e.g., *Broadway v. Household Fin. Corp. of Huntsville*, 351 So. 2d 1373 (Ala. Civ. App. 1977).

57. *Sw. Bell Tel. Co.*, 549 P.2d at 907. One of the factors is not really a factor but a recognition of the importance of context in the making of the unconscionability determination. The court states that a factor to be considered is “the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect.” *Id.*

58. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (asserting that there has been a resurgence in the use of the doctrine of unconscionability over the years as the use of arbitration has increased; courts continue to invalidate unconscionability clauses despite the Federal Arbitration Act); Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383 (2003) (explaining that many of the cases focusing on the one-sidedness of arbitration agreements also use the rhetoric of unconscionability).

limitation of remedy provisions could apply unconscionability even without any evidence of procedural overreaching.⁵⁹ Section 2-719 of the Code provides another example of heightened judicial scrutiny by mandating that limitation of remedy clauses that exclude the recovery of consequential damages by consumers are per se unconscionable.⁶⁰ The fact that certain clauses have long been scrutinized by the courts may indicate that unconscionability is just another device used by courts to restrict the reach of these clauses. The coding project will measure the prevalence of these types of clauses in unconscionability jurisprudence.⁶¹

III. UNCONSCIONABILITY SCHOLARSHIP: *EMPEROR'S NEW CLAUSE*⁶² AND BEYOND

In the late 1960s, the first generation of unconscionability literature⁶³ following the enactment of the U.C.C. focused on the vagaries of the language of section 2-302 and the need to develop an analytical framework to guide judicial decisionmaking. As one of the Code's most controversial provisions, it immediately generated tremendous scholarly attention.⁶⁴ The next two Parts will analyze a select few of these seminal articles. The articles selected add insights and make claims that will be explored in the coding project.

A. *Defining the Undefinable*

The most influential of these articles⁶⁵ was Arthur Leff's 1967 article: *Unconscionability and the Code—the Emperor's New Clause*.⁶⁶ Professor Leff criticized section 2-302 as an example of code-drafting that results in an end product that “say[s] nothing with words.”⁶⁷ He then detailed the history of unconscionability premised on the finding of both procedural and substantive elements. This bifurcation was

59. *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995).

60. U.C.C. § 2-719(2) (2005). See generally Jonathon A. Eddy, *On the 'Essential' Purposes of Limited Remedies: The Metaphysics of U.C.C. Section 2-719(2)*, 65 CAL. L. REV. 28, 42-50 (1977).

61. See *infra* Part IV.D.1-4.

62. See, e.g., Leff, *supra* note 23.

63. See generally *id.*; Braucher, *supra* note 6; M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 759 (1969); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Murray, *supra* note 4; John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Richard E. Speidel, *Unconscionability, Assent, and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

64. Bridwell, *supra* note 37, at 1513 (“Section 2-302 . . . is one of the Code's most controversial provisions. By 1967, only 16 years after the first official version of the Code appeared, over 130 articles had been published on the doctrine of unconscionability.”).

65. Professor Hillman refers to Leff's article as a “leading article [in which he] . . . suggested a framework [of procedural-substantive unconscionability] that courts and commentators have followed.” Hillman, *supra* note 6, at 2.

66. *Id.*

67. Leff, *supra* note 23, at 559.

adopted as the dominate analytical framework in determining unconscionability.⁶⁸ The coding project attempts to measure the relative importance of the procedural and substantive unconscionability elements in judicial reasoning.⁶⁹ Professor Leff also remarked that despite section 2-302's shortcomings, "courts will most likely adjust, encrusting the irritating aspects of the section with a smoothing nacre of more or less reasonable applications."⁷⁰ Our survey attempts to discover if such reasonable applications have produced a consistent jurisprudence.

Leff's framework has not been without critics. Professor Hillman rejects the bifurcation of unconscionability as "raising more issues than it resolves."⁷¹ Instead, he argues that unconscionability cases can be divided into two groups: "common-law-doctrines unconscionability" and "pure unconscionability."⁷² The former type primarily concerns matters of assent. It is not the fairness of a term, but the quality of the assent which is relevant. Professor Hillman poses this question: "What is the relationship of existing legal doctrines such as duress, undue influence, fraud, the duty to disclose, contract interpretation, and contract formation to procedural unconscionability?"⁷³ He concludes that these types of cases are best handled directly by the doctrines directly targeted to the issue of bargaining assent. This is because these types of unconscionability cases are primarily made up of assent cases and there is no need to consume the courts' time in analyzing substantive unconscionability. The coding project measures the existence and importance of existing doctrines, including fraud, misrepresentation, mistake, duress, and bad faith in cases that also discuss unconscionability.⁷⁴ Ultimately, we conclude that a consent theory of unconscionability best explains unconscionability cases, including those Hillman characterizes as common law doctrines unconscionability and pure unconscionability.⁷⁵

The relationship between unconscionability and common law doctrines pertaining to reality of consent (mistake, misrepresentation, duress, undue influence) and other U.C.C. policing principles (good faith, fair dealing, impracticability) raises the issue of the relation-

68. See, e.g., *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 57-58 (Ariz. 1995) ("The framework upon which the vast majority of courts construct their analysis consists of the well recognized division of unconscionability into substantive and procedural parts . . . [T]his dichotomy evolved from a distinction made by the late Professor Leff in his oft-cited article *Unconscionability and the Code—The Emperor's New Clause.*").

69. See *infra* Part IV.D.1-4.

70. Leff, *supra* note 23, at 558.

71. Hillman, *supra* note 6, at 3-4.

72. *Id.* at 4-5. Pure unconscionability is the type that often involves findings of both procedural and substantive unconscionability. In contrast, common law doctrine's unconscionability pertains to procedural issues, namely, the quality of the assent.

73. *Id.* at 4.

74. See *infra* Part IV.D.1-4.

75. See *infra* Part VI.

ship of unconscionability to highly-scrutinized clauses, such as limitation of liability, limitation of remedies, warranty disclaimer, attorney fee, arbitration, and exculpatory clauses.⁷⁶ If a large portion of unconscionability cases involves scrutiny of these types of clauses, then the characterization of the unconscionability doctrine as broadly applied would be debunked. In such cases, the unconscionability analysis is either ancillary to the application of a more specific policing doctrine or is a purely redundant and unnecessary support for voiding an offending clause or contract. The coding project measures the frequency in which unconscionability cases involve one of these highly-scrutinized clauses.⁷⁷

Two other issues raised by Hillman in his article relate to the current project. The first involves the role of conspicuousness in insulating a contract from a claim of unconscionability. Does full disclosure or “superconscionable procedural conduct”⁷⁸ eliminate the opportunity to find procedural unconscionability? Hillman concludes that disclosure does not equate to understanding and, therefore, conspicuousness cannot completely insulate a contract or term from a claim of unconscionability.⁷⁹ The coding project survey measures the role of conspicuousness in the unconscionability decision.⁸⁰

A second issue raised by Hillman and others⁸¹ is whether unconscionability is available in merchant-to-merchant transactions. He concludes that it is rarely needed in commercial transactions because merchants are generally not “dependent” on one another (in the overreaching sense) and they are capable of protecting themselves from the insertion of shocking terms into their contracts.⁸² However, Hillman asserts that unconscionability should be made available in the rare situation where the merchant possesses the characteristics of a

76. Professor Mallor states that “[c]ourts have found substantive unconscionability most frequently in various types of risk shifting or ‘remedy meddling’ provisions” Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1073 (1986); see also Ellinghaus, *supra* note 63, at 793-808 (discussing warranty disclaimers, remedy limitations, submission to foreign jurisdiction, repossession under installment contract, and waiver of defense).

77. See *infra* Part IV.D.1-2.

78. Hillman, *supra* note 6.

79. Other scholars have advanced a greater role for superconscionability through disclosure and conspicuousness. See, e.g., Michael J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359 (1976) (recommending legal rules governing disclosure, conspicuousness, and intelligibility of form terms in response to the problem of suboptimal information); see also Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995). Professor Eisenberg suggests that form terms be enforced only when “separately signed” by buyers. *Id.* at 311.

80. See *infra* Part IV.D.1-4, IV.E.2.

81. See, e.g., Mallor, *supra* note 76.

82. Hillman, *supra* note 6.

consumer.⁸³ We disagree with the implication that all merchants are alike but for a relatively small set of merchants *qua* consumers. A merchant, broadly speaking, can encompass any incorporated business.⁸⁴ Given the popularity of the corporate entity, along with the complexity of the market system, the unsophisticated or dependent merchant is more likely to be the rule than the exception. Professor Mallor in a 1986 article stated that “the case law reveals an increasing tendency to recognize that commercial parties can be victimized by the same types of bargaining unfairness that stimulated the rebirth and expansion of unconscionability.”⁸⁵ Our project measures whether this recognition is reflected in a trend toward the greater application of unconscionability to merchant-to-merchant or merchant *qua* consumer cases.⁸⁶

If the typical unconscionability case involves a consumer, then the characteristics of the consumer in winning unconscionability claims is relevant to understanding the unconscionability doctrine as applied. The literature highlights three relevant consumer characteristics as level of sophistication, level of education, and socio-economic status (level of wealth).⁸⁷ The coding project measures the prevalence

83. *Id.* at 43-44. Professor Murray referred to this class of merchants as “merchants in name only.” John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 778 (1982).

84. The U.C.C. also defines “merchant” broadly as a person who deals in goods of the kind or otherwise by occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1) (2005).

85. Mallor, *supra* note 76, at 1088.

86. *See infra* Part IV.D.1-4.

87. *See, e.g.*, Ellinghaus, *supra* note 63 (explaining inequality of bargaining position and exploitation of underprivileged). Courts have typically used the doctrine of unconscionability to protect consumers. This consumer-protection theme is based on the belief that consumers are less educated and less sophisticated relative to merchant sellers. As such, they are more prone to accept unconscionable terms. Law-and-economics scholars have argued that there is no support for this nexus. *See, e.g.*, Harrell, *supra* note 54, at 114. “The gap between merchant and consumer, in terms of information and bargaining power, has apparently narrowed rather than widened. The best consumer protection of all has always been the consumer’s self-interest, and unsophisticated consumers often get the better of larger and more experienced negotiating partners.” *Id.* at 114 (citing Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 296 (1995)). “By now it should be apparent to almost everyone that stature, resources, education, and a high income do not equate to wisdom or shrewdness.” *Id.* at 114 n.26. “Influenced by advertising schemes that rely on popular emotions, consumers are often lured into merchants’ establishments and reportedly induced into unwittingly signing adhesion contracts with onerous terms that cannot be viewed as representing consensual transactions.” *Id.* at 113; *see also* Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716-21 (1992) (arguing that the economic model is flawed because consumers are unlikely to read form terms or understand the terms they do read); Robert A. Hillman & Jeffrey J.

of these characteristics in unconscionability cases.⁸⁸ It will also measure whether these characteristics have become more or less important over time.⁸⁹

Another phenomenon to be measured is the impact of the U.C.C. Article 2, more specifically section 2-302, outside of sale of goods transactions.⁹⁰ The impact of the U.C.C. has been twofold. First, it has had an impact on the law of sales as expressed in its goals to harmonize and modernize the law of sales throughout the fifty jurisdictions of the United States.⁹¹ The second impact is its unintended impact on the general law of contracts. The coding project measures the proportion of nonsale of goods cases that make reference to section 2-302 and its surrounding jurisprudence.⁹² It also measures the trend over time in unconscionability cases between the proportion of sales and nonsales cases.⁹³

The application of unconscionability outside of sales law should not come as a surprise. As shown earlier, the use of unconscionability was previously developed in equity. In sum, the unconscionability principle was and is available in the equity wing of general contract law.⁹⁴ The interesting phenomenon is the “direct” application of section 2-302 by analogy to nonsales cases. For example, a New York court in *Joseph Martin, Jr. Delicatessen v. Schumacher*⁹⁵ states:

Section 2-302 of the Uniform Commercial Code gives a court faced with an unconscionable contract the power to refuse enforcement of the contract or to strike or limit the unconscionable clause itself. The unconscionability principle, however, has no peculiar application to contracts for the sale of goods. “Courts can, if they choose,

Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 483 (2002). A merchant-consumer approach based upon an economic analysis would simply assess whether a term is inefficient as a precursor to the application of an unconscionability analysis. See Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 559-66 (1991) (claiming that contract terms that allocate costs inefficiently are likely to be found unconscionable).

88. See *infra* Parts IV.D.1-2, IV.E 2.

89. See *infra* Part IV.D.2-4.

90. The potential use of section 2-302 outside the scope of sales law was offered by Professor Ellinghaus in his 1969 article. He noted that financing agreements, although beyond the scope of Article 2, the courts will feel pressured to apply section 2-302 to such agreements. Ellinghaus, *supra* note 63, at 767-68, 808-12 (“Going Beyond Sales”).

91. U.C.C. § 1-103(a)(1), (3) (2005) (stating that the underlying purpose of the U.C.C. is “to simplify, clarify, and modernize the law governing commercial transactions” and “to make uniform the law among various jurisdictions.”).

92. See *infra* Part IV.D.1-2.

93. See *infra* Part IV.D.2-4.

94. See generally LARRY A. DIMATTEO, *EQUITABLE LAW OF CONTRACT: STANDARDS AND PRINCIPLES* (2001) (tracing the principles of fairness of exchange in the common law, including the principle of unconscionability, to medieval just price theory and to Aristotelian-Thomastic philosophy).

95. 419 N.Y.S.2d 558 (N.Y. App. Div. 1979).

carry the principle over into real estate or any other kind of cases, quite apart from the Code.”⁹⁶

The idea that courts are free to *carry-over* the framework of section 2-302 into the general law of contracts indicates that the courts generally fail to fully recognize the common law precept of unconscionability.

The current review of cases indicates that courts directly apply the factors and approach developed under section 2-302 without reference to any overarching equitable principle of unconscionability.⁹⁷ The importance of this is that, by and large, section 2-302 unconscionability has consumed any separate notion of equitable unconscionability in general contract law.

One of the major criticisms leveled at the doctrine of unconscionability, as expressed in section 2-302, is that it fails to prescribe meaningful content, namely a workable definition of unconscionability. Section 2-302 merely allows courts the option of not enforcing a clause or a contract or to limit their application when they find as “a matter of law” that a contract or clause is unconscionable.⁹⁸ The comments to section 2-302 provide little additional insight. Comment 1 states:

This section makes it possible for a court to police explicitly against the contracts or terms which the court finds to be unconscionable instead of attempting to achieve the result by an adverse construction of language, by manipulation of the rules of offer and acceptance, or by a determination that the term is contrary to public policy or to the dominant purpose of the contract. The section allows a court to pass directly on the unconscionability of the contract or a particular term of the contract and to make a conclusion of law as to its unconscionability. Courts have been particularly vigilant when the contract at issue is set forth in a standard form. The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.⁹⁹

96. *Id.* at 562 (quoting D. DOBBS, LAW OF REMEDIES §10.7, at 713 (1993)).

97. *See, e.g.*, *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., Inc.*, 413 S.E.2d 670 (W. Va. 1991) (holding when flower shop brought action for breach of contract against telephone company that failed to include its advertisement in yellow pages directory, the contract was unconscionable); *Associated Press v. S. Ark. Radio Co.*, 809 S.W.2d 695 (Ark. Ct. App. 1991) (holding when national news service sued local radio station for breach of contract to pay for news services that contract under which news service was entitled to its profits during the balance of its term was unconscionable).

98. LLEWELLYN, *supra* note 1.

99. U.C.C. § 2-302 cmt. 1 (2005). It should be noted that revised Article 2 makes only one minor change to section 2-302 and its comments. It changes the word “clause” to “term” in the body of the section. It makes no changes to the comments.

Although it fails to provide a definition or clear framework for applying unconscionability, comment 1 has been mined for insight by scholars¹⁰⁰ and courts.¹⁰¹

Professor Ellinghaus in his 1969 *Yale Law Journal* article *In Defense of Unconscionability*¹⁰² offers a defense to the definitional criticism by asserting that the doctrine of unconscionability is not a rule, but a standard,¹⁰³ or what he refers to as one of the "residual categories."¹⁰⁴ Such residual constructs inherently create definitional problems associated with their application or use: "[N]ot all of the actually observable facts . . . fit into the sharply, positively defined categories, they tend to be given one or more blanket names which refer to categories negatively defined . . ." ¹⁰⁵ This application of negatively defined residual concepts to law can be seen at work in the Summers-Burton¹⁰⁶ discussion of the standard of good faith. Summers' position is that good faith can best be defined negatively by the rec-

100. See, e.g., Braucher, *supra* note 6, at 339 (quoting comment one); William B. Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967) (discussing the notions of oppression and unfair surprise noted in comment one); Murray, *supra* note 4, at 13-23 (discussing assumption or allocation of risks); see also Speidel, *supra* note 63, at 359 & n.2 (quoting the purpose of comment one to prevent oppression, but not disturbing the allocation of risks).

101. See, e.g., *Willie Co. v. Sw. Bell Tel. Co.*, 549 P.2d 903 (Kan. 1976) (breach of contract quoting comment one); *Lytle v. Roto Lincoln Mercury & Subaru, Inc.*, 521 N.E.2d 201 (Ill. App. Ct. 1988) (revocation of sales contract); *Beneficial Commercial Corp. v. Cottrell*, 688 P.2d 1254 (Mont. 1984) (warranty disclaimer clause); *W.L. May Co., Inc. v. Philco-Ford Corp.*, 543 P.2d 283 (Or. 1975) (termination of a distributorship contract between the parties, quoting comment one).

102. Ellinghaus, *supra* note 63.

103. *Id.* at 759 (citing Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645-46 (1923)). Subsequent to the publication of Ellinghaus's article, a substantial literature has developed differentiating between rules and standards, popularly referred to as the rules-standards debate. See generally Duncan Kenedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing distinction between rules and standards; benefits and costs of formal rules or "formal realizability"); Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823 (1991) (discussing that rules and standards are not distinct poles but vary in degrees of "ruleness"); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (discussing role of discretion in rule and standard applications); Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (analyzing the role of rules and standards in Supreme Court decisions).

104. Ellinghaus cites Parsons for the proposition of residual categories. *Id.* at 759 (citing T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 17 (1937)).

105. *Id.*

106. Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982); Steven J. Burton, *More on Good Faith Performance of a Contract—A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1982); cf. E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1966); Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299 (1988) (discussing the distinction between good faith in performance and good faith in enforcement).

ognition of categories of bad faith or what he has referred to as “excluders.”¹⁰⁷ Thus, rules are often viewed as relatively closed devices that provide discrete on-off application. Standards, in contrast, provide a continuum that gives the courts the needed flexibility to apply the law to a diverse set of cases.

Defense of Unconscionability poses some interesting questions for which the present research will provide some tentative answers. The first series of questions revolves around the bifurcation of procedural-substantive unconscionability forwarded by Leff. Professor Ellinghaus poses this question: “[M]ay the parties, by a sufficient compliance with the proprieties of bargaining, insulate the contract from judicial intervention on the ground of ‘substantive’ unconscionability?”¹⁰⁸ Does purity of procedure overcome a substantively unconscionable result? Alternatively, “what level of bargaining unfairness (if any) . . . is sufficient to entitle a court to refuse to enforce a contract for unconscionability even where the terms of the contract are not themselves unconscionable?”¹⁰⁹ Thus, unconscionability scholarship has raised the same issues as we saw evidenced in the court cases.¹¹⁰ Therefore, the measurement of the relative importance of procedural-substantive factors is a major objective of the coding project.¹¹¹

Ellinghaus concludes that unconscionability *qua* residual category is by nature not susceptible to definition. It is, in Llewellyn’s vision,¹¹² susceptible to definition and application only through a case-by-case contextual analysis. It is the novelty of real-world cases that gives unconscionability its meaning. This meaning is not a fixed meaning that Ellinghaus rejects as impossible to attain, but a dynamic meaning that is forever evolving and forever informed by real-world context. In the end, Ellinghaus concludes that the best that can be done is for the courts “to develop a set of relevant questions.”¹¹³ The main purpose of the current project is to determine what sets of questions or factors have been weighed by our courts over the past thirty-five years.

The single most dominant or predictive factor alluded to by Ellinghaus is whether the claim of unconscionability is directed at a form contract.¹¹⁴ The “problem” of standard form contracting and the use of unconscionability as the primary policing doctrine has been

107. Summers, *supra* note 106.

108. Ellinghaus, *supra* note 63, at 762.

109. *Id.* at 763.

110. *See supra* note 101.

111. *See infra* Part IV.D.1-2.

112. *See generally* Larry A. DiMatteo, *Reason and Context: A Dual-Track Theory of Interpretation*, 109 PENN ST. L. REV. 397 (2004).

113. Ellinghaus, *supra* note 63, at 814.

114. “Most cases so far decided under Section 2-302 have involved ‘form’ contracts, but the fact is as often ignored as commented upon.” *Id.* at 764-65.

extensively explored in the literature.¹¹⁵ The project codes cases between form and custom drafted contracts.¹¹⁶ This coding, however, only recognizes the fact of the existence of a form contract and not whether it was a factor that was heavily weighed by the courts.

B. An Alternate Analytical Framework: The Circle of Assent

The vagaries of section 2-302 provided the opportunity for scholars to offer analytical frameworks to guide judicial reasoning. One such example is presented in Professor Murray's 1969 article *Unconscionability: Unconscionability*¹¹⁷ in which he uses the English concept of fundamental breach to analyze unconscionability. He uses it to fashion a three-part approach to unconscionability: apparent assent, materiality, and genuineness of assent. He begins his article by providing the rationale for the doctrine of unconscionability through the recognition of a *circle of assent*¹¹⁸ that surrounds all contracts. Murray's analysis begins with how the circle of assent applies to form contracting and the invocation of Llewellyn's bifurcation of assent into specific and blanket assent.¹¹⁹ For Llewellyn, written contract terms that are not connected to either form of assent are to be disregarded.¹²⁰

115. The evolution of form contracting as the most common form of contracting has been recognized. As to the dominance of form contracting, Korobkin states:

More than thirty years ago, W. David Slawson estimated that 99 percent of all contracts did not resemble the Platonic ideal of a list of jointly negotiated terms but were instead presented by one party to the other on a pre-printed form. If anything, the dominance of form contracts over negotiated contracts has increased in the intervening decades. The terms of mergers, joint ventures, and very large transactions are sometimes dickered, one at a time in the classic fashion, but nearly all commercial and consumer sales contracts are form driven.

Korobkin, *supra* note 6, at 1203 (citing W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971)). The policing of standard form contracting has received much scholarly attention. *See, e.g.*, Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 489 (1994) (calling for an "expanded notion of unconscionability" to prevent "uneven exchanges"); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1299 (1993) (claiming that consumers should be bound only to the terms they know and understand); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983) (arguing that form terms should be presumptively unenforceable); Alex Y. Seit, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75, 132 (1984) (proposing that contracts should be governed by default terms some of which may only be overcome when the disadvantaged party has given "intelligent and meaningful approval"); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23 (1984) (recommending that the reasonable expectations of the parties be enforced).

116. *See infra* Part IV.D.1-2.

117. Murray, *supra* note 4.

118. *Id.* at 9, 12.

119. LLEWELLYN, *supra* note 1.

120. Murray, *supra* note 4, at 13-23.

The problem for Murray is with Llewellyn's concept of blanket assent. Instead, he utilizes the concept of *unexpected consent*¹²¹ as a better means to apply unconscionability to standard form terms. Unconscionability should be applied where the risk allocated is unexpected and is one normally borne by the risk allocator. Professor Murray refers to the conspicuousness requirement of section 2-316¹²² as a method for narrowing the reach of unexpected assent. But, in the end, he asserts that conspicuousness is merely evidence of assent.¹²³ Conspicuousness is evidence of apparent assent but not true assent.¹²⁴ The importance of conspicuousness (and of negotiation) in the unconscionability determination is measured in the coding project.¹²⁵

Because of the fact that a clause may be the product of apparent assent and not true assent, Murray argues that Leff's bifurcation of unconscionability into procedural and substantive does "little but add more labels to the increasing number of substitutes for analysis."¹²⁶ Ultimately, Murray states that substantive unconscionability is the primary aim of the unconscionability doctrine: "How does a court decide whether the unexpected risk sought to be altered by the expression of the parties is either insignificant (not burdensome) on the one hand or 'oppressive' on the other?"¹²⁷ Or is Murray merely substituting labels? The factors he utilizes to determine if a risk allocation was "unexpected" are those applied to determine unconscionability.¹²⁸

Murray's tripartite approach to unconscionability includes the notions of materiality and verification. The first part dealing with apparent assent, discussed above, determines the apparent allocation of risk. The second part focuses on the materiality of the risk being allocated.¹²⁹ It is necessary "to determine the gravity of the risk being allocated, for if there is no substantial burden imposed, there is no need to go beyond the terms of the writing."¹³⁰ Murray refers to the *Restatement (First) of Contracts* for the answer.¹³¹ Section 275 of the *Restatement* provides a number of factors to be used to determine the materiality of breach. Murray recites two of the factors: "What is the

121. *Id.* at 28-34.

122. Section 2-316(2) requires that any disclaimer or modification of the implied warranty of merchantability "must mention merchantability and in case of a writing must be conspicuous . . ." U.C.C. § 2-316(2) (2005).

123. Murray, *supra* note 4, at 19. He later states, "A court should not rely exclusively upon conspicuousness as its guide . . ." *Id.* at 22.

124. *Id.* at 21.

125. *See infra* Part IV.D.1-2, IV.E.1.

126. Murray, *supra* note 4, at 21.

127. *Id.* at 23.

128. *Id.*

129. *Id.* at 23-28.

130. *Id.* at 24.

131. Professor Murray also refers to the use of a "materiality" standard in section 2-207 of the U.C.C. *Id.* at 7-8, 27.

extent of the hardship on the party seeking enforcement of the clause in the event the court refuses to enforce it?" and "Will the party against whom the clause is to operate still obtain the substantial benefit which he could have reasonably anticipated?"¹³² In theory, such a determination between material and nonmaterial is important, but in practice, it begs the question. A clause that may seem immaterial at the time of contracting will always be material in the context of the subsequent lawsuit. The clause being attacked as unconscionable is generally the key to the outcome of the lawsuit or a claim of unconscionability would be irrelevant. Thus, the hardship to the party seeking its enforcement and the anticipated benefit to the party seeking its avoidance will necessarily be substantial.

The final part of Murray's analytical framework is "verification of assent."¹³³ In the event that there is no evidence of apparent assent, then this final stage is irrelevant. However, in the case of apparent assent, this stage is triggered to determine if there was genuine assent. He describes this element as when the disfavored party has knowingly consented to a material, "originally unexpected" (divergent from the normal risk allocation) risk allocation.¹³⁴ This is the area where the assuming party is aware of the clause, as in the case of conspicuous presentation of the term, but has no genuine choice or alternative but to accept. The clearest case would be the subject matter of the contract is an absolute necessity and there is no reasonable likelihood of the "buyer . . . procur[ing] the item from other sellers absent the clause."¹³⁵ The importance of consent to the application of unconscionability is analyzed in the final Part V's discussion of consent theory.

C. Other Issues: Legal Representation and Reformation

Other factors examined in the present coding project are the importance of legal representation to the unconscionability decision, the prevalence of price unconscionability to see whether courts intervene to void or reform a contract due to excessive price, and the frequency of use of the remedy of reformation.¹³⁶ The latter factor has been re-

132. *Id.* at 25 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 275 cmt. (1932)).

133. *Id.* at 28-34.

134. *Id.*

135. *Id.* at 32.

136. Recently, a Canadian court noted that representation by an attorney is a factor, but it is not dispositive in determining unconscionability:

Although independent counsel is an important factor to consider in determining whether the parties voluntarily entered into the contract, absent other defenses, it is insufficient to demonstrate a lack of voluntariness. However, if the party asserting procedural unconscionability was unable to meet with an attorney or if the advice was explained in an incomprehensible manner, the court may find the voluntariness element absent.

ferred to as “per se unconscionability.”¹³⁷ This exists when the imbalance in consideration is so severe as to be considered unconscionable on its face, as in the case of price gouging.¹³⁸

Section 2-302 provides courts with the option of either voiding the unconscionable term or to reforming the term to make it reasonable. It establishes that courts “may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”¹³⁹ This express statement indicates that the drafters intended reformation to be the favored remedy, especially in situations lacking profound procedural overreaching.¹⁴⁰ The coding project measures the percentage of cases where courts have reformed an unconscionable clause or contract.¹⁴¹

IV. METHODOLOGY AND FINDINGS

Section 2-302 recognized and codified the longstanding equitable doctrine of unconscionability although, it did little to provide a definition or a set of rules for analyzing claims under the doctrine.¹⁴² In order to better understand this doctrine as it is applied in practice, a systematic methodological approach based on the coding of a sample

Sikaitis, *supra* note 55, at 358 (footnotes omitted).

137. Ellinghaus, *supra* note 63, at 789.

138. However, numerous states have adopted price gouging statutes to police this form of unconscionability. Eighteen states have antiprice-gouging statutes with sixteen triggered by a declaration of a state of emergency or natural disaster. These states include New York and Florida. Under section 501.160, *Florida Statutes*, (2005) it is illegal to charge unconscionable prices for goods or services following a declared state of emergency. New York’s price gouging statute is similar.

139. U.C.C. § 2-302(1) (2005).

140. Professor Ellinghaus concluded:

[A] court should probably begin with a bias in favor of “rewriting.” Where modification of the contract, by way of appropriate treatment of the unconscionable component, seems to be capable of working a measure of justice, it would seem unnecessarily and arbitrarily zealous on the part of the court to go further. The court should, in particular, be on guard against an inherited bias tending in the opposite direction, that is, *against* modification of the contract: Section 2-302 clearly calls for a break with tradition in this respect, and it is more in accordance with its mood and tenor to err here on the side of boldness than on that of caution.

Ellinghaus, *supra* note 63, at 780.

141. See *infra* Part IV.D.1-2.

142. See *supra* note 4. This difficulty in defining unconscionability is analogous to the courts and commentators difficulty in defining obscenity. This difficulty is evidenced by the famous statement by the late Justice Potter Stewart in 1964. When faced with a case involving obscenity, Justice Stewart stated in a concurring opinion, “I shall not today attempt further to define [obscenity] . . . ; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). This statement also illustrates the difficulty of trying to determine what constitutes an unconscionable contract. Courts and respected commentators alike have grappled with defining and applying unconscionability under the U.C.C. since its adoption.

of cases has been employed. Cases were coded based upon a litany of specific unconscionability factors¹⁴³ enumerated in case law and legal scholarship. Parts IV.A and IV.B describe the parameters and methodology used in the case coding project. Part IV.A describes how the data was collected and explains the analytical tools used to analyze the data. Part IV.B explains the independent and dependent variables that were tested and the hypotheses posed. Part IV.C enumerates fifteen hypotheses divided into two groups. The first group focuses upon the relative importance of the different procedural and substantive factors. The second group assesses changes between different time periods. Part IV.D reports the findings of the factor associations enumerated in the hypotheses and suggests some conclusions. Finally, Part IV.E presents the results of a regression analysis that shows the effect of the factors on one another.

A. Selection of Cases

Since the evolving nature of the law poses particular challenges for data analysis,¹⁴⁴ the cases sampled were bifurcated into two distinct decision periods to test for changes over time. All cases for the years 1968 to 1980 and from 1991 to 2003 were sought where unconscionability and U.C.C. section 2-302 were mentioned. A total of 101 possible court decisions were located for the period 1968-1980 and 86 possible court decisions were located from 1991-2003.

It is estimated that this reporting database publishes approximately 38% of all appellate decisions and 10-15% of all district court decisions.¹⁴⁵ The individual courts of appeals decide which decisions are published based on perceived importance and precedential value.¹⁴⁶ All published decisions since 1980 are included on WESTLAW. Thus, although this data base does not cover all courts of appeals decisions for the time period, the most important and relevant cases have been included. The WESTLAW computer database was searched for the years 1968 to 1980 and from 1991 to 2003.¹⁴⁷

Of the total of 187 federal court cases that were located for the periods 1968-1980 and from 1991-2003, 148 (80%) were included in the sample or data analysis. A few cases ($n = 6$) were from lower court

143. See *infra* app. A (Unconscionability Coding Sheet).

144. See M.V. Roehling, *Extracting Policy from Judicial Opinions: The Danger of Policy Capturing in a Field Setting*, 46 PERSONNEL PSYCHOL. 477-502 (1993).

145. See William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

146. See MORRIS L. COHEN & ROBERT C. BERRING, FINDING THE LAW: AN ABRIDGED EDITION OF "HOW TO FIND THE LAW" (8th ed. 1983).

147. West Publishing Company publishes the *Federal Reporter* for U.S. Courts of Appeals decisions and the *Federal Supplement* for U.S. District Court decisions.

decisions of identical appellate cases and, thus, were not included in the analysis. Additionally, a large number of discarded cases were those that were remanded back to the trial court ($n = 17$). However, in eleven of these decisions to vacate or remand, the appellate court provided guidance in the judicial opinion to the district court, thus, these eleven cases were included in the final analysis. The remaining cases that were discarded ($n = 27$) referred to unconscionability merely extraneously or tangentially.

The procedures used in examining the legal cases were similar to those employed in content analysis of secondary data sources.¹⁴⁸ The basic steps in analyzing each case consisted of the following: (a) selection of independent and dependent variables, (b) identification of coding procedures, and (c) classification of each case according to the coding procedure. Part IV.B explains the process used in the coding of the independent and dependent variables.

B. Independent and Dependent Variables

The review of articles and judicial opinions uncovered seventeen categorical independent variables that were then examined by this study to see their relationships and influence on court decisions (see Appendix A, "Coding Sheet"). These variables and their scoring included the following: (1) the parties to the litigation (1 = consumer; 0 = merchant); (2) parties represented by an attorney (1 = yes, 0 = no); (3) parties that were unsophisticated (1 = yes, 0 = no); (4) parties that were uneducated (1 = yes, 0 = no); (5) parties that were from low social economic status (1 = yes, 0 = no); (6) cases that involved a form contract (1 = yes, 0 = no); (7) clause was negotiated or conspicuous (1 = yes, 0 = no); (8) excessive price or undue profits (1 = yes, 0 = no); (9) clause was grossly one-sided (1 = yes, 0 = no); (10) contract was for the sale of goods (1 = yes, 0 = no); (11) court found procedural unconscionability (1 = yes, 0 = no); (12) court found substantive unconscionability (1 = yes, 0 = no); (13) exculpatory, limitation of liability or remedy clause present (1 = yes, 0 = no); (14) warranty or disclaimer of warranty clause present (1 = yes, 0 = no); (15) court discussed other policing doctrines (fraud, misrepresentation, undue influence, good faith or fair dealing) (1 = yes, 0 = no); (16) clause was voided or rescinded (1 = yes, 0 = no); (17) contract was reformed (1 = yes, 0 = no). The dependent variable in the study was the decision reached by the court. A decision finding unconscionability was coded 1, while a decision that did not find the contract unconscionable was coded 0.

148. See OLE R. HOLSTI, *CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES* (1969); Fred Kort, *Content Analysis of Judicial Opinions and Rules of Law, in JUDICIAL DECISION MAKING* 133-97 (B. Schubert ed., 1963).

Information on the case characteristics was obtained from the published decision, which included factual background information on the case and the legal arguments put forth by the parties, as well as the court's analysis and decision. Each independent variable was coded by observing if the written opinion noted specifically that a characteristic was or was not present. If the written opinion in the case did not mention a specific case characteristic, then data for that particular variable was treated as missing.

Using the coding procedures previously described, the cases were coded by two raters working independently. For the seventeen variables coded, the reliability, or index of agreement, among the raters was 93.2%.

C. Factor Association

To determine what factors contribute to a court's decision in an unconscionability case, we posed numerous hypotheses to test. These hypotheses were divided into two groups. The first group statistically tested the factors on the aggregated data set (both time periods combined). This aggregation allowed us to look at specific hypotheses with greater statistical power than if the cases were not aggregated. The second set of hypotheses specifically tested for statistical differences between the two timeframes selected. Group A hypotheses are those measured in the aggregate. Group B hypotheses measure intergenerational change. Finally, a logistic regression analysis was performed to determine the global effects of the factors or variables when other factors were present in the fact patterns. In short, a logistic analysis shows whether the predictive power of a factor or variable is enhanced or diminished by the existence of another factor or factors.

1. Group A Hypotheses

The following list of hypotheses was formulated using the aggregated data from all 148 cases. First, we tested the likelihood of being successful in a claim of unconscionability in general and when lodged by a merchant party. We also hypothesized what affects a form contract, the presence of an attorney and whether the alleged unconscionable term was negotiated or conspicuous would have on claims of unconscionability. Also of interest was the testing of the procedural-substantive matrix made famous by Leff's seminal article,¹⁴⁹ along with the effects of other policing doctrines,¹⁵⁰ and the fact that the challenged clause was one that typically results in heightened

149. See *supra* note 62.

150. The policing doctrines tested for were fraud, misrepresentation, the duty of good faith, and "others." See *infra* app. A. In the "others" category, the policing doctrines of duress, mistake, and undue influence were grouped.

scrutiny by the courts¹⁵¹ would have on claims of unconscionability. Finally, we were interested in testing the court's paternalistic actions in cases involving unsophisticated/uneducated/low socio-economic status parties and the effects that excessive price or undue profits have on the court's decisions in unconscionability cases. Formally stated, Hypotheses 1A to 12A are as follows:

Hypothesis 1A: Claims of unconscionability are difficult to win.

Hypothesis 2A: The number of decisions finding unconscionability in sales cases is small.

Hypothesis 3A: Merchants rarely win claims of unconscionability compared to consumers.

Hypothesis 4A: The likelihood that a successful unconscionability case involves a standard form contract is greater than that for a non-standard form contract case.

Hypothesis 5A: Findings of unconscionability require both procedural and substantive unconscionability.

Hypothesis 6A: A party represented by an attorney in the negotiation or preparation of a contract rarely succeeds with an unconscionability claim.

Hypothesis 7A: Unconscionability allegations rarely succeed in cases where the alleged unconscionable term was negotiated or conspicuous.

Hypothesis 8A: A substantial percentage of successful unconscionability claims involve cases where another policing doctrine, such as fraud, misrepresentation, bad faith is also applied.

Hypothesis 9A: A substantial percentage of successful unconscionability claims involves highly scrutinized clauses, such as limitation of liability, limitation of remedy, liquidated damages, penalty, attorney fees, disclaimer, warranty or arbitration.

Hypothesis 10A: Unconscionable clauses or contracts are rarely reformed.

Hypothesis 11A: Decisions of unconscionability will be more likely when the case involves excessive price or undue profits.

Hypothesis 12A: Decisions of unconscionability will be more likely when the case involves an unsophisticated/uneducated/low socio-economic status (SES) party.

Also posed were three longitudinally-based hypotheses enumerated in the next section.

151. The "high scrutiny clauses" tested for included limitation of remedy, limitation of liability, exculpatory, liquidated damages or penalty, attorney fees, warranty, disclaimer of warranty, and arbitration clauses. See *infra* app. A.

2. Group B Hypotheses

The following list of hypotheses was formulated by bifurcating the sample of cases into two periods: 1968-1980 and 1991-2003. First, we tested the likelihood that the success of unconscionability claims has increased from the first period to the second. Additionally, we were interested in the diffusion of the doctrine of unconscionability into nonsale-of-goods cases. Finally, we were interested in testing whether the courts have applied the doctrine of unconscionability more favorably to merchants from one period to the next. Formally stated Hypotheses 1B to 3B are as follows:

Hypothesis 1B: The rate of successful claims of unconscionability has increased over time.

Hypothesis 2B: The doctrine of unconscionability has increasingly been applied outside the law of sales.

Hypothesis 3B: The number of successful unconscionability claims brought by merchants has increased over time.

The next part reports the statistical findings and whether the above hypotheses were supported.

D. Findings of Factor Association

Initial descriptive statistics demonstrate that overall, courts found an unconscionable contract in 37% ($n = 56$) of the cases sampled. Of these cases, forty contained both procedural and substantive elements of unconscionability. Substantive unconscionability was present in 55 cases. In 41 cases, procedural unconscionability was present. Also of interest was that only 30% of the 148 cases present ($n = 44$) involved a contract for the sale of goods. Of these cases, the court found 36% ($n = 16$) to be unconscionable. Geographically, New York accounted for the largest percentage (23%) of cases (34 out of 148), while Connecticut and New Jersey followed with 11% and 8% of the cases respectively (16 and 12 out of 148). Overall, cases from 38 states were represented in the sample.

A series of categorical logistic regression models (LOGIT)¹⁵² was used to fit the data using Proc Genmod in SAS®. LOGIT was chosen because each court decision was coded dichotomously. LOGIT models predict the likelihood for a particular category of a dichotomous variable.¹⁵³ In this case, we were predicting the likelihood that any given court would find a contract unconscionable.

152. See generally MAURA E. STOKES ET AL., CATEGORICAL DATA ANALYSIS USING THE SAS® SYSTEM (2d ed. 2000).

153. See generally ALAN AGRESTI, AN INTRODUCTION TO CATEGORICAL DATA ANALYSIS (1996).

In the first step of the analysis, a categorical logistic regression model was fit to the data to determine if decision year was related to the court's decision. This was done to determine if our data could be aggregated across time periods and thus provide a larger sample to test for significant effects of the independent variables. A chi-square analysis¹⁵⁴ revealed that collapsing across time periods was appropriate ($\chi^2 = 36.69, p = 0.01$). Therefore, we aggregated the data into one time period to test for significant effects in group A hypotheses.

1. Group A Hypotheses: Results

Hypothesis 1A: Claims of unconscionability are difficult to win.

In order to determine if a claim of unconscionability is difficult to win, frequencies were calculated based on court findings of unconscionability. Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found providing support for Hypothesis 1A.

Hypothesis 2A: The number of decisions finding unconscionability in sales cases is small.

The number of decisions finding unconscionability in a sale of goods contract was predicted to be small. Results of cross tabulations revealed that 30% (44 out of 148) of the cases involved the sale of goods. From these case 36% (16 out of 44) were found to be unconscionable thus Hypothesis 2A was supported.

Hypothesis 3A: Merchants rarely win claims of unconscionability compared to consumers claims.

Hypothesis 3A posited that merchants rarely win claims of unconscionability when compared to consumer claims. Individual cross tabulations were computed. Results of this analysis revealed that 34% (50 out of 148) of the unconscionability claims sampled were brought by merchants. Out of these cases 16% (8 out of 50) were successful. While 66% (98 out of 148) of the unconscionability claims sampled were brought by consumers. In 49% (48 out of 98) of these cases the consumer was successful in their unconscionability claim, providing support for Hypothesis 3A.

Hypothesis 4A: The likelihood that a successful unconscionability case involves a standard form contract is greater than that for a non-standard form contract.

In order to determine if there is a relationship between the court's decision and the presence of a form contract, cross tabulations of the cases that indicated a form contract was used were calculated. Results revealed that in 71% (105 out of 148) of the cases sampled a form contract was present. Additionally, in 43% (45 out of 105) of these form

154. See generally STOKES ET AL., *supra* note 152.

contract cases the court subsequently ruled the contract was unconscionable. Meanwhile, in cases where a form contract was not present the court ruled the contract was unconscionable only 27% (11 out of 43) of the time. This data provides support for Hypothesis 4A.

Hypothesis 5A: Findings of unconscionability require both procedural and substantive unconscionability

In order to determine if the courts require both a procedural element and a substantive element to find a contract unconscionable, cross tabulations of the cases were calculated that indicated that procedural unconscionability was present. Results revealed that in 29% (43 out of 148) of the cases procedural unconscionability was present. From these cases the court ruled 95% (41 out of 43) of the time that the contract was unconscionable. Next, we calculated the cross tabulations for substantive unconscionability. Calculations indicated that in 40% (59 out of 148) of the cases substantive unconscionability was present. From these cases the court ruled 93% (55 out of 59) of the time that the contract was unconscionable. To determine if the courts require both a procedural element and a substantive element to find a contract unconscionable, we further statistically analyzed the data. In the 43 cases where the court found procedural unconscionability existed substantive unconscionability was present in 95% (41 out of 43) of the cases. While in the 59 cases where substantive unconscionability was present, the court found procedural unconscionability present in 70% (41 out of 59). Based on these results, Hypothesis 5A is partially supported. More fully stated, where substantive unconscionability is found without a finding of procedural unconscionability the contract is ultimately found to be unconscionable 100% (15 out of 15) of the time. Only in one instance did the court rule that a contract was unconscionable after finding only procedural unconscionability present.

Hypothesis 6A: A party represented by an attorney in the negotiation or preparation of a contract rarely succeeds with an unconscionability claim.

Cross tabulations revealed that an attorney represented a party in precontractual negotiations 5.4% (8 out of 148) of the cases sampled. In each of these eight cases the court did not find the contract unconscionable. Thus, Hypothesis 6A, which posited that a party represented by an attorney in the negotiation or preparation of a contract rarely succeeds with an unconscionability claim, is supported.

Hypothesis 7A: Unconscionability allegations rarely succeed in cases where the alleged unconscionable term was negotiated or conspicuous.

Cross tabulations revealed that when an alleged unconscionable term was negotiated or conspicuous, the court found the term to be

unconscionable only 22.2% (8 out of 36) of the time. This finding was substantiated with a logistic analysis where the chi-square was significant ($\chi^2 = 4.72$, $p = 0.02$). In cases where the alleged unconscionable term was negotiated or conspicuous, the estimated odds that the court would find the contract unconscionable is $e^{-.97}$ or 0.37 times less likely than if the claim did not involve a negotiated or conspicuous unconscionable term in the contract. Thus, Hypothesis 7A, which posited that unconscionability allegations rarely succeed in cases where the alleged unconscionable term was negotiated or conspicuous, is supported.

Hypothesis 8A: A substantial percentage of successful unconscionability claims involve cases where another policing doctrine such as fraud, mistake, or misrepresentation is also applied.

Cross tabulations revealed that out of the 56 cases where the court found unconscionability existed, 43% ($n = 24$) of these cases contained fraud, mistake or misrepresentations suggesting, Hypothesis 8A is supported.

Hypothesis 9A: A substantial percentage of successful unconscionability claims involve highly scrutinized clauses such as limitation of liability, limitation of remedy, liquidated damage, penalty, attorney fee, disclaimer, warranty or arbitration.

Aggregative cross tabulations revealed that out of the 56 cases where the court found unconscionability existed, 52% ($n = 29$) of these cases contained either a(n) limitation of liability, limitation of remedy, liquidated damage, penalty, attorney fee, disclaimer, warranty or arbitration clause, providing support for Hypothesis 9A.

Hypothesis 10A: Unconscionable clauses or contracts are rarely reformed.

Cross tabulations revealed that in the fifty-six cases where the court found the contract unconscionable, the unconscionable clause or contract was reformed only 7% (4 out of 56) of the time, suggesting Hypothesis 10A is supported.

Hypothesis 11A: Decisions of unconscionability will be more likely when the case involves excessive price or undue profits.

Cross tabulations revealed that in only 15% (22 out of 148) of the cases sampled did the court find excessive price or undue profits existed. Out of these 22 cases, the court ruled the contract was unconscionable 77% (17 out of 22) of the time, suggesting Hypothesis 11A is supported.

Hypothesis 12A: Decisions of unconscionability will be more likely when the case involves an unsophisticated/uneducated/low socioeconomic status party.

In order to determine if there is a relationship between the court's decision and the presence of an unsophisticated/uneducated/low socio-economic status party, we calculated cross tabulations of the cases that indicated a party was of unsophisticated/uneducated/low socio-economic status. Results revealed that in 85% (22 out of 26) of the cases involving an unsophisticated/uneducated/low socio-economic status party, the court found unconscionability, suggesting Hypothesis 12A is supported.

2. Group A Hypotheses: Conclusions

Results of our analysis revealed that unconscionability claims are difficult to win. As seen in Hypothesis 1A, only in 37.8% of the cases was a contract ruled unconscionable. Also of interest was the relatively small percentage (30%) of cases actually involving a sale of goods contracts. Since we initially only coded whether a contract was or was not for the sale of goods, we performed a post hoc analysis of the data to determine what areas of law the unconscionability claims most frequently appeared. This post hoc analysis revealed that a large amount of cases arose from contracts for employment, real-estate sales contracts, and service contracts. Hypothesis 3A, which posited that merchants rarely win claims of unconscionability, was supported despite there being no codification limitation on the applicability of a claim of unconscionability in a merchant-to-merchant transaction. Results revealed that relatively few ($n = 8$) merchants' unconscionability claims were upheld.

Generally, the results of testing hypotheses in Group A indicated that the use of a form contract increased the likelihood of the contract being found unconscionable. While the presence of an attorney in precontract negotiations, or where the alleged unconscionable term was negotiated or conspicuous, diminishes the likelihood that the court will find a contract unconscionable. Interestingly, a statistically significant number of cases ($n = 15$) did not require a showing of procedural unconscionability.

3. Group B Hypotheses: Results

Hypothesis 1B: The rate of successful claims of unconscionability has increased over time.

Hypothesis 1B posited that the rate of success of parties bringing unconscionability claims has increased over time. Individual cross tabulations were computed across time periods. Results of this analysis revealed that for the period 1968 to 1980, 34% (24 out of 70) of the unconscionability claims were successful while 41% (32 out of 78) unconscionability claims were successful for the time period 1991 to 2003. Although there was a slight increase (7%) in the percentage of

cases where unconscionability was found between the two periods, this increase was not significant. Thus, Hypothesis 1B is not supported.

Hypothesis 2B: The doctrine of unconscionability has increasingly been applied outside the law of sales.

Hypothesis 2B posited that the doctrine of unconscionability has increasingly been applied outside the law of sales. To test for the diffusion of the section 2-302 unconscionability in ancillary areas of contract law, cross tabulations were calculated of the cases that were coded as sale of goods transactions and those designated as nonsale cases. Results revealed that for the period 1968 to 1980, 54.3% (38 out of 78) of the unconscionability cases involved non-sale of goods contracts, while 84.6% (66 out of 78) of the cases for time period 1991 to 2003 involved non-sale of goods contracts. In order to determine whether this was a significant increase in the application of the U.C.C. to nonsale of goods cases, a logistic regression analysis was conducted. Results of this analysis indicated that year of decision was significantly related ($\chi^2 = 15.06$, $p < 0.01$) to whether or not the case involved a sale of goods contract; thus, Hypothesis 2B is supported.

Hypothesis 3B: The number of successful unconscionability claims brought by merchants has increased over time.

Hypothesis 3B posited that the number of successful unconscionability claims brought by merchants has increased over time. Individual cross tabulations were computed across time periods. Results of this analysis revealed that for the period 1968 to 1980, 16% (4 out of 25) of the unconscionability claims brought by merchants were successful. The result was the same for the time period 1991 to 2003 where 16% (4 out of 25) of the cases were successful. Therefore, Hypothesis 3B is not supported.

4. Group B Hypotheses: Conclusions

Group B hypotheses tested for intergenerational changes among the cases for the two time periods. Hypothesis 2B posited that the doctrine of unconscionability has increasingly been applied outside the law of sales. This hypothesis was supported by a 30% increase in non-sale unconscionability cases from 1968 to 1980 to the period of 1991 to 2003.¹⁵⁵ Results from Hypothesis 3B also revealed that merchants did not fair any better from the earlier to the later time periods.

155. While the total number of unconscionability cases did rise from 70 to 78 (an 11% increase) from the first period to the second period, this increase was far less than the 30% increase of the nonsales cases.

E. Results of Logistic Regression Analysis

Courts customarily designate more than one factor as relevant or important in their decision, rather than expounding a bright-line, single factor rule. Thus, several factors, rather than any one single factor, might explain the court's finding of unconscionability. In fact, many factors are normally present simultaneously in a case and may have separate and/or simultaneous effects on the court's decision. The presence of multiple factors may prevent or hinder legal scholars and practitioners from determining the "real" reason for the court's decision. One could reason that as more and more factors are present, the likelihood of the court finding a contract unconscionable will increase with each additional factor. In those cases where multiple factors are present, all may have been necessary for the court to reach their decision without any one single factor being sufficient for the court's decision. This proposition assumes, however, that all factors are given equal weight by the court. In reality, certain factors may be weighed differently by the courts. Thus, merely identifying factors in a case fails to take into consideration their relative influence on the court's decision.

As we have shown above,¹⁵⁶ by coding the presence or absence of certain factors in the case, we were able to determine the relative importance of each factor being present and the factor's relationship to the court's decision. However, to determine the relative importance of each factor individually when compared to all factors requires the use of logistic regression.¹⁵⁷ This analysis takes into consideration all factors present in the case simultaneously with their respective influence or affect on the court's decision. This type of statistical analysis responds to the fact that courts do not compute the presence or absence of factors in a vacuum or on a scorecard when reaching their decisions. Certain factors we posit may carry greater weight when compared to other factors, while some factors may be necessary but insufficient by themselves for a court to find a contract unconscionable. Courts often use a "factor analysis" or a multifactor balancing test when reaching their decisions.¹⁵⁸

156. See *infra* Part IV.D.1-4.

157. See *supra* notes 152-54.

158. See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 416 (1984). The Supreme Court's decision in this case is supported by a multifactor balancing test under the U.S. Copyright Act. The "fair use factors" to be considered under 17 U.S.C. § 107 are the following: (1) the purpose and character of the use, including whether it is commercial or noncommercial; (2) the nature of the work (e.g., factual works are entitled to less protection than creative works); (3) the amount and substantiality of the portion of the work used; and (4) the effect of the use upon the potential market for the work. A court must weigh each factor in reference to the other factors in the case before arriving at its ruling. In contract law, the court in *In re Antonelli* provided this description of a factors analysis approach to rule application: "Application of the rule, however, calls for a particularized,

In this Part we analyze the factors that were enunciated in the case coding project through logistic regression to determine what factors are significantly related to the court's decision and also which factors have the greatest statistical influence on the court's decision. The regression analysis models the factors that contribute to a court's decision as to whether a contract was unconscionable.¹⁵⁹

1. *Logistic Regression*

Logistic regression is a multiple regression technique that has an outcome variable that is a categorical dichotomy (0 or 1) and predictor variables that are continuous (1, 2, 3, . . .) or categorical. More simply stated, logistic regression provides researchers with the ability to model or determine the influence of individual case factors by identifying their relative weights or influence on the court's dichotomist decision. In this instance, we are predicting the court's decision that a contract is unconscionable or not unconscionable while simultaneously controlling for the presence of multiple independent factors.

We started the logistic analysis by first hypothesizing the expected factors beta coefficient's sign and their relationship with the court's decision. Table 1 shows the number of cases in which the independent variable was present and the expected beta coefficient's sign. We predicted positive coefficient signs for those variables that, when present in the case, increase the probability that the court will find the contract unconscionable. Conversely, negative coefficient signs indicated that when the variable is present in the case the probability the court will find the contract unconscionable is decreased.

practical approach rather than a conceptual one to the assignment question." 148 B.R. 443, 448 (D. Md. 1992) (involving the issue of the assignability of a personal service contract).

159. Prior application of regression analysis in similar legal context has been used to explain and even predict judicial decisions. Franklin M. Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 730 (1980), Jeffery A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891 (1984).

TABLE 1
LIST OF VARIABLES FOR LOGISTIC REGRESSION ANALYSIS
DEPENDENT VARIABLE

1 = CONTRACT FOUND UNCONSCIONABLE (56 CASES)

0 = CONTRACT NOT FOUND UNCONSCIONABLE (92 CASES)

INDEPENDENT VARIABLES	EXPECTED SIGN	NUMBER OF CASES
1. Consumer Plaintiff	+	98
2. Merchant Plaintiff	-	50
3. Attorney Representation	-	8
4. Party Was Unsophisticated	+	26
5. Party Was Uneducated	+	21
6. Party Was from Low SES	+	20
7. Form Contract	+	105
8. Clause Was Negotiated or Conspicuous	-	36
9. Excessive Price or Undue Profits	+	22
10. Grossly One-sided	+	48
11. Sale of Goods	+	44
12. Limitation of Liability	+	43
13. Liquidated Damages	+	10
14. Disclaimer of Warranty	+	22
15. Arbitration Clause	+	16
16. Other Policy Doctrines	+	54

Table 1 provides several insightful comparisons. First, the only hypothesized negative coefficient signs were the presence of an attorney, the plaintiff being a merchant, and a clause that was negotiated or conspicuous. These variables were hypothesized to have negative coefficient signs since one would expect that if an attorney represented the plaintiff in precontractual negotiations, or if the clause was conspicuous, any unconscionable terms would be deleted from the contract,¹⁶⁰ while the coefficient for merchant was hypothesized to have a negative coefficient since courts have historically disfavored applying U.C.C. section 2-302 protection to merchants.¹⁶¹

160. Previously, one of the authors studied the importance of the presence of legal representation in the application of reliance theory to enforce precontractual agreements or comfort instruments. See Larry A. DiMatteo & René Sacasas, *Credit and Value Comfort Instruments: Crossing the Line from Assurance to Legally Significant Reliance and Toward a Theory of Enforceability*, 47 BAYLOR L. REV. 357 (1995) (concluding that the existence of an attorney weighed in favor of a finding of contractual intent or reliance on informal business instruments).

161. See *supra* note 46 and accompanying text.

Correlations were then computed for all variables as shown in Appendix A. From the initial computation we noted high intercorrelations ($r > 0.85$) between the three variables of unsophisticated, uneducated and low socio-economic status. This high intercorrelation is not surprising given the similar underlying conceptual and methodological relationship of these three variables.¹⁶² To reduce the effects of multicollinearity,¹⁶³ which reduces the overall size of the test statistic and thereby lowers reported significance levels, we collapsed the three independent variables (unsophisticated, uneducated and low socio-economic status) into one variable named sophistication. This new composite variable, not surprising given the paternalistic approach of the courts, was significantly correlated with the court decisions ($r = .40, p < 0.001$). Also of interest was the very significant relationship between the presence of a one-sided contract and the finding of unconscionability ($r = 0.80$). Excessive price and the presence of consumers as a party were also significantly related to the finding of unconscionability ($r = 0.34$ and $.32, p < 0.001$ respectively).

2. Logistic Regression Results

To reduce the effects of multicollinearity and to prevent the LOGIT regression model from not converging,¹⁶⁴ we chose to exclude from the analysis those factors that did not have a significant first order correlation with the court's decision.¹⁶⁵ The LOGIT regression model contained the following factors: parties, form contract, negotiated or conspicuous clause, excessive price, exculpatory clause, arbitration clause, sale of goods, sophistication, and one sidedness. These remaining nine variables produced a model that fit the data and significantly predicted judicial decisions ($\chi^2 = 122.52, p < 0.000$).

The logistic regression results appear in Table 2.

162. JASON A. COLQUITT & JOHN C. SHAW, *How Should Organizational Justice Be Measured?*, in THE HANDBOOK OF ORGANIZATIONAL JUSTICE 113-52 (J. Greenberg & J.A. Colquitt eds., 2005). Correlations greater than 0.70 should be aggregated since the individual dimensions are indicators of the same underlying construct.

163. See generally DONALD P. SCHWAB, RESEARCH METHODS FOR ORGANIZATIONAL STUDIES ch. 18 (2d ed. 2005).

164. See *supra* notes 152-54.

165. See generally JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES (2003). Excluded from the LOGIT regression model were the following factors: attorney, policing doctrines, fraud, good faith, liquidated damage and disclaimer.

TABLE 2
LOGISTIC REGRESSION COEFFICIENTS

DEPENDANT VARIABLE: FINDING OF UNCONSCIONABILITY

FACTORS	BETA	WALD	SIGNIFICANCE	EXP(BETA)
Parties	1.68	4.23	0.04	5.40
Form Contract	0.97	1.38	0.23	2.65
Negotiated or Conspicuous	0.23	.09	0.75	1.26
Excessive Price	1.60	2.86	0.09	4.95
Exculpatory	1.26	3.18	0.07	3.53
Arbitration	0.44	0.14	0.70	1.55
Sale of Goods	0.27	0.16	0.68	1.31
Sophistication	0.63	4.66	0.03	1.88
One-Sided	4.54	29.59	0.00	93.74
Constant	-5.27	17.46	0.00	0.00

Confirming our hypothesized coefficient direction, all variables in the model had positive coefficient signs. The factors of parties, sophistication, and one-sided contract were significant predictors ($p < 0.05$) of the court's decision. In order to interpret the coefficients in a logistic regression, all betas must be transformed into odds ratios by taking the exponential log of β . Thus, the odds ratios of 93.74 for a one-sided contract indicates that when a contract is found to be one-sided, the odds of the court finding a contract to be unconscionable was 93.74 times more likely than if the contract was not one-sided. Similarly, when the parties are found to be unsophisticated, the court rules the contract unconscionable 1.89 times more likely than when the parties are not found to be unsophisticated. Additionally, when the parties are consumers, the court finds a contract or contract term unconscionable at a rate of 5.4 times more likely than when the parties are merchants. Excessive price and the presence of an exculpatory clause were also significantly related ($p < 0.10$) to the

court's decision. The odds of the court finding a case unconscionable when an excessive price was paid was five times more likely than if an excessive price was not present, while the presence of an exculpatory clause increased the odds of the court finding the contract unconscionable by 3.5 times.

Similar to the cross tabulations reported earlier in this Part, the logistic regression statistically confirmed that courts take a paternalistic approach when deciding unconscionability cases. The beta estimates indicate that the plaintiffs were more likely to win their cases when (a) an unsophisticated party was involved, (b) the parties were consumers, (c) the contract was one-sided, (d) the contract was for an excessive price, and (e) the contract contained an exculpatory clause. Interestingly, no procedural unconscionability factors were significantly related to the court's decision. Thus, substantive unconscionability which examines the relative fairness of the obligations assumed¹⁶⁶ can alone support an unconscionability claim.

V. A THEORY OF CONSENT APPROACH TO UNCONSCIONABILITY

The results of the coding project showed that the notion of true assent,¹⁶⁷ despite the dominant role of apparent assent in the objective theory of contracts,¹⁶⁸ remains an overriding consideration in unconscionability cases. Part V.A that follows briefly explores consent theory. Part V.B then borrows from consent theory in offering a consent theory approach to unconscionability. This approach is premised upon the conclusion that the factors analyzed in the case coding project are divisible into *consent-questioning* and *consent-enhancing* factors.

A. Consent Theory

In *The Bargain Principle and Its Limits*,¹⁶⁹ Professor Eisenberg provides the case for a doctrine of unfair persuasion within the principle of unconscionability.¹⁷⁰ He proposes that strict enforcement of

166. *Res. Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1041 (Utah 1985).

167. It is important to make clear that "true assent" is not necessarily subjective or actual assent. It can be understood as simply broadening the interpretative viewfinder of the objective theory of contracts to include additional types of contextual evidence. It is a search for a *truer* form of objective or apparent assent.

168. See generally LARRY A. DiMATTEO, *CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT* (1998) (providing a historical and philosophical analysis of the subjective and objective theories of contract interpretation).

169. Melvin Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

170. Although akin to the common law doctrine of undue influence, his proposed doctrine of undue surprise would not require a confidential relationship. He states that "[u]ndue influence, which might otherwise seem in point, traditionally requires a preexisting relationship between the parties." *Id.* at 774. A doctrine of undue persuasion would "be a defense to a bargain promise whether or not the parties had a preexisting relationship." *Id.* at 774-75.

bargain promises should be limited in cases of unfair persuasion, which is a subset of cases within his examination of the principle of unconscionability, whose defining characteristic is the utilization of bargaining methods that produce a *state of acquiescence*.¹⁷¹ The state of acquiescence is a *transitory state*¹⁷² either fostered by the bargaining method or one for which the bargaining method takes advantage. In this transitory state, the weakened party is incapable of acting in her normal *deliberate manner*.¹⁷³ This is a recognition of the divergence between the bargain principle as generally applied in contract law to what is needed for truly free bargaining in practice. In short, the former recognizes the contract as a product of bargain which requires the strict enforcement of the contract's terms, while the latter broadens the view of bargain from the narrow exchange of consideration to agreements whose terms are the product of free or deliberate bargaining. Alternatively stated, the apparent assent of bargain is limited by the recognition of a lack of true or actual assent.

The court in *Sitogum Holdings, Inc. v. Ropes*¹⁷⁴ explains that “[t]he intent of the clause [Section 2-302] is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and *understanding* and ability to *negotiate* in a meaningful fashion.”¹⁷⁵ For this court, real bargaining is premised upon *understanding* and *negotiation*. The existence of actual knowledge of the term through disclosure, best achieved through negotiation, implies real or true consent.

Randy Barnett's consent theory approach¹⁷⁶ to contractual obligation is helpful to understanding the underlying rationale motivating judicial decisionmaking in unconscionability cases—the search for “truer consent.”¹⁷⁷ “[A] consent theory specifies that a promisor incurs a contractual obligation the legal enforcement of which is morally justifiable by manifesting assent to legal enforcement and thereby invoking the institution of contract.”¹⁷⁸ Barnett concludes that “[t]he basis of contractual obligation is not promising per se [but] . . . con-

171. *Id.*

172. *Id.*

173. *Id.* at 773.

174. 800 A.2d 915 (N.J. Super. Ct. Ch. Div. 2002).

175. *Id.* at 922 (emphasis added) (quoting Judge Francis' opinion in *Kugler v. Romain*, 279 A.2d 640, 651-52 (N.J. 1971)).

176. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *Consent Theory*]; Randy E. Barnett, . . . *And Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421 (1993); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

177. Barnett, *Consent Theory*, *supra* note 176.

178. *Id.* at 305.

sent.”¹⁷⁹ Professor Blake Morant offers this succinct statement of consent theory:

Appreciation of the limitations of objective assent presupposes that individuals are not compelled to honor obligations that were not willingly assumed. This is the essence of a consent theory of contract, which does not recognize objective manifestations as dispositive of assent. While an objective approach to the determination of consent is probative, consent theory seeks confirmation of the reality of that assent. In the best case scenario, only *true* consent substantiates enforcement of obligations specified in the agreement.

Consent theory represents a moral and realist refinement of the freedom of contract notion. Parties may bargain freely; however, the objective manifestations of their assent may require greater verification. True contract validity rests with the establishment of real or palpable assent. Thus, objective manifestations, such as a signature on a form, may not constitute the genuine assent necessary to justify enforcement.¹⁸⁰

Jean Braucher asserts that contract law inevitably plays a regulatory role and as such “[e]nforcement of contractual obligation requires external normative definition.”¹⁸¹ Acknowledging the central role that consent plays in contract law she then admonishes that contract law also must set “appropriate limits of consent as a rationale for contract enforcement, particularly for enforcement of very harsh terms.”¹⁸² Braucher suggests that the status quo distribution of wealth and knowledge is a reflection of an “imperfect world”¹⁸³ and that imperfect world limits the free exercise of consent. Thus, the relative “wealth, power, knowledge, and judgment”¹⁸⁴ of contracting parties provide the grounds for inquiry into the validity of their apparent consent.¹⁸⁵ These insights of consent theory will be used in the next section to fashion the framework for a consent theory of unconscionability.

179. *Id.*

180. Blake Morant, Critical Legal Studies (unpublished manuscript, on file with authors). For a critique of Barnett’s “libertarian consent theory of contract,” see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

181. Braucher, *supra* note 180, at 712.

182. *Id.*

183. *Id.* at 713. Because of the unjust distributions of entitlement, “consent is at best a relative justification for contract enforcement, not an absolute one.” *Id.*

184. *Id.* at 712-13.

185. Braucher describes the common law’s invalidity doctrines (duress, undue influence, mistake, capacity and misrepresentation) as directed toward the divergence of apparent consent with actual consent. Regarding unconscionability, she states that “[u]nconscionability can be understood as a residual invalidity category.” *Id.* at 713.

B. A Consent Theory of Unconscionability

The courts' recognition and use of the factors tested in the coding project can best be understood as a search for truer assent than the objective first order consent represented by the signed contract. The question then becomes whether the consent search is a search for the apparent assent of the objective theory of contracts or something more?¹⁸⁶ The answer is that it is an objective search for a truer form of apparent assent. The importance of conspicuousness¹⁸⁷ indicates that the appearance of consent, such as knowledge or the appearance of knowledge, is an important force in judicial decisionmaking in this area of law. However, there is also a recognition, given the importance of factors, such as level education and sophistication,¹⁸⁸ the merchant-consumer distinction,¹⁸⁹ existence of other policing doctrines,¹⁹⁰ that the appearance of knowledge does not equate to understanding or subjective consent.

The divergence between the appearance of knowledge and actual knowledge is illustrated by Professor Speidel's "circle of assent."¹⁹¹ The circle of assent is bifurcated into "apparent consent" and "real consent."¹⁹² Apparent consent is best illustrated by the technique of disclosure, and real consent is exemplified by the element of choice.¹⁹³ Both are aligned with procedural unconscionability. The case coding project proved that the existence of procedural elements of disclosure, or knowledge and choice,¹⁹⁴ will almost always insulate a contract from a claim of unconscionability. However, even if both elements of consent are present, the needs of consumer protection still dictate judicial intervention in clearly unconscionable contracts. This consent *plus* paternalism is seen at work when courts intervene to

186. For Barnett it is something more. "In a consent theory, then, contracts are interpreted with an eye towards honoring the actual intentions of the parties." Barnett, *Consent Theory*, *supra* note 176, at 306-07.

187. See *supra* Part IV.D.1 (Hypothesis 7A).

188. *Id.* (Hypothesis 12A).

189. *Id.* (Hypothesis 3A).

190. *Id.* (Hypothesis 8A).

191. Speidel, *supra* note 63, at 362 (discussing Professor Murray's template for applying unconscionability); see Murray, *supra* note 4.

192. Speidel, *supra* note 63, at 362.

193. *Id.*

194. Speidel's analysis is specifically focused toward the consumer buyer. He offers a tripartite test to determine the existence of choice or real assent:

[T]he concept of *real assent* apparently involves three questions: (1) Could the consumer, by reasonable efforts at comparative shopping, have found similar goods in a relevant market area without the objectionable clause? (2) If not, is the subject of the contract a frill or a necessity? [If a frill, then the decision to purchase is a matter of choice.] (3) If a necessity, however, the last inquiry seems to be whether the professional can justify the term as commercially reasonable.

Id. at 361-62.

police covenants not-to-compete, antiassignment lease provisions, and liquidated damages clauses. In these areas, courts generally make no distinction between boilerplate and fully-negotiated clauses. For example, a fully-negotiated penalty (liquidated damages) clause between equally sophisticated parties is just as unenforceable as one in an adhesion contract between parties of highly unequal bargaining power. A penalty is simply unenforceable.¹⁹⁵

Even if substantial fairness is the underlying philosophy for the unconscionability doctrine, consent, namely real, meaningful consent, remains the foundation of contractual obligation. Substantive unconscionability is the surrogate for the theme that contract law as a regulatory device needs to ensure at least a minimum level of fairness in the exchange. Procedural unconscionability is the champion of the dominant autonomy theme of contract law. Consent is the human vehicle for exercising freedom or autonomy. As such, it must be incorporated into the application of any limiting or policing doctrine such as unconscionability. Thus, it should not come as a surprise that factors connected to the finding of a truer consent, then that simply represented by a signed contract, have a high predictive power in unconscionability decisions.

The importance of consent-enhancing factors explains the predictive power of factors such as conspicuousness,¹⁹⁶ negotiations,¹⁹⁷ and the existence of legal counsel¹⁹⁸ in the unconscionability decision. The existence of substantial evidence of a number of the consent-questioning factors can be nullified or counteracted by the existence of consent-enhancing factors.¹⁹⁹ Thus, when challenged terms were the product of negotiations, conspicuously presented (or brought to the attention of the challenging party), or where the challenging party was represented by legal counsel at the time of formation, the existence of

195. U.C.C. § 2-718(1) (2005).

196. See *supra* Part IV.D.1-2.

197. *Id.*

198. *Id.*

199. One of the boldest examples of a court focusing on a single consent-enhancing factor was delivered in *Bd. of Ed. of Berkeley County v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (W. Va. 1977). The case involved the enforceability of an arbitration clause. The court pronounced a new rule in which all disputes would be subject to arbitration if the arbitration clause was the product of negotiation. "The important words in the new rule are that the agreement to arbitrate must have been 'bargained for.'" *Id.* at 447. The court, however, narrowly defined "bargained for" as cases not involving a contract of adhesion, when arbitration is inappropriate given the nature of the contract, and when it is deemed to be unconscionable pursuant to section 2-302. *Id.* Thus, the new rule begs the question regarding the application of section 2-302. However, the court then clarified the importance of the bargained for requirement in relationship to section 2-302: "Whenever a party can bring an arbitration clause within the unconscionability provisions of § 2-302 of the Uniform Commercial Code . . . then that, too, would indicate that there was *no meaningful bargaining* with regard to the arbitration provision and should invalidate it." *Id.* (emphasis added) (citations omitted).

consent-questioning factors (for example, merchant-consumer transaction) is often trumped. The consent-enhancing factors support the belief that the apparent consent of the written contract is a reliable surrogate of actual assent. On the other hand, the existence of consent-questioning factors (lack of sophistication, low level of education, low socio-economic status, etc.) will often show that the apparent consent represented by the written contract does not reflect the actual understanding or consent of the challenging party.

Much like other policing doctrines, such as duress, undue influence and mistake, the doctrine of unconscionability can be viewed as the court's reexamination of the genuineness of the assent. A consent theory of unconscionability best explains the jurisprudence that has developed since the adoption of section 2-302 of the U.C.C. An overreaching clause will not be viewed as unconscionable if there is evidence of knowing consent. Evidence of superconscionability or what Arthur Leff referred to as "super-assent,"²⁰⁰ such as clear disclosure (written and/or oral), negotiation, or express "signing off,"²⁰¹ bolsters the case for actual or knowing consent. The notion of particularized or deliberative consent in the bargaining phase will generally insulate a one-sided clause from a claim of unconscionability. Cases that focused on evidence that the challenged clause was conspicuous, either by way of its presentation in the contract or by notification by the clause-benefiting party, or that the clause itself was a product of negotiation or was part of the menu of terms that were subject to negotiation, or that the party challenging the clause or contract was represented by an attorney at the time of formation, overwhelmingly failed to find unconscionability. Cases in which there was some evidence of negotiation or conspicuousness relating to the challenged clause had only a 22% success rate for unconscionability claims.²⁰² Only 5.4% of the cases acknowledged the existence of legal counsel at the time of formation and none were successful.²⁰³ However, in all of those cases the party challenging the clause failed on its unconscionability claim. In addition, the success rate is appreciably higher for challenged clauses in standard form contracts (42.9%) than for clauses found in custom or nonstandard form contracts. This is likely due to the fact that the level of negotiation and the level of conspic-

200. The concept of superconscionability is not a novel one. Arthur Leff in a 1970 article wrote of "super-disclosure" and "super-assent" that "one can imagine instances of some sort of super-disclosure by a seller, coupled with some sort of super-assent by a consumer, which might validate an otherwise 'unconscionable' provision." Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349-50 (1970).

201. "Signing off" refers to the technique of having a party sign or initial clauses that the other party wants to insulate from future charges of unconscionability.

202. See *supra* Part IV.D.1-2.

203. *Id.*

ousness is lower in standard form contracting than in nonstandard form contracting.

Another indicator that supports a consent theory of unconscionability includes the high degree of the existence of other policing doctrines (47%) in successful unconscionability cases.²⁰⁴ The fact that almost half of the successful unconscionability cases also discussed other policing doctrines is significant. The doctrines of fraud, misrepresentation, mistake, and undue influence all involve the element of genuineness of consent. The fact that true consent is an element discussed in the fact patterns of these cases supports the finding that the underlying factor in the courts' analysis is consent-based.

The higher success rates for specific types of clauses, such as arbitration clauses (75%), liquidated damages clauses (60%), limitation of liability or remedy clauses (51%), and disclaimer or warranty clauses (41%), as compared to an overall success rate for unconscionability claims of 37.8%, works against a consent theory of unconscionability.²⁰⁵ Much like the law on covenants not-to-compete,²⁰⁶ the fact that the parties consented to the particular clause is largely irrelevant. These types of clauses are part of a list of highly scrutinized clauses that courts have traditionally policed under the rubric of public policy. These clauses are policed due to their inherent substantive naughtiness. A consent theory, however, can still be sustained by the fact that these particular clauses have been historically or statutorily²⁰⁷ disenfranchised from the rubric of freedom of contract enforceability. Therefore, the cases involving these types of clauses are really not true unconscionability cases. A separate body of jurisprudence is being utilized to void or reform these clauses. The fact that the clauses are or are not unconscionable is beside the point. For example, an overly broad covenant not-to-compete will be reformed

204. *Id.*

205. *Id.*

206. See generally T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, AM. BUS. L.J. (2006) (forthcoming) (on file with author) (discussing the role of equitable principles in the enforcement between competitors of employee noncompetition agreements); Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001) (discussing the role of corporate scandals and the problem of "brain drain" in the enforcement of such covenants); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 629-31 (1960) (tracing the general enforceability of covenants not-to-compete to the 18th century); Samuel C. Damren, *The Theory of "Involuntary" Contracts: The Judicial Rewriting of Unreasonable Covenants Not to Compete*, 6 TEX. WESLEYAN L. REV. 71 (1999) (analyzing cases involving judicial revision); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999) (discussing the economic incentives of employers to continue requiring such agreements); see also Frederick E. Hines, *Employees' Covenants Not to Solicit Former Patrons*, 20 CAL. L. REV. 607 (1932) (discussing the associated nonsolicitation agreement).

207. See, e.g., U.C.C. §§ 2-718, -719 (liquidated damages and limitation of remedy clauses).

even in cases of super-procedural conscionability because of the policy against restraints of competition.²⁰⁸ Liquidated damages clauses are often voided due to the policy against punitive or super-compensatory damages in contract law.²⁰⁹ The fact that the parties negotiated the clauses is irrelevant.²¹⁰

The low rate of reformation (7%) can also be seen as supporting a consent theory of unconscionability. As previously discussed, section 2-302 emphasizes the remedy of reformation in addressing unconscionable clauses or contracts.²¹¹ The rationale would seem to be that since the parties inserted the clause in their contract they, at some level, intended that the issue addressed by the clause be covered by the contract. For example, if the parties' contract included a conspicuously presented per diem liquidated damages or penalty clause, then the objective theory of contract would hold that such a clause is reflective of contractual intent.²¹² Therefore, instead of voiding the clause, a rewriting of the clause to be conscionable would be truer to contractual intent. The fact that few unconscionable clauses are reformed reflects the courts' belief that such clauses or contracts do not possess even a modicum of consent.

In the end, as in all forms of litigation, the success of a claim of unconscionability is dependent upon evidentiary matters. The designation of factors as consent-enhancing and consent-questioning aids in properly apportioning such matters of evidential burdens of proof. The party claiming unconscionability should bear the burden of proving the existence of sufficient consent-questioning factors. The party asserting the enforceability of the challenged clause or contract has the burden in rebutting the claim of unconscionability by proving the existence of countervailing procedural-based, consent-enhancing factors. The clause or contract defending party, especially in a merchant-consumer transaction, should also bear the burden of proving

208. RESTATEMENT (SECOND) CONTRACTS §§ 186, 188 (1979) ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade."). A restriction is unreasonably in restraint of trade if "the restraint is greater than is needed to protect the promisee's legitimate interest." *Id.* § 188(1)(a).

209. See, e.g., Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633 (2001) (reviewing the law of liquidated damages).

210. Other examples include antiassignment clauses in real property leases and exculpatory clauses. See, e.g., *Fernandez v. Vazquez*, 397 So. 2d 1171 (Fla. 3d DCA 1981) (explaining that leases are presumed to be assignable unless the landlord gives a commercially reasonable reason for withholding consent); *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837 (Cal. 1985) (en banc). See generally Murray S. Levin, *Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord*, 30 DEPAUL L. REV. 109 (1980) ("[A] landlord may not unreasonably and capriciously withhold his consent." (quoting *Homa-Goff Interiors, Inc. v. Cowden*, 350 So. 2d 1035, 1038 (Ala. 1977))).

211. See *supra* Part IV.D.1-2.

212. See generally DIMATTEO, *supra* note 168; Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 329-31 (1997).

the substantive reasonableness of the challenged clause when the balancing of consent-enhancing and consent-questioning factors is indeterminate.²¹³ It is this battle over the finding of a truer form of apparent consent that best explains the law of unconscionability as applied under the rubric of section 2-302.

VI. CONCLUSION

Since the codification of the unconscionability principle in section 2-302, questions have persisted as to its meaning and the rationality of its application. This Article reported the findings of a case coding project of unconscionability cases taken from two different time periods. This allowed for the measuring of factors in the aggregate and intergenerationally. The findings presented confirmed a number of widely held assumptions. The findings support the hypothesis that it is very difficult for a merchant to succeed in an unconscionability claim. It also confirmed the importance of section 2-302 methodology to the common law of contracts. The importance of factors such as the use of standard forms and the level of education, sophistication, and socio-economic status of the challenging party was confirmed. In addition, the rarity of use by the courts of the remedy of reformation was confirmed. Finally, the success rate of unconscionability claims has remained remarkably stable over the past three to four decades.

The findings also showed that about half or more of all unconscionability cases may not be “true” unconscionability cases. A significant number of cases had other principles of law or public policy at stake other than the principle of unconscionability. These included cases involving other policing doctrines such as mistake, misrepresentation, fraud, undue influence, and bad faith, and cases involving highly-scrutinized types of clauses such as exculpatory, arbitration, limitation of liability or remedies, liquidated damages, warranty or disclaimer of warranty. In these cases there were other bodies of jurisprudence or doctrines available to the courts in rendering their decisions.

The findings of the case coding project supports a consent theory of unconscionability as the best means to understand the case law. The types of factors utilized by the courts in making unconscionability determinations are separable into consent-questioning and consent-enhancing factors. The existence of standard forms, other policing doctrines, levels of education and sophistication provided the avenue for courts to question the true consent of the parties relating

213. Professor Spiedel previously argued for this allocation of the substantive burden of proof: “[T]he professional [merchant] should have the burden of establishing the commercial reasonableness of the disputed term.” Editors, *Unconscionability: An Attempt at Definition*, 31 U. PITT. L. REV. 333, 335 (1970) (summarizing Spiedel’s position by law review editors).

to the challenged clause or contract. Other factors, such as representation by legal counsel, conspicuousness, and negotiations, enhanced the courts propensity to find that the apparent consent represented by the written contract was indeed a reflection of the true understanding of the parties.

APPENDIX A
UNCONSCIONABILITY CODING SHEET

Case Number _____ Jurisdiction _____ State _____ Year _____

1. Court Found Unconscionability (circle one): Yes No Case Remanded W/O Finding
2. Parties (circle one): Consumer Merchant
3. Did the court find Procedural Unconscionability? (circle one): Yes No
 - Did the court discuss procedural unconscionability? (circle one): Yes No
 - Did case involve a Form Contract (circle one): Yes No
 - Was the clause being challenged negotiated or conspicuous? Yes No
4. Consumer Was:
 - Unsophisticated (circle one): Yes No
 - Uneducated (circle one): Yes No
 - Low SES (circle one): Yes No
5. Parties Represented By Attorney (circle one): Yes No
6. Evidence Of Other Doctrines Presented:
 - Did the court discuss other "policing doctrines"? (circle one): Yes No
 - Fraud or misrepresentation (circle one): Yes No
 - Did the court discuss good faith and/or fair dealing? (circle one): Yes No
7. Substantive Unconscionability Present (circle one): Yes No
 - Did the court discuss substantive unconscionability? Yes No
 - Excessive Price or undue profits (circle one): Yes No
 - Clause was considered grossly one-sided? Yes No
8. Additional Clauses Present:
 - Exculpatory, Limitation of Liability, or Limitation of Remedy (circle one): Yes No
 - Liquidated Damage, Penalty Clause, or Attorney Fee Clause Yes No
 - Disclaimer or Warranty Clause (circle one): Yes No
 - Arbitration Clause (circle one): Yes No
9. Result:
 - Clause Voided/Rescission (circle one): Yes No
 - Contract Reformed (circle one): Yes No
10. Type of Contract
 - Was this a sale of goods transaction? (circle one): Yes No

APPENDIX B
CORRELATIONS

FACTORS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Unconscionability Found	1																		
Parities	.32**	1																	
Form Contract	.16*	.08	1																
Negotiated or Conspicuous	-.18*	-.10	-.12	1															
Unsophisticated	.45**	.22**	.14	-.10	1														
Uneducated	.36**	.25**	.13	-.14	.88**	1													
Low SES	.34**	.24**	.17*	-.13	.86**	.97**	1												
Sophistication	.40**	.24**	.15	-.13	.95**	.98**	.97**	1											
Attorney	-.19*	-.15	-.24**	.14	-.11	-.10	-.09	-.11	1										
Policing Doctrines	.10	.25**	.21*	-.07	.20*	.26**	.23**	.22**	-.12	1									
Fraud	.10	.27**	.08	-.03	.26**	.26**	.27**	.28**	-.05	.56**	1								
Good Faith	.00	.12	.10	-.12	.21**	.28**	.30**	.27**	-.06	.45**	.26**	1							
Excessive Price	.34**	.22**	-.03	-.06	.36*	.43**	.39**	.40**	-.02	.26**	.38*	.22**	1						
One-Sided	.80**	.22**	.09	-.20*	.32**	.25**	.23**	.28**	-.17*	.07	.02	-.01	.28**	1					
Exculpatory	.17*	-.04	.15	-.08	-.10	-.09	-.08	-.10	-.15	-.12	-.12	-.21*	-.23**	.15	1				
Liquidated Damage	.12	-.04	.05	-.15	.02	.05	.05	.04	.06	.08	-.14	.05	-.04	.21**	.24**	1			
Disclaimer	.03	-.10	.06	.16*	.01	-.06	-.05	-.04	-.02	-.04	-.08	-.09	-.12	.11	.40**	.12	1		
Arbitration	.27**	.11	.08	-.15	-.16	-.14	-.14	-.15	.01	-.13	-.13	-.09	-.15	.34**	.11	.17*	-.15	1	
Sale of Goods	-.02	-.16	.06	.01	.05	.07	.05	.06	-.09	.09	.02	.07	.06	-.05	.07	-.06	.27**	-.13	1

** Correlation is significant at the 0.01 level (2-tailed).

* Correlation is significant at the 0.05 level (2-tailed).