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Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability

Richard L. Barnes*

The doctrines of adhesion and unconscionability owe their existence to the power of the libertarian model of bargaining. The premise of this Article is that the concept of objectivity has made adhesion and unconscionability doctrines of convenience, helpful in fine tuning the powerful concept of objectivity in that libertarian model. The conclusion reached is that both of these limiting doctrines are a product of the objective theory and serve complementary purposes. This Article asserts that the purpose of the doctrines of adhesion and unconscionability is to save the objective theory of contracts from troublesome over breadth.

This Article begins with a description of the objective and subjective theories of contract enforceability. It will be shown that the traditional definition of contract as an objective bargain-in-fact¹ of the parties leaves too much to the imagination between the parties. Can individuals create a bargain for what is illegal? The libertarian answer would be yes, but the traditional objective doctrine hedges. Some well-recognized limitations will be elaborated to show that the presence of consideration in an objective exchange is not enough to ensure its validity.²

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1. Restatement (Second) of Contracts § 1 (1981). Compare U.C.C. § 1-201(b)(3) (agreement defined), with § 1-201(b)(12) (contract defined) (2004).

2. For instance, the Restatement limits contracts to those promises for which the law will provide a remedy. Restatement (Second) of Contracts § 1. To ensure that the law will enforce our structured agreements as contracts, do we seal our bargains with a kiss, a hand shake, a wax seal, or some other formality? Does ceremony count for more than what is in the minds and hearts of the parties? If a term contained in a license agreement seen only as a pull-down menu on a computer screen, an agreement that is neither dickered nor even available except as hard-to-read dense print offered on a take-it-or-leave-it basis, can create a binding contract, then we are much closer to the wax seal of ancient pre-commerce than we are to the libertarian model of genuine bargained-for exchange that modern commercial law posits. Is there liberty of action when the liberty is presumptive and *pro forma* rather than genuine?

Illustration One

A highway robber waylaid a stage coach and killed the driver. He then said to the passengers: "Your valuables or your lives." When they complied there was no more than that, compliance. Notwithstanding the fact that there was language of choice, an objectively expressed exchange does not mean that there was a bargained for exchange.³

Adopting the form of an exchange should not be a privilege to commit a tort or a crime.⁴ Adhesion and unconscionability are useful, in part because they help us identify other instances of form over substance. Their vigor reduces tensions in the Law of Contracts which arise through the dominance of objectivity. We know there are times when we must lift the mask of formula used by the robber and other bad actors.

This Article will elaborate on the distinction between the objective and subjective models of contract.⁵ Next, a group of significant cases, all of which deal with the doctrines of adhesion and unconscionability as limitations on contract power, will be examined for traces of this unresolved conflict.

This Article proposes that there is great value in retaining some subjectivity as the basis for contract enforcement. One conventional area in which this subjectivity is used is in

3. 7 Joseph M. Perillo, Corbin on Contracts § 28.2, at 39 (rev. ed. 2002). Interestingly enough the treatise points out that in early English jurisprudence it took more than threats of loss of goods or even imprisonment to amount to duress. Only actual imprisonment or the threats of loss of limb or life were duress. The reason was that all else was compensable in damages, so the threat should be resistible. *Id.* Here is the kind of evolution that seems not only plausible, but intuitive. We accept this, and I suggest a similar evolution in understanding assent as an evolving concept in this article.

4. *Id.*

5. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991), will be used to illustrate a traditional, too quick reliance on the construct we call the "bargained-for-exchange." This construct will be shown to leave as much, or more, unresolved as it solves. When the law of contracts accepted the "objective" theory of contract bargaining, it precluded the only possible route to true understanding of a bargain—that is, the subjective meeting of the minds that can be reached only through some true understanding of what both parties together intended. While this loss is real, I do not suggest that the loss itself is controversial. Instead, I suggest a way to reintegrate adhesion and unconscionability by looking at the nature of the bargaining relationship and the depth of bargain-in-fact reached by the parties.

misunderstandings which can only be discovered and resolved through subjectivity.⁶ This concededly radical proposition is made less so by limitations on it which will be introduced below.

Conventionality will be supported by two themes carried throughout this Article. The first is that adhesion and unconscionability are to formation what misunderstanding is to interpretation. They should be seen and used in a way that makes them akin to an interpretive gloss on the theory of objective formation. They should not be seen as an antithetical alternative to objectivity. No contest for supremacy will be played.

Second, by being forthright in our application of these modest interpretive devices we save the more manipulative devices which skirt formation, but still erode objectivity of meaning.⁷ Judges have demonstrated their desire for subjectivity. That desire is the reason that two major sources of contract law, the Uniform Commercial Code (UCC) and the Restatement Second of Contracts (Restatement), speak of unfair surprise as one concern in unconscionability. However, to do the real work we need to connect the unfairness with the lack of assent rather than the result. Some bargains should not be enforced even though their substance is acceptable. They should be rejected solely on the basis of their lack of fair bargaining. If a deal is created by power that presents only the appearance of genuine assent, then the interest of the law in protecting objectivity largely disappears. A lack of genuine assent makes these transactions more akin to robbery than contract.

6. Restatement (Second) of Contracts § 20 (1981).

7. In *Weaver v. American Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971), the court acknowledged the duty to read, but also noted the difficulty to do that due to fine print and lack of headings. The court concluded that the party who seeks to enforce a contract exculpating himself from negligence should have the burden of proving that the provisions were explained and understood. *Id.* at 148. In *Williams v. Walker-Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965), the court refused to enforce a cruel provision for repossession because of the obscurity of the language, difficulty to comprehend its effect, and the low income and lack of education of the buyer. *Id.* at 449-50. "In such a case the usual rule [objective manifestation] that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld." *Id.*; see also *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 73-74 (N.J. 1960) (refused to enforce a warranty that would have limited the remedy for a defective steering wheel to replacement of the part because the clause was difficult to find, difficult to read, and nearly impossible for the consumer to understand).

Where the bargained-for-exchange is not genuine, we need to be able to say this in a forthright manner.⁸

These tools of adhesion and unconscionability remove some of the pressure from other doctrines and devices. While both require an examination of the circumstances and result of the objective bargain, their directness reduces the reliance on other doctrines which appear more conventional, more doctrinaire, but, in actuality, can be manipulative and result-oriented. Whether direct or manipulative, some inquiry into the bargain is hard to resist because of the over breadth of the objectivist approach. Both adhesion and unconscionability can reinforce objectivity. By making legitimacy of the bargain a frank issue, they can alleviate a glut of untenable decisions that would result from a purely objective system. They are conveniences, if not necessities, given the resiliency of the objective theory.⁹

What will emerge throughout this Article is an analytical approach that heightens our sensitivity about the assent of the parties by asking if we can separate assent to the transaction as a whole from the assent that implicitly attaches to the lesser included terms of the transaction. For this purpose it is helpful to look at the

8. Adhesion and unconscionability share the referents of oppression and unfair surprise found in the UCC and the Restatement. See U.C.C. § 2-302 (2004); Restatement (Second) of Contracts § 208. The comments to both sections mention these elements.

9.

But the objectivists also went too far. They tried (1) to treat virtually all the varieties of contractual arrangements in the same way, and (2), as to all contracts in all their phases, to exclude, as legally irrelevant, consideration of the actual intention of the parties or either of them, as distinguished from the outward manifestation of that intention. The objectivists transferred from the field of torts that stubborn anti-subjectivist, the "reasonable man"; so that, in part at least, advocacy of the "objective" standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses.

Ricketts v. Pa. R.R. Co., 153 F.2d 757, 761 (2nd Cir. 1946) (Frank, C.J., concurring) (footnote omitted).

The objective theory has been especially powerful in specialized industries such as that of insurance. Professor Keeton first formulated the rule in this way: "[T]he objectively reasonable expectations of applicants and intended beneficiaries . . . will be honored even though painstaking study of the policy provisions would have negated those expectations." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970). This is just a nuance on the traditional rule that if the contract term is not understandable, the provision will be interpreted in light of the objective and reasonable expectations of the average consumer. *Id.*

assent as one of three types: (1) was the deal in the nature of a take-it-or-leave-it transaction because one of the parties was unwilling to bargain and was in a position to impose, (2) were the circumstances or process of the transaction such that no bargaining was expected, or (3) were the circumstances or process such that, despite bargaining over some terms, ignorance of other terms was the reasonable expectation of the parties. If it is concluded that one of these three patterns fits the transaction, the contract should be viewed as adhesive.

This does not mean the agreement should be unenforceable. Adhesive contracts are not unenforceable solely because of their adhesiveness. We can reinforce the objective theory of contracts and come to a fairer representation of the actual agreement if we enforce the deal, but refuse to enforce those terms which are unfair surprises or would result in unexpected harshness. Just to create a clear line from the outset, harsh is not the equivalent of unconscionable. It is assumed that the doctrine of unconscionability will remain as an alternative. Adhesion complements it by recognizing that some bargains should not be enforced because there is inadequate assent to what may be unfair or harsh terms. Inadequate assent does not mean that the resultant terms will necessarily be unconscionable. The essence of this analytical model is a constant quest for the reasonable expectations of the parties which requires interpretation, construction, and gap-filling.

I. A BRIEF OVERVIEW OF OBJECTIVITY AND SUBJECTIVITY

Illustration Two

A clever and personable felon approaches a pensioner with a story. She is working her way through college selling a satellite-based Internet service. She hastens to add that she knows the pensioner is probably not interested, but she will get paid a twenty dollar fee if the pensioner will fill out and sign a form attesting to her visit, the positive impression she made, and the positive image of the company. He may still decline to purchase the service. The pensioner is charmed, reads the form, and signs it. The felon thanks the mark, the door is closed, and the felon walks away with the form. Later, in her expensive sports coupe, she peels off the upper layer of the paper to reveal a promissory note. It recites that pensioner made a purchase and is obligated to pay one thousand dollars.

After collecting several of these, she discounts them to a good faith purchaser and leaves town with the cash.¹⁰

If we use the analytical tool above we quickly conclude that this is a case in which the failure of assent is so significant as to preclude a contract. It is as much a failure of assent as it is a robbery. Some courts recognize this lack of assent. Other courts have resisted even this modest infringement on objectivity. They have concluded that the agreement is enforceable, but because of the fraud, the terms are subject to reformation in appropriate cases.¹¹

Let us begin with an uncontroversial proposition: basic hornbook material. Modern commercial realities demand that the law largely abandon the subjective in favor of the objective.¹² Whether this preference for the objective, reasonable expectations, over the subjective, the personal and peculiar, was the product of the industrial economy or helped to produce it is beyond this project.¹³ Either way there is little doubt that the objective conception of contracts occupies the field.¹⁴ In all fifty states, the Uniform Commercial Code provisions on sales of goods, which are an attempt to state the rules of that commercial world, emphasize objective rules.¹⁵ In many of its most significant provisions—

10. This type of fraud, called fraud in the factum, is defined by the lack of knowledge of the real facts and the lack of opportunity to discover them. See Joseph M. Perillo, Calamari and Perillo on Contracts § 9.22, at 354–55 (5th ed. 2003). In other words, it is a classic blend of subjective and objective innocence. U.C.C. § 3-305(a)(1) & cmt. 1. Sometimes called real fraud or essential fraud, it is a “real” defense that is good even against a holder in due course, such as the one posited here. See U.C.C. § 3-305(b).

11. 7 Perillo, *supra* note 3, § 29.9, at 408.

12. E. Allan Farnsworth, Contracts § 1.7, at 19–20 (3d ed. 1999); John Edward Murray, Jr., Murray on Contracts § 30, at 61–64 (4th ed. 2001).

13. Compare Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 Colum. L. Rev. 629, 629–31 (1943), with Farnsworth, *supra* note 12, § 1.7, at 19–21.

14. Murray, *supra* note 12, § 30, at 63–64.

15. What the UCC suggests is a view of contracts, not as an actual bargain, but rather a core bargain of actual agreement surrounded by apparent agreement and even implicit agreement. Compare U.C.C. § 2-207 (Official Text 2003) (pre-amendment 2003, currently adopted in all fifty states), with U.C.C. § 2-207 (Revision 2003) (not yet adopted in any jurisdiction). This radical rewrite of the section appears to call for a bargain only as to those terms to which the parties have agreed either explicitly through their forms or through other genuine assent. *Id.* It is a product of legal fiction, a fiction created by the law or what

especially those involving quality, quantity, price, and warranty—the repeated talisman of the UCC is “reasonable” or some equivalent.¹⁶ The actual bargain is the first source, but not the only source.¹⁷

The classic doctrine which protected the objective theory of contract is that of the duty to read and understand.¹⁸ It is a foundational idea of the objective theory of contracts because it requires the parties to take responsibility for those things which are in the contract. This responsibility for written terms is said to override any subjectively held expectations¹⁹ and even to override other express terms stated at or before the bargain was

the law presumes to be the reasonable understanding of the parties without regard to actual understanding. Professor Karl Llewellyn expressed this idea during the time period he worked on the UCC as chief draftsman of Article 2. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 370–71 (1960). Llewellyn expressed it as a consideration of what makes boilerplate clauses different. Instead of thinking of boilerplate clauses which have been dickered over, we ought to see that there are only a few dickered terms, which establish broad outlines of the transaction and form its framework. *Id.* Then the framework gives a blanket assent to any terms not unreasonable or indecent that the seller may include as boilerplate. *Id.* Llewellyn’s contributions were plentiful, but include the innovations of section 2-207 and the normative concept of unconscionability in section 2-302 which adds the third layer, one offering resolution of the conflict by use of so-called gap-fillers. Terms that are not written are often found in the context and purpose of the transaction. An example from classic contract cases is that of the covenant of good faith effort found in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

16. See, e.g., U.C.C. § 2-305 (2004) (open price to be a reasonable price), § 2-306 (output or requirements quantity to be a reasonable amount), § 2-309 (open delivery time to be a reasonable time), § 2-103(1)(j) (good faith to include reasonable commercial standards of fair dealing).

17. Compare U.C.C. § 2-207(1), with § 2-207 (3).

18. See, e.g., *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 667–68 (7th Cir. 2003); *Merit Music Serv., Inc. v. Sonneborn*, 225 A.2d 470, 473–74 (Md. 1967).

19. Restatement (Second) of Contracts § 215 states: “where there is a binding agreement [defined in section 209 as a written agreement], either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.” Section 216 allows consistent additional terms only where there is not complete integration. Restatement (Second) of Contracts § 216 (1) (1981).

memorialized.²⁰ These objective terms control even though they may not be the product of dickering or negotiation.²¹

The law established "Contract" as a creature of special circumstance.²² Consideration was the defining special circumstance.²² Consideration limited enforceable promises to those where something more than promise was present.²³ Consideration took care of the bulk of commercial agreements and, therefore, large commercial interests in the age of pre-industrial commerce were comfortable with it.²⁴ One historian of the law concluded that America presented the ideal case for testing the idea of libertarian economic growth.²⁵ It was the ascendancy of freedom of contract that made the objective view the dominant model in the early law merchant,²⁶ and the industrial revolution with its liberal economic theory reinforced it and firmed its acceptance.²⁷ So strong was the economic influence, that by the end of the nineteenth century the bargained-for-exchange and consideration were firmly established doctrines. Nevertheless, already changing economic conditions were making the doctrines less important.²⁸

20. Restatement (Second) of Contracts §§ 215, 216.

21. Consider again the consumer who goes into a big box retailer to purchase a vacuum cleaner. The outside of the box clearly states the price, which is \$100, and also states that the warranty is for ninety days and is valid only if the goods are returned to the original manufacturer for replacement. It is the apparent policy of many of the major retailers, including Target, Wal-Mart, Costco, J.C. Penney, K-Mart, Sears Roebuck & Co., and Sam's Club, to accept return of recent purchases when accompanied by a receipt or, in some cases, just store markings that show the item was purchased from that retailer. By placing the explicit language of warranty inside the container, the retailers have created a reasonable expectation of something quite different from those terms. They have separated the questions of what is the total bargain and what is the warranty. By this separation the sellers have removed the possibility of a bargained-for exchange on dickered terms and have even eliminated a bargained-for exchange on dictated terms with notice. For this reason, this is a classic adhesive, take it or leave it, contract without notice of other possibilities.

22. Farnsworth, *supra* note 12, § 1.6, at 18-19.

23. *Id.*

24. *Id.* at 19.

25. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 18 (1956).

26. Farnsworth, *supra* note 12, § 1.7, at 20.

27. Kessler, *supra* note 13, at 629-31.

28. Farnsworth, *supra* note 12, § 1.7, at 20.

It was, in fact, the nineteenth century's developing socio-economic influences that brought with them a number of changes.²⁹ Western economies adopted the idea of freedom of action within a sphere of influence allowing individuals to control their own debt.³⁰ Perhaps it was the presumptive democratic value, but it was widely accepted as the natural order for a society emerging as an industrial economy to have libertarian contract features.³¹ The legislatures and judges accepted a model of industrial revolution and organization in which greater scale was equated with greater good because of maximized welfare.³² This brought standardization of goods and contracts as the necessary partners in an efficient society.³³

29. *Id.* at 21–22.

30. Kessler, *supra* note 13, at 638–40. In his landmark article on adhesion contracts Professor Kessler wrote:

With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically. Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. Society, but proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture.

Id. at 640 (footnote omitted).

31. *Id.* at 629–30.

32. *Id.*; see also Murray, *supra* note 12, § 96, at 545–55.

33. This is neither shocking nor radical. Karl Llewellyn, in drafting the UCC in the 1940s, recognized his obligation to correctly express current business norms and practices and to then add normative values where they could be without radical shifts. It was no more ambitious than looking a bit ahead. Richard L. Barnes, *Toward a Normative Framework for the Uniform Commercial Code*, 62 Temp. L. Rev. 117, 158–60 (1989). See also Farnsworth, *supra* note 12, § 4.26, at 295–96 (1999). “As with goods the standardization of

Illustration Three

A drover of cattle is offered shipment of his cattle from Buffalo to Albany on the only railroad available. He is offered the tariff price or, if wishes, he may ride in the car and maintain control of his cattle. If he chooses this, his fare is "free" and the price is one-third of the "tariff" rate. He chooses, as do all other shippers, the lower rate as it is the only practicable rate for a profit. Along the way the drover is injured through the negligence of the employees of the railroad. The railroad points to a release of liability in the contract which specifies it is part of the consideration for the "free" passage and lower price.³⁴

Illustration Three is based on the facts of *N.Y. Central R.R. Co. v. Lockwood*.³⁵ The Supreme Court refused to enforce the exculpatory clause.³⁶ The opinion is a marvelous examination of the precedents, extending back more than a century into English law, as well as a good survey of the leading state rules.³⁷ While New York was one of the more liberal jurisdictions in allowing exculpation, the Court felt the need to deny the effect asked for by the railroad.³⁸ The Court's reasoning was reflective and its analysis careful. The *Lockwood* contract was squarely within category two of the analytical device proposed here. This category is for those situations where we conclude that the circumstances and process of the bargain were such that bargaining was neither invited nor expected. This is a classic take-it-or-leave-it deal, although the Court did not use the phrase.

Sound public policy was offered as the reason why the contract was unenforceable. Without using any categorical language the Court found the contract to be adhesive and violative of sound policy.³⁹ First, "[t]he carrier and his customer [did] not stand on a footing of equality."⁴⁰ The customer was one of millions who

and mass production of contracts may serve the interest of both parties." *Id.* § 4.26, at 296.

34. *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 359 (1873).

35. *Id.*

36. *Id.* at 383-84.

37. *Id.* at 363-78.

38. *Id.* at 379-84.

39. *Id.*

40. *Id.* at 379.

could not afford to haggle or stand out from the crowd.⁴¹ The railroad was one of the large corporations in whom the power and wealth of the industry was concentrated.⁴² Had the drover been aware of the term there would have been no bargaining.⁴³ The railroad's freight agent testified that they made forty or fifty contracts every week and had carried on the business for years, and no other arrangement was ever made because the only alternative offered was the tariff rate which, at three times the cost, was not feasible.⁴⁴

The Court held:

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangement which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit These circumstances . . . show that the conditions imposed by common carriers ought not to be adverse . . . to the dictates of public policy and morality.⁴⁵

The Court concluded that the railroad's obligations were akin to that of a fiduciary and thus it was charged with a duty to ensure that their contracts with the public were "just and reasonable."⁴⁶ From there it was a short step to the holding that the carrier could not in justice and reasonableness exculpate itself for negligence. An informative history of exculpation clauses was given. The Court pointed out that exculpation clauses came into vogue among carriers who wished to avoid liability for non-chargeable accidents. That is, the carriers had at first sought only to avoid liability for pure accidents for which they were not responsible. The Court approved of these clauses. The difference between the older

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 379–80.

46. *Id.* at 380–81.

clauses and this new variety was that the older exemptions were just and reasonable because they did not amount to an abandonment of the carrier's obligations to the public.⁴⁷ The Court recognized that standardized forms were being used to work a change.

They stated:

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.⁴⁸

This is a remarkable foreshadowing of what standardized contracts are today and offers support for the claims made in this Article. We should not allow the appearance of bargaining, even when presented in an objective form, to override the basic sense of justice inherent in contract law. Contract law calls us to enforce promises because they carry the imprimatur of assent. We need not throw out objectivity, but we should be particularly vigilant to the absence of assent in standardized transactions like the one in *Lockwood*. Standard forms allow abuses to develop. Although they may begin as carefully and consciously crafted terms, their repeated use routinizes them and diminishes their thoughtfulness. The routine is then further transformed as small and even insubstantial mutations occur. At some point the mutations accumulate and mark a radical break from the expected. It is this element of surprise that is both inherent in their use and essential to their economy. Some would say there is a duty to read.⁴⁹ This

47. *Id.* at 381.

48. *Id.* at 381–82.

49. There are certainly some courts that disagree with this open approach. At least one court has unapologetically rejected unconscionability founded on the failure to read or understand by the weaker party in a very sophisticated arrangement. The Seventh Circuit has taken this much sterner approach to the unconscionability doctrine. In *Dugan v. R.J. Corman R.R. Co.*, Dugan brought suit on behalf of the railroad's employees alleging a failure to make

Article asks: Should there not also be a duty not to abuse where the drafter can hide unfair surprises?⁵⁰

Standard forms create tension in an evolving economy. Standardization saves transactional costs.⁵¹ Yet standardization tends toward rigidity in order to maximize those transactional savings. Meanwhile goods and services change and the seller gains sophistication as sales transactions accumulate. The seller, as contract drafter, stays ahead of the expectations of its consumers by the sheer volume of information he obtains about the good or service. Standardized forms will trail the knowledge curve of the seller unless the forms integrate the changing information. If they do integrate change, they will drag with them the substantive terms of the bargain. This means that the consumer becomes a reluctant or uninformed subject, an ongoing experiment, a laboratory mouse, as was Mr. Lockwood. If sellers stretch to accommodate new

contributions to an ERISA plan that were required by the collective bargaining agreement with the union. 344 F.3d 662, 664 (7th Cir. 2003). The question was one of pension contributions for “casual employees.” *Id.* The question hinged on a clause in the contract defining “casual employee” and whether this definition, which was spelled out in a “boilerplate” provision, was affected by prior agreements between the parties. *Id.* at 667. The court, in examining the provision, rejected Dugan’s argument that the provision was unenforceable because it was “boilerplate.” *Id.* The court said “there is no ‘mere boilerplate defense’ to a suit for breach of contract any more than there is a ‘fine print’ or ‘I didn’t read it’ defense.” *Id.* The court explained this by saying: “allowing such defenses would be a throwback to the era of exaggerated concern with the supposed one-sidedness of form or standard contracts denigrated as ‘contracts of adhesion.’” *Id.* at 668. The court then further explained:

Widespread judicial suspicion of the form contract—the dreaded “contract of adhesion,” the contract that is offered by the authoring party on a take it or leave it basis rather than being negotiated between the parties . . . has never crystallized . . . in a rule making such contracts unenforceable, on grounds of fraud or duress or unconscionability or mistake or what have you, or even presumptively unenforceable Although the vagueness of the concept of unconscionability may seem to place contracts of adhesion under a cloud, they are generally upheld against attacks from that direction.

Id. (quoting *Northwestern Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990)).

50. *See* Restatement (Second) of Contracts § 20 (1981) (a contract is to be interpreted in accordance with the expectations of one party where the other party is aware of the misunderstanding).

51. Farnsworth, *supra* note 12, § 4.26, at 295–96.

patterns and transactions, but use standard forms, there will be inevitable stretch marks. These marks are camouflaged by law's desire for the public to see these forms as typical and ordinary. All the while the marketer introduces change, inevitable change, because commerce changes. The continued presumption of assent must at some point fail.⁵²

II. THE NEED FOR SUBJECTIVITY TO LIMIT OBJECTIVITY IN FORMATION

Illustration Four

Baffle approached Wiggle about the purchase of goods from the colonies. Wiggle agreed to provide the goods and these goods would arrive on a ship called the Pinafore. Unknown to either there were two such ships, the first sailing in October and the second in December. Baffle meant the earlier, and Wiggle intended the later.

In *Raffles v. Wichelhaus*⁵³ the seller and buyer agreed to the shipment of Indian cotton and its purchase in Liverpool upon the arrival of the ship Peerless.⁵⁴ The court determined that there was no contract.⁵⁵ The resolution turned on there being a "latent" ambiguity which was discovered through parol evidence supplied by the parties.⁵⁶ There being no basis for choosing one over the other, there was no contract.⁵⁷

Contrast this result to that in a well-know case which asks, "What is Chicken?"⁵⁸ Judge Friendly decided that there was a contract between a shipper of chicken and a Swiss importer who bought the goods it described as "chicken." On appeal, the importer wished to confine the word to mean only chickens of a certain quality on the basis that trade usage meant young chicken suitable for broiling or baking. The importer contended that a

52. *Id.*; see also Barnes, *supra* note 33, at 158-60.

53. 2 H. & C. 906, 159 Eng. Rep. 375 (Ct. of Exchq. 1864).

54. *Id.*

55. *Id.*

56. *Id.*

57. Restatement (Second) of Contracts section 20 would reach the same result. There the rule is that a misunderstanding creates no binding assent if there is a materially different meaning attached and the parties do not know of each other's meaning or have no reason to know of the other's meaning.

58. *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

broader class encompassing those generally marketed for stewing would have been called "fowl."⁵⁹ Judge Friendly did not find a misunderstanding which canceled the agreement. Instead he determined that the word should be given its ordinary or reasonable meaning absent persuasive evidence that it was used in a more specific or atypical sense.⁶⁰ Judge Friendly conceded that the word "chicken" was ambiguous;⁶¹ however, there was a failure to prove the trade usage and other evidence of extrinsic meaning was mixed.⁶² Friendly's conclusion is instructive. Because the importer failed to show the significance of his subjective meaning, the seller's subjective meaning was significant, but only because it coincided with the objective meaning of "chicken."⁶³

Where there is a misunderstanding between the parties the contract can be avoided if there are materially different meanings and those meanings are known by one of the parties, but not to the other. In this case, the importer must suffer the attribution of the ordinary meaning, the linguistic convention. It is a meaning all of us should be aware of and therefore it was incumbent upon the importer to resolve any ambiguity. It is a situation of wrongful or negligent misunderstanding. By contrast, in *Peerless*, the linguistic symbol used was a ship's proper name which was ambiguous only upon examination with specialized knowledge. The knowledge of two ships named *Peerless* was not widespread and should not necessarily have been known to either party to the cotton contract. It was not a case of wrongful or negligent misunderstanding.

Justice Holmes said:

While other words may mean different things, a proper name means one person or thing and no other In theory of speech your name means you and my name means me, and the two names are different. They are different words [H]ere the parties have said different things and never have expressed a contract.⁶⁴

For the objectivist this is a necessary theory to explain the case if its holding is to be preserved. It makes names into unmistakable

59. *Id.*

60. *Id.*

61. "Since the word 'chicken' standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation." *Id.* at 118.

62. *Id.* at 119.

63. *Id.*

64. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 418 (1899).

symbols. One is not interchangeable with another. It does not explain why the subjective inquiry was foregone. Following the Restatement of Contracts would prove much easier. The Restatement suggests that we begin with a presumption of objective meaning and set it aside where there is clearly a material difference and that difference is not the result of wrongful or negligent ignorance.⁶⁵

These cases suggest both the power and the limitations of objectivity and subjectivity. The *Raffles* case is one where the court must look at subjective intent. *Frigaliment*, the "Chicken Case," is one where the court could remain objective. Unlike *Raffles*, there was no fundamental misunderstanding in *Frigaliment*. All of the parties attributed different meanings to the word chicken and these meanings did not lead to a misunderstanding. Instead the misunderstanding was founded on a failure of the parties to recognize the other person's meaning. The analogous case in *Raffles* would have been if one of the parties had been aware of the ambiguity and chose not to address it. In *Frigaliment*, the importer, a Swiss buyer, used the term chicken which he understood to be limited to young chickens, but which he also knew was a term other people might use more broadly. In that circumstance, the objectivity principal should override any concerns about subjective intent. Notice that the effect of this is to encourage parties to clear up ambiguities where they are known to exist, but not to punish either party where the ambiguities are latent and could not have been provided for by the parties. Thus a neutral error falls neutrally.⁶⁶

III. ADHESION: A SIGN THAT OBJECTIVITY HAS NOT FULLY DIGESTED THE SUBJECTIVITY MEAL

65. Of similar import is *Oswald v. Allen*. 285 F. Supp. 488 (S.D.N.Y. 1968). In this case Dr. Oswald was denied enforcement of a contract to purchase the Swiss coin collection of Mrs. Allen. Mrs. Allen had divided her coins between the Swiss Coin Collection and the Rarity Coin Collection, but showed all of them to Dr. Oswald who thereafter negotiated a purchase of her Swiss Coin Collection. *Id.* The court denied recovery on the theory of subjective misunderstanding. *Id.* at 492. The factors are tantalizingly interspaced between *Raffles* and *Frigaliment*. Names are involved, but they are personal names assigned by Mrs. Allen. *Id.* at 489-91. There was considerable interaction, but because of a difference in native language there was little true understanding. *Id.* at 492.

66. See Restatement (Second) of Contracts § 20 (1981).

Where does the division between subjectivity and objectivity originate? These two approaches are at the core of the law's determination of which agreements to enforce. One perceptive author said:

No legal system has ever been reckless enough to make all promises enforceable. As a legal philosopher expressed, some freedom to change one's mind is essential "for free intercourse between those who lack conscience," and most of us "would shudder at the idea of being bound by every promise, the matter how foolish, without a chance of lighting increased wisdom undo past foolishness."⁶⁷

Every legal system must have some limitation on contract.⁶⁸ According to this conventional view, the limitation lies in the requirement of mutuality of obligation.⁶⁹

There are two requirements for an agreement to have mutuality. These two requirements are assent and definiteness.⁷⁰ It is in the requirement of assent that the controversy develops. Professor Williston observed that there was a common misconception that a meeting of mental attitudes between the parties was needed for contract. The conception of a metaphysical, but mutual and simultaneous understanding was referred to as a "meeting of the minds."⁷¹ This view held sway in the courts of America and England during the late eighteenth and early nineteenth centuries, but was passé by the middle of the nineteenth century.⁷² From the substantial rejection of this simple-minded approach, the conclusion is reached that the law now favors objectivity.⁷³

Unconscionability has found more notoriety of late by its inclusion in the UCC and Restatement Second.⁷⁴ However, it is adhesion that has given the law more experience in the commercial practices of merchants. Adhesion was a fictional construct used by commentators to describe what was being readily accepted by a variety of actors in industries which benefited from an economy of

67. Farnsworth, *supra* note 12, § 1.5, at 11.

68. Murray, *supra* note 12, § 3, at 4–5.

69. *Id.*

70. Farnsworth, *supra* note 12, § 3.1, at 110.

71. Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 Ill. L. R. 85, 86 (1919–20).

72. *Id.* at 85–87.

73. Murray, *supra* note 12, § 30, at 63–64.

74. U.C.C. § 2-302 (2004); Restatement (Second) of Contracts § 208 (1981).

scale. For instance, insurers, common carriers, shippers, warehousemen,⁷⁵ and employers have all been the beneficiaries of mass marketing and therefore mass or standard form contracts—the so called off-the-shelf deal. It is a doctrine that developed along with the rise of objectivity. Adhesion fits comfortably, more comfortably than unconscionability which is an external value imposed on the commercial world. Adhesion asks a basic question: Can we fit notions of economy of scale within the greater body of contract law? The basic answer is that contract can exist even if the agreement is more about take-it-or-leave-it terms than it is about the willing exchange of mutual obligation.⁷⁶ The claim, developed below, is that we must be wary of the implications in this basic answer.

Adhesion is objectivity triumphant. It is form over substance.⁷⁷ Adhesiveness alone does not void these routinized deals. To overcome the objectivity of a written or otherwise acknowledged agreement the courts require a second element. The bargain struck must denigrate some significant policy to make them unacceptable as contracts. Exculpatory clauses imposed by an employer on its employees are an example.⁷⁸ A diminishing number of courts trust agreements to place the insurable risk on one party or the other,

75. See Murray Seasongood, *Drastic Pledge Agreements*, 29 Harv. L. Rev. 277 (1915-16) (describing abusive and unfair terms which have been voided in various pledge situations including pawn brokers and bailments).

76. Restatement (Second) of Contracts § 71.

77. Professor Karl Llewellyn, the Chief Reporter for the UCC, suggested that bargains do not fit neatly into the objective, subjective model. Llewellyn expressed it this way:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few ticker terms, and abroad type of the transaction, and but one thing more. The one thing more is a blanket assent (not a specific assent) to any not unreasonable or in decent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

Llewellyn, *supra* note 15, at 370.

78. See generally K.A. Drechsler, *Validity of Contractual Provision by One Other than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8 (1948). While many courts were uncomfortable with the concept of exculpating oneself from reckless, intentional or even gross negligent conduct, others were relatively sanguine. 53 Am. Jur. § 158, 221 (1970).

allowing negligence to be shifted back and forth as a risk of employment.⁷⁹

Unconscionability has roots deep in equity. It differs from adhesion in that the court need only decide that the agreement shocks the conscience. While this has been expressed as a question of procedural and substantive limits in bargaining, no one formula has captured the audience.

Illustration Five

After the birth of her second child Patty Holder decided she needed life insurance. She went to the local Mega-Life agent and they talked. They decided on coverage split between term life and whole life, the latter having an investment return feature. They settled on the amount of coverage and an appointment for a brief physical was made. Patty wrote a check as a "binder" with the understanding that after passing the physical the coverage would be approved and the policy sent to her. No other significant terms were discussed.

This illustration suggests adhesion as opposed to unconscionability. Contracts of adhesion are the result of take-it-or-leave-it propositions that appear commercial or contractual, but are more about the relationship of the parties than they are about a negotiated bargain. Adhesion is a doctrine accumulated from the detritus of failed contracts across time. One plausible theory of adhesion's linguistic origin is the French perception of certain international agreements. There are treaties, originally negotiated by the core signatory nations, later adopted by other nations who had no part in the negotiations and therefore no direct role in crafting language and terms. Yet these non-signatory nations choose to adhere to the agreements, to enter the relationship of nation states.⁸⁰ The terminology was picked up as a term of convenience to describe standard form contracts, especially standard form contracts in the insurance industry in late nineteenth

79. *Id.* How these courts came down on one side of the issue or the other is not germane to this topic. What is important is that they sought to decide the matter as one of the limitation of contract by matters of public policy.

80. Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 Harv. L. Rev. 198, 222 n.106 (1919-1920); Farnsworth, *supra* note 12, § 4.26, at 296-97.

and early twentieth century America.⁸¹ Professor Kessler, in his landmark 1947 article, attributed the creation of the phrase "contract of adhesion" to Professor Patterson in Patterson's discussion of life insurance policies at the beginning of the twentieth century.⁸² Arthur Leff took the language and influenced our perception of the doctrine with a late twentieth century idiom. He said adhesion contracts did not involve the haggling or cooperative drafting of typical contracts, their creation being "rather of a fly and flypaper."⁸³

While much can be said about the possibility of cost savings, it cannot be ignored that contracts of adhesion can also be used to increase bargaining power. They can even be tools of oppression. It is not lack of choice alone which makes them invalid. Hence, contracts of adhesion have been examined in search of two separate elements. Early on, lack of choice in combination with a violation of public policy invalidated adhesive contracts. Later, it was lack of choice combined with unfair surprise.

Some adhesive contracts present classic situations still found in tort and contract casebooks: common carriers exculpating themselves for tortious acts,⁸⁴ employers imposing harsh terms on their employees,⁸⁵ and insurance company contracts dictated by the carrier and imposed on the client without bargaining.⁸⁶ These

81. It is said that they are the product of mass business, of standardized products and services and an attempt at economy of scale. Farnsworth, *supra* note 12, § 4.26, at 296.

82. Kessler, *supra* note 13, at 632.

83. Arthur A. Leff, *Contract as a Thing*, 19 Am. U.L. Rev. 131, 143 (1970). For instance, the typical bank account is standard among depositors as is the typical business machine. Consumers of the service want much the same features in the service as do purchasers of the business machine. Once approved for one customer, it makes sense for it to be the standard form offered by the bank. 1 Perillo, *supra* note 3, § 1.4, at 13-14.

84. *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873) (refusing to enforce an exculpation clause as to a claim by a cattle drover who was injured through the negligence of the railroad while riding as caretaker of the cattle he was shipping).

85. Attempts to exonerate the employer from liability for future negligence are generally void as against public policy. Mathew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, & Analysis*, 76 St. John's L. Rev. 5, 33 (2002).

86. See *N.Y. Cent. R.R. Co.*, 84 U.S. at 379.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit

cases can be found throughout several centuries past⁸⁷ and in legislatively identified problems within the recent five years.⁸⁸

Contracts are ubiquitous in commerce. The objective model of contract imposes no requirement that the parties actually haggle, dicker, or even agree to what is exchanged, only that there is objective assent in the seeking and giving of value in an

such a course. . . . In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover.

Id. The court then pointed out that the usual, or “tariff,” rate for cattle was three times the amount contracted so that no drover “could afford to pay such tariff rates.” *Id.*

87. Unconscionability, on the other hand, became part of our lexicon with the drafting of the UCC in the 1950s. See Farnsworth, *supra* note 12, § 1.9, at 31–35. It was the model for the Second Restatement when it was drafted in the 1970s. Restatement (Second) of Contracts section 308 and UCC section 2-302 are cut from the same cloth. Neither talks about the difference between procedural and substantive unconscionability as many would like. Neither attempts to list the factors of unconscionability. Both are understated and ambiguous. Yet they contain a very powerful concept. They call on the court to ask whether it is just and fair to enforce the contract. Although oppression and unfair surprise are mentioned in UCC section 2-302, it is apparent that the drafters were struggling to articulate the origins of the unconscionability provision rather than suggesting its limits. In this borderland of contract there are the passengers such as Mr. Lockwood, the cattle drover injured in *New York Central Railroad Co. v. Lockwood*. Mr. Lockwood had no more power to change the terms offered by the railroad than did the canners who were faced with a revolt once they had transported their workers to Alaska in *Alaska Packers’ Ass’n v. Domenico*. 117 F. 99 (9th Cir. 1902). Both involved economic duress. Both left the party under duress with no choice even though the formal exchange took place. A court can manipulate doctrine by finding a pre-existing duty and therefore no valid consideration as the court did in *Domenico*, or it can declare exculpation clauses void because they are inherently unreasonable in the context of a common carrier trying to avoid liability for its own negligence. See *N.Y. Cent. R.R. Co.*, 84 U.S. 357.

88. The Federal Trade Commission has promulgated recommendations about disclosures in on-line advertising. Jack Winn and Benjamin Wright, *Law of Electronic Commerce* § 5.08(C) (Aspen Publishers 2001). More recent still is the fracas over how on-line search engines such as Google should disclose sponsorship by some of its search results.

exchange.⁸⁹ Professor Kessler pointed out that the free enterprise system of rationality urges us toward and depends upon rationality of contracts. Agreements, even though private, should be respected as agreements by the public law. Free enterprise would struggle without some method of enforcing the private arrangements of the parties. Statutory and case law is too general and unwieldy to provide for specific resolutions of all disputes that might arise on a case-by-case basis.⁹⁰ Rather than attempt an ordering of all transactions, the law fosters broad policies and patterns and allows the parties to provide for variations consistent with these policies and patterns.⁹¹

Evolution in commerce and especially the development of economies of scale have affected the way we view contracts.⁹² Just as goods and services have become more standardized so have their agreements. Professor Kessler recognized the usefulness of adhesive contracts, but he also pointed out that they evolved in mass marketing situations such as transportation, insurance, and banking.⁹³ We should understand that adhesiveness and scale of economy are linked. They form powerful and complementary tools.⁹⁴ This does not mean that they lead to just results.⁹⁵ They

89. Farnsworth, *supra* note 12, § 4.26, at 296-97. See also Restatement (Second) of Contracts § 71 (1981).

90.

In the happy days of free enterprise capitalism the belief that contracting is law making had largely emotional importance. Law making by contract was no threat to the harmony of the democratic system. On the contrary it reaffirmed it. The courts, therefore, representing the community as a whole, could remain neutral in the name of freedom of contract. The deterioration of the social order into the pluralistic society of our days with its powerful pressure groups has needed to make the wisdom of the contract theory of the natural law philosophers meaningful to us.

Kessler, *supra* note 13, at 641.

91. *Id.*

92. *Id.* at 631.

93. *Id.* at 631. The contributions of Professors Patterson and Kessler are significant, but a bit beyond the scope of the present project. Professor Kessler said this inner marking would be better if we saw adhesion contracts as something other than contracts, yet the power of language especially use of the word contract was such that courts are not likely to stray far from the concept of the writing as a contract. The insurance field perhaps deserves credit or blame for the use of adhesion contracts and their early recognition. *Id.* at 631-32.

94. That society benefits by using standard contracts is evident early on in the insurance industry, which realized enhanced competition by the use of

still must stand or fall on their ability to fairly represent the agreement of the parties and this has long been tested by the presence of willing assent. Contracts as private law have power because the parties agree to them.⁹⁶ The further we retreat from genuine bargaining, the further we are from the fundamental power of contract as a just legal doctrine.

Illustration Six

Mr. and Mrs. Henningsen visited the local Plymouth dealer with the intention to buy a new car. After a test drive and some dickering over the price, the sales agent wrote up an offer sheet containing the bare bones of the deal. This was signed by the Henningsens and presented to the manager for his acceptance. It was accepted and then the long form contract was prepared for everyone's signature. In the fine print of the contract was the language on warranty included here in the footnotes.⁹⁷

standard contracts. This is simply the nature of the type of business involved. *Id.* At a time when most people were not even property owners, that is did not own their own residence, an insurance contract was one of the most significant writings that they entered into during their lifetimes. The standard contract was a way to express an important and complex idea in a way that could be modified and adapted from client to client without additional negotiation. Kessler credited Professor Patterson for the recognition of the pattern and use of the "contract of adhesion" in the life insurance business just after the turn of the twentieth century. *Id.*

95. *Id.* at 630–33.

96. Professor Kessler suggested it might be useful if we used a linguistic symbol other than "contract" to designate these transactions and thereby avoid indiscriminately applying ordinary rules of contract to them. *Id.* at 633. He reminded us that contracts are created by the parties through the system of free bargaining. As a result, those parties have accepted and established the contract on "footing of social and approximate economic equality." Their freedom to deal with one another makes any resulting contract a product of their freedom. *Id.* at 630. Where they lack freedom, however, there must be some obvious constraint on the dealings of the parties. Kessler suggested that contracts of adhesion should not be viewed as contracts, but he recognized that courts would inevitably do so. *Id.* at 633. This Article suggests that adhesion contracts are not just contracts of a different color, but very different animals from the typical contract. They look like what we would see if there was true bargaining, but they are not the result of bargaining as the law requires.

97. The contract language read as follows:

The manufacturer warrants each new motor vehicle (including original

The facts of *Henningsen v. Bloomfield Motors* present a nearly archetypal case in which the duty to read confronts a contract of adhesion. Clause Henningsen purchased a 1955 Plymouth sedan from Bloomfield Motors, Inc. in Bloomfield, New Jersey on May 7, 1955.⁹⁸ He purchased the car for his wife, Helen Henningsen, as a Mother's Day gift.⁹⁹ While she was present at the dealership and helped to select the car, Mrs. Henningsen was not a party to the purchase contract.¹⁰⁰ On May 19, Mrs. Henningsen was driving in Highlands, New Jersey when she heard a sharp crack from under the front of the car.¹⁰¹ The steering wheel spun in her hand, and the car veered ninety degrees to the right, hitting a highway sign and running into a brick wall.¹⁰² Mrs. Henningsen was injured and the car was totaled.¹⁰³

The terms of the automobile sale were those offered by Chrysler, the manufacturer, and Bloomfield Motors, the seller, to the buyer, on the seller's form contract. They were offered by the salesman, as agent for the seller and manufacturer.¹⁰⁴ The

equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligations under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; *this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part*, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its vehicles.

Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 74 (N.J. 1960).

98. *Id.* at 73.

99. *Id.*

100. *Id.*

101. *Id.* at 75.

102. *Id.*

103. Mr. Henningsen's claims were for property damages, medical expenses, and for loss of his "wife's society and services" as a result of the wreck. The court upheld his award of damages as derivative from his wife's claims. *Id.* at 101.

104. *Id.* at 78.

salesman had no authority to vary the terms.¹⁰⁵ There was no alternative in the marketplace because all the major American manufacturers used a standard warranty.¹⁰⁶

Most of the printing on the standard purchase form was in twelve-point block type, but six-point solid type was used in two paragraphs above the signature line.¹⁰⁷ The paragraph relevant to this brief stated, "I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am 21 years of age, or older, and hereby acknowledge receipt of a copy of this order."¹⁰⁸ No other reference was made to the terms in the above paragraph, and Mr. Henningsen testified that he did not read the six-point solid-type paragraphs above his signature.¹⁰⁹

Mr. Henningsen also did not read the express warranty on the back of the contract, which was referenced by the six-point solid type paragraph above.¹¹⁰ The terms on the back were contained in eight and one-half inches of fine print¹¹¹ and ten paragraphs consisting of a total of sixty-five lines.¹¹² The express warranty provided that it only applied to the original purchaser for ninety days or 4,000 miles and only covered the replacement of defective parts.¹¹³

What was present was a minimum of bargaining.¹¹⁴ This led to a form contract which was the instrument of the seller and, whether or not read, was a contract under the traditional duty to read doctrine.¹¹⁵ First, the court noted that "the traditional contract is the result of free bargaining of parties who are brought together by

105. *Id.* at 87.

106. *Id.*

107. *Id.* at 73.

108. *Id.* at 74. For sake of comparison, the main text of this brief is in twelve-point double-spaced font, and the endnote text is in ten-point single-spaced font. The following is the same quotation from the Henningsen contract in six-point solid-spacing font:

I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. I certify that I am 21 years of age, or older, and hereby acknowledge receipt of a copy of this order.

109. *Id.*

110. *Id.* at 74.

111. The court notes that the print was not as extreme as the six-point solid-type. The court does not state the actual point size of the type on the back of the form, but only that the type was "fine print." *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 87.

115. *Merit Music Serv., Inc. v. Sonneborn*, 225 A.2d 470, 474 (Md. 1967).

the play of the market, and who meet each other on a footing of approximate economic equality.”¹¹⁶ This environment was not present between the Henningsens and Chrysler; rather, the modern landscape of standardized mass contracts, which are used by companies of infinitely greater bargaining power to impose their terms on the weaker consumer who needs the manufacturers’ products, controlled their contract.¹¹⁷ The Henningsens were not in a position to shop around for a better warranty because all automobile manufacturers employed a similar exculpatory, express warranty.¹¹⁸ Instead of a meeting of the minds, Chrysler was able to impose its will on the Henningsens as if its will were law.¹¹⁹

But this is quite different from the insurance industry’s standard form. Standard forms began as a way to save costs where bargaining over non-controversial terms would have resulted in the standard version anyway. In early insurance practice it would have been assumed that the full policy would be unobjectionable and that if it was later discovered to contain some unexpected substance, it could be modified or the policy canceled upon objection. This is significantly different from the insurance terms and the like which gave rise to standard, form, adhesive contracts. If we had asked the Henningsens if they were interested in the warranty term the probable answer would have been “yes.” In addition, the lengths to which the manufacturer went to obscure the language and its meaning suggests a desire not to bargain and an awareness that interest would have been excited had the terms been understood. This is no longer the recognition of a predetermined and uncontested result that arose from a lack of interest. This behavior by the seller and manufacturer is suspect, as it was in the *Lockwood* case. The industry sought, in both cases, to change the substance of the bargain by adjusting obscure terms in standard contracts. It is an extraordinary imposition and an unfair surprise arrived at by disguising it as the commonplace and the routine. We might have been better off to apply some tagline such as quasi-contract to these deals which result from adhesive situations. Those who urged the use of traditional contract language won.¹²⁰

116. *Henningsen*, 161 A.2d at 86.

117. *Id.*

118. *Id.* at 87.

119. *Id.* at 86.

120. See Perillo, *supra* note 10, § 9.43, at 399–400 (discussing *Henningsen*, 161 A.2d at 95). This text claims that while there was discussion about assent in *Henningsen*, the “ultimate holding” was that it was invalid as unconscionable. *Id.* at 401. While the claim is that this is shown by the court’s refusal to consider a charge to the jury on the basis of lack of assent, this is a misplaced

By being sensitive to the origin of adhesion we can use objectivity to ask whether there really was a bargain. Contracts of adhesion are no longer merely a device to cut costs in a mass marketing situation. They are used for their substantive role of avoiding disagreements and imposing terms on the other party. *Henningsen v. Bloomfield Motors* is a good example. Bloomfield Motors was less concerned about mass marketing than it was the imposition of a substantive term by its use of the industry-wide warranty clause. This was more than mass market efficiency. It was an imposition of a harsh term. Rather than being the product of reasonable expectations, it was the product of clever advantage-taking packaged as a deal. That is not to say that the dealership did not enjoy some scale of economy by including the warranty provision in all consumer contracts as boilerplate. Surely they did. Rather, the purpose of that provision was not mass marketing and boilerplate efficiency, it was to impose a term, all the while knowing that this would occur because the buyer would be unaware or have no power to object.

IV. UNCONSCIONABILITY AS A POSSIBLE EMETIC AFTER THE OVERINDULGENCE

Unconscionability¹²¹ as a general concept has its origins in equity and has received lip service for centuries.¹²² Its acceptance

surety. *Id.* Because unenforceability on the basis of adhesion and violation of public policy are matters for the court to decide as a matter of law, it was appropriate for the court to refuse to consider a charge to the jury about a factual finding as to these matters. *Id.* The provision was void as a matter of law, not necessarily unconscionability alone, therefore no question of fact should have been presented. *Id.*

121. Black's Law Dictionary offers a definition of "unconscionability" that is divorced from the holdings of the various cases. It defines "unconscionability" as "extreme unfairness." Black's Law Dictionary 1526 (7th ed. 1999). If Black's Law Dictionary is given its due as an authority on the meaning of legal terms as drawn from the primary sources of cases and statutes, then this definition presents a telling irony. What better way to define a legal concept that is overly broad than to use overly broad substitute words. This vague definition shows not only how much room has been left for the courts to shape and mold the concept, but also how effective the drafters of the UCC were in accomplishing a shift from the pretextual to the explicit in the courts' reasoning.

122. An unconscionable contract is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Hume v. United States*, 132 U.S. 406, 411, 10 S. Ct.

as a mainstream doctrine, a ready aid in contract limitation, dates back only to its inclusion in the UCC. This is a short period of time relative to the development of contract and is even shorter when related to the length of time objectivity has been the test of assent.¹²³ This very lack of history to guide us reinforces the need for the analytical tool offered by this Article.

The Restatement Second of Contracts¹²⁴ followed the lead of the Uniform Commercial Code¹²⁵ and added a prohibition of unconscionability. Neither the UCC nor the Restatement gives a definition; at least not one which is not a self-reference. The language of this section of the UCC is straightforward though abstruse:

(1) [I]f 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 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 the unconscionable result.¹²⁶

The official comment to section 2-302 of the UCC states:

This section is intended to make it possible for the courts to police explicitly against the contracts or causes which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.¹²⁷

Professor Llewellyn and the other drafters of the UCC had transparent motives. They believed that it did more harm than good for courts to subject contracts to various manipulations to

134 (1889) (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)).

123. Murray, *supra* note 12, § 96, at 551-53.

124. Restatement (Second) of Contracts § 208 (1981).

125. U.C.C. § 2-302 (2000).

126. U.C.C. § 2-302(1).

127. U.C.C. § 2-302 cmt. 1.

achieve a result of fairness. An examination of the history of unconscionability and an examination of recent cases which apply the unconscionability doctrine reinforce the observation of the drafters. The drafters believed an explicit tool is better than a covert or even manipulative tool.¹²⁸

Professor Arthur Leff is often credited with helping develop the modern concept of unconscionability. It was he who began to analyze the unconscionability doctrine in two facets: (1) procedural unconscionability and (2) substantive unconscionability.¹²⁹ In examining the early formation of the doctrine, Professor Leff pointed to one problem, also noted by Professor Llewellyn, with the “adoption of the position that any form contract was open to clause-by-clause policing.” That

128. Many authors have grappled with the idea of unconscionability. An early commentator believed the main focus of the courts should be on the relative bargaining power of the parties. See, e.g., Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 Com. L.J. 287, 289 (2000); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. Pa. L. Rev. 485, 487 (1967); *Comment: Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2-302*, 114 U. Pa. L. Rev. 998, 999 (1966). One believes that a clarification of the doctrine of unconscionability is needed and to do so would not harm or overly restrict its application. In a recent article, one scholar argued that the concept of unconscionability has become so outdated as to be an unreliable concept for lawyers to use. Brown, *supra*, at 288–89. Evelyn Brown suggested that because of its indefinable nature, unconscionability gives no guidance to courts in its application; thus, we get inconsistent application and no basis for making future claims. *Id.* at 291. Asifa Quraishi warns that “if the law fails to develop a clear unconscionability test, then the fate of every contract will be left to the unfettered discretion of each individual judge.” Asifa Quraishi, *Comments—From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. Davis L. Rev. 187, 203 (1991). Quraishi proposes that courts look to “both the American and Islamic legal systems to improve the law of unconscionability in each.” *Id.* at 215. Quraishi states that courts should only hold a contract unconscionable when “two elements are present: (1) one of the contracting parties, through the contract, creates a potential for unearned profits (in Islamic terminology) or unjust enrichment (in Western common law terminology), especially through excessive speculation; and (2) the beneficiary of the unearned profit occupies the stronger position in an oppressive relationship between the contracting parties.” *Id.* In justifying the test, Quraishi applied it to the *Williams v. Walker-Thomas Furniture Co.* decision by saying that the first prong would be met because the contract went “beyond acceptable market practices,” and thus was excessively speculative, and the second prong would be met as it was articulated by the *Williams* court. *Id.* at 222–23.

129. Leff, *supra* note 128, at 487.

problem is, Llewellyn wrote, that "the use of form contracts is a social good."¹³⁰ He said that courts should look for something greater than just the form contract when examining procedural unconscionability; they should look for adhesion.¹³¹ Leff also referenced the need for courts to look at the difference between merchant-to-merchant and merchant-to-consumer transactions.¹³² He spoke of substantive unconscionability in terms of "imbalance" and how such a term could be judged by a court.¹³³ To him it would have been better to have a "special merchant's jury" to determine whether the provisions of a contract fit the circumstances of a particular trade.¹³⁴ In the end, Professor Leff offered a glib, but accurate assessment of the impact of section 2-302 on the sales sector: "The world is not going to come to an end."¹³⁵ So although he doubted the true effectiveness of section 2-302, he was quite sure it would not bring the form contract and its economy to a grinding halt.¹³⁶

Several of the major treatises suggest that the literature and courts' opinions focus on unconscionability as a product of two strains: procedural and substantive unfairness.¹³⁷ Courts emphasize the flexibility of the concept, but remain centered on the concepts of unfairness in the bargaining process and unfairness in the result reached by the bargaining parties.¹³⁸ Professor Leff suggested that oppression is substantive and quite distinct from surprise, which is procedural, even though the comment to section 2-302 mentions both as an apparent monolith.¹³⁹ Even Leff, who offered the two labels of substance and procedure, suggested they come from different sources and serve different masters.¹⁴⁰ Despite some criticism of his conclusions, Leff's very readable

130. *Id.* at 504.

131. *Id.* at 507.

132. *Id.*

133. *Id.* at 510.

134. *Id.*

135. *Id.*

136. *Id.* at 558.

137. Perillo, *supra* note 10, § 9.37, at 381; Farnsworth, *supra* note 12, § 4.28, at 311-12; Murray, *supra* note 12, § 96, at 556-58.

138. Murray, *supra* note 12, § 96, at 555.

139. The quote is: "The principle is one of the prevention of oppression and unfair surprise (*Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948)) and not of disturbance of allocation of risks because of superior bargaining power." U.C.C. § 2-302 official cmt. (2004).

140. Leff, *supra* note 128, at 487-88.

article has been influential in setting the terminology.¹⁴¹ Some have echoed Leff's call to carefully tread on contract freedom, in some cases using traditional libertarian concepts,¹⁴² and in others using less conventional, but interesting language.¹⁴³

141. Perrillo, *supra* note 10, § 9.37, at 381.

142. Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 Iowa L. Rev. 843 (1960). This note stated that the code section could be applied in three ways:

(1) 'unconscionability' could be narrowly restricted to its common-law meaning as developed in actions at law; (2) 'unconscionability' might be interpreted as embodying certain common-law doctrines which were developed in other areas and have not yet had general application in the law of sales; (3) the concept could be given broad application by which contractual provisions could be stricken or modified if they would be grossly unfair in the operation.

Id. The danger of the latter, the note warned, was that a liberal interpretation of unconscionability would allow courts to make new contracts for parties. *Id.* However, the author of the note also said that absolute freedom to contract "carries the seeds of the destruction of the competitive economy which it is supposed to foster." *Id.* at 844. Though the note did not focus on bargaining power, it stated that "[f]ew contracts are negotiated wherein the parties are perfectly equal in bargaining power." *Id.* The author of the note observed that some cases involved such extreme inequalities of bargaining power such that they were difficult to ignore. *Id.* The primary focus of the note, therefore, was on the flexibility of UCC section 2-302 to meet any given set of facts and to render unenforceable genuinely "unfair" contracts. *Id.* at 846. In the end, the author said that "[t]he concept should develop beyond its restricted scope at common law." *Id.* at 866. The note concluded by saying, "[t]he ultimate configurations of unconscionability will depend on the evolution of workable standards and a judicial intuition for knowing when one party has gone too far." *Id.*

143. Phillip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. Chi. L. Rev. 1513 (2003). Bridwell draws his distinctions in the philosophical concepts of positive and negative freedom. *Id.* at 1514–15. Phillip Bridwell says:

Negative freedom, in contrast to positive freedom, defines free choice solely by reference to external factors rather than examining the reasonableness of the choice. Under this concept of freedom, a court's inquiry into whether the transaction was voluntary would be limited to determinations of whether external factors improperly affected the transaction.

Id. at 1515.

Bridwell posits that if courts would quit relying on positive freedom to analyze unconscionable contracts and start using negative freedom, then the concept would have a more definite scope of application and a clear line of cases would

Leff's procedural and substantive terminology is adopted here as well. There is a slight modification however. While the terminology is of procedure and substance, one should consider that this is also a different way of stating the older question of subjective and objective view point in bargained-for exchanges. Procedural unconscionability looks into the naughtiness of the bargaining process itself and demands that we compare the results with the intentions of the parties. Parties generally understand what they are doing and have the ability to read and understand, but what they lack is the motivation to ensure that their intention is carried into the language of the deal. This is the source of the tension between the objective and subjective divisions of contracts.¹⁴⁴ If we truly believed in a pure, unadulterated, objective theory of contract we would never inquire into whether misunderstanding, duress, or fraud were involved in the transaction. Iconoclastic views of the contract, whether objective

develop. *Id.* at 1529. He says that courts should do this for two reasons. *Id.* "First, negative freedom allows clear precedent to develop by clearly defining the relevant category of criteria by which a court should evaluate free choice. Second, negative freedom limits courts' ability to decide cases based on intuitive conceptions of fairness." *Id.* He further states:

Positive freedom encourages courts to engage in an ad hoc resolution of cases because it advances a concept of the will that equates free choice with reasonable choice. Negative freedom provides a better basis for application of Section 2-302 because it limits courts' discretion in applying the doctrine of unconscionability and therefore allows clear precedent to develop.

Id. at 1531.

144. From objectivity's preeminence comes a complementary principle. Genuine assent is not needed where there is apparent assent. *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 760-61 (2nd Cir. 1946) (Frank, J., concurring). Where this leads is that the modern contract rests on an objective view that does not take into account personal, unspoken, and unsignaled preferences. Outward appearances count for much more than inward reflections and judgments. Among the many qualities they share, adhesion and unconscionability can be grouped together in this. Both express limits on the objective nature of contracts. Unconscionability in bargaining, also called procedural unconscionability, addresses some of the same territory as adhesion. *Id.* What appears to be a bargain is not because the process by which the questionable bargain was arrived is so unfair as to be a sham. *See* U.C.C. § 2-303. Objectivity represents laissez-faire policies carried as far as possible, while adhesion, unconscionability, and the other interventionist doctrines represent the activist side of the law.

or subjective, lead to ridiculous extensions of the iconic value. Some of that controversy can be assuaged by reinvigorating the doctrine of adhesion and seeing it as a complementary and coordinate part of the resistance to total objectivity. In carefully considering the issue of formation, the jury and the judge will have valuable roles in limiting abuse in both bargaining and substance. These better articulated roles will in turn relieve some of the controversy associated with the open-ended nature of the current view of unconscionability.

V. UNCONSCIONABILITY AS ADMINISTERED BY THE COURTS

There have been efforts at elaboration and simplification.¹⁴⁵ It appears that most courts agree that elements of both procedural and substantive wrongdoing must be present.¹⁴⁶ Courts have been particularly reluctant to find unconscionability where there is only procedural unconscionability without substantive unfairness as a complement.¹⁴⁷ No matter the exact proportion sought and accepted, Leff's analysis has great appeal in the court opinions.¹⁴⁸

145. See *Maxwell v. Fidelity Financial Services*, 907 P.2d 51 (Ariz. 1995), for an example of a case that places an emphasis on efforts at elaboration. One federal court has articulated seven elements that may be used in determining unconscionability. *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) (discussing *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986)). Among the elements suggested are the presence of standardized agreements, the lack of an opportunity to read and become familiar with the document, the use of fine print quality, whether the terms are substantially unfair and the relationship of the parties, which might affect assent or lead to unfair surprise or lack of notice. These attempts amount to a more elaborate articulation of the two elements dealing with procedure and substance. They are helpful in urging the court to look at all of the possibilities in both areas, but they do not contain much new discussion.

146. *Murray*, *supra* note 12, § 96, at 557.

147. The Seventh Circuit has taken a much sterner approach to the unconscionability doctrine. In *Communications Maintenance v. Motorola*, 761 F.2d 1202 (7th Cir. 1985), the court found a lack of substantive unfairness and therefore refused to find unconscionability. See *supra* note 49 and accompanying text.

148. In defining unconscionability courts have divided it into two facets: procedural and substantive. Procedural unconscionability has generally been applied to the bargaining process, while substantive unconscionability has been applied to the actual bargain. In order to determine procedural unconscionability, the Ninth Circuit stated that the court must examine the bargaining process and the circumstances which surrounded the parties at that

One of the landmark cases to discuss unconscionability was *Campbell Soup Co. v. Wentz*.¹⁴⁹ Wentz entered into a contract with Campbells which stated he was to sell his crop of Chantenay red carrots grown on fifteen acres of land.¹⁵⁰ Wentz was to deliver the carrots himself to the Campbell plant in Camden, New Jersey for a price ranging from twenty-three to thirty dollars per ton depending on the time of delivery.¹⁵¹ Wentz failed to deliver due to an increase in the market price to over ninety dollars per ton and Campbell sued to enforce the contract.¹⁵² The court pointed to equity which does not allow the enforcement of unconscionable contracts.¹⁵³ It decided that the contract was unconscionable on the whole.¹⁵⁴ Among the clauses called into question was one allowing Campbell to refuse carrots in excess of twelve tons per acre, but not allowing Wentz to sell excess carrots without the permission of Campbell.¹⁵⁵ The court called this provision, "carrying a good joke too far."¹⁵⁶

It is interesting that the court considered traditional limitations on objectivity, determining that the contract was neither illegal nor the product of duress, but that "the sum total of its provisions drives too hard a bargain for a court of conscience to assist."¹⁵⁷ Thus, in this early case, pre-UCC, one that was offered as authority for section 2-302, the traditional or manipulative doctrines were

time. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir. 2003) (applying California law). It further stated that "[a] contract is oppressive if an inequality of bargaining power between the parties precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract." *Id.* The court went on to define substantive unconscionability as whether the terms of the contract were "so one-sided as to shock the conscience." *Id.* at 1172 (quoting *Kinney v. United Healthcare Servs, Inc.*, 70 Cal. App. 4th 1322, 1329 (1999)). This determination was to be done in analyzing the contract as of the time it was made. *Id.*

149. 172 F.2d 80 (3d Cir. 1949). It was of sufficient stature that the commentators used it to justify the section on unconscionability added to the UCC in the 1950s. See U.C.C. § 2-302 official cmt. (2004).

150. *Campbell Soup Co.*, 172 F.2d at 81.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 83.

155. *Id.*

156. *Id.*

157. *Id.* at 84.

tried before the court veered from them to make a substantive review.

Williams v. Walker-Thomas Furniture Co., another landmark case, demonstrates the close connection between adhesiveness and unconscionability.¹⁵⁸ In *Williams*, the court held unconscionable a contract for the sale of furniture.¹⁵⁹ Williams, and other defendants, purchased several items from the plaintiff on installment plans.¹⁶⁰ The contract stated that all payments made would be applied on a pro rata basis to all outstanding accounts, leases, and bills the buyers had with Walker-Thomas.¹⁶¹ It also stated that upon default, Walker-Thomas could repossess all items with outstanding balances.¹⁶² The effect was that Williams would never own any piece of furniture until all had been paid off. Upon any default, seller could repossess everything ever sold to Williams.

In reviewing the contract and noting that Williams had paid \$1,400 of \$1,800 owed, the court stated they could not “condemn too strongly appellee’s conduct.”¹⁶³ The court also noted that the buyers had low income, were recipients of federal aid, and had little choice within the market place to which they had access.¹⁶⁴ The collection of circumstances—buyers’ limited choice, their difficulty reading the complex language, and the seller’s willingness to exploit—combined to make a person of little education and knowledge enter into an unreasonable agreement. It was the combination of harsh terms and the buyers’ grossly inferior bargaining position that made the contract unconscionable.¹⁶⁵ In such a case, the court said the person entering the contract was left with “no meaningful choice,” and should not have to suffer the consequences of irresponsible business practices.¹⁶⁶ The amalgam of factors present in *Williams* makes it more than just a landmark unconscionability case.¹⁶⁷ It

158. 350 F.2d 445 (D.C. Cir. 1965).

159. *Id.* at 450.

160. *Id.* at 447.

161. *Id.*

162. *Id.*

163. *Id.* at 448 (citing *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964)).

164. *Id.*

165. *Id.* at 449.

166. *Id.* at 450.

167. One author has argued that the *Williams* case has little lasting power. In a recent comment, Eben Colby wrote that it has failed to become the “powerful tool for the indigent . . . [to] guard against unfair surprise and oppression . . . that

adds much to the argument that unconscionability can come passably close to a pure adhesion situation.¹⁶⁸

Substantive unfairness distinguishes unconscionability from adhesion. Adhesion is defined by its take-it-or-leave-it approach, while unconscionability depends upon a conscience shocked by the ultimate result. The elements of procedure and substance offer more of an opportunity to ask how the harshness came about than they offer an elemental definition. An early, bold declaration of unconscionability by the New Hampshire Supreme Court illustrates this.

The court held that a large price discrepancy alone is enough to satisfy an unconscionability claim.¹⁶⁹ In *American Home Improvement, Inc. v. MacIver*, a creditor extended credit to MacIver without disclosing all of the terms of the agreement.¹⁷⁰ In

would help the common law become a leveling force in the field of form contracts." Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 Conn. L. Rev. 625, 646-47 (2002). Ten years prior to the *Williams* case, thousands of people faced writs of replevin from Walker-Thomas while, after the case, the company continued to pursue people in default with just as much vigor and "the only change being that the furniture company stopped using writs of replevin, and instead sued customers for the balance of the contract." *Id.* at 657.

168. For instance, in *Vitex Manufacturing Corp., Ltd. v. Caribtex Corp.*, the Third Circuit found that even though a large price and cost differential were present, the apparent equality in bargaining power between sophisticated parties and the availability of other options meant the contract could not be found unconscionable. 377 F.2d 795, 799 (3d Cir. 1967). In *Vitex*, the Caribtex buyer negotiated for the processing of cloth to allow for its duty-free import into the United States. *Id.* at 797. The special relationship may allow the court to manipulate the doctrine to achieve a result. One such case is *Unico v. Owen*, 232 A.2d 405 (N.J. 1967). In *Unico*, the New Jersey Supreme Court applied the principle of UCC § 2-302 to waiver of defense clauses that are common as boilerplate in provisions of negotiable instruments. *Id.* at 418. Owen executed a promissory note with Universal Stereo which was eventually negotiated to Unico. *Id.* at 406-07. Unico attempted to enforce the contract which Owen claimed to have been lacking in consideration. *Id.* The court avoided the harshness of the waiver clause by determining that Unico was not to be a holder in due course because of its close connection to Universal Stereo. *Id.* at 413. The court said the waiver clause was clearly unconscionable and enforcement would be a violation of public policy. *Id.* at 418.

169. *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886, 888 (N.H. 1964).

170. *Id.* at 886.

reviewing the value of the goods it was found that their actual value was only \$959, thus creating a cost-value difference of \$1,609.60.¹⁷¹ Cases such as this are remarkable.¹⁷² The court made no apology for its forthright examination and review of substantive fairness based on the price differential alone.¹⁷³

In determining how the concept of unconscionability should evolve, courts have taken claims on a case-by-case basis. This has given attorneys much latitude to craft contracts and to redraft them to cure shortfalls.¹⁷⁴ Some courts appear to prefer the vague test

171. *Id.* at 888. Upon this revelation the court stated that “[i]nasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features.” *Id.* at 889.

172. One commentator explored this question of pure price unconscionability and asked, “Should a contract be declared unconscionable on substantive grounds alone?” Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. Rev. 940, 943 (1986). In asking this question, Craig Horowitz proposed that courts should use tort principles in enforcing the good faith and fair dealing concept. *Id.* at 944. In examining consumer credit cases, Horowitz said simply using unconscionability is insufficient and the court should apply the covenant of good faith and fair dealing. *Id.* at 964.

173. In New York, a court has held a contract unconscionable under section 2-302 of the UCC because, among other things, salesmen defrauded consumers and charged excessive prices. *Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39, 53 (N.Y. Sup. Ct. 1966). The court never crafted or cited a test to be enforced under UCC section 2-302 other than to directly quote section 2-302 and say that “[n]o longer do we believe that fraud may be perpetrated [sic] by the cry of *caveat emptor*.” *Id.* at 54.

In *Frostifresh Corp. v. Reynoso*, a Spanish-speaking couple signed a contract that was written entirely in English and was filled with hidden charges and penalty clauses. 52 Misc. 2d 26 (N.Y. Dist. Ct. 1966). There, the defendant, Reynoso, purchased a refrigerator that had cost Frostifresh \$348 for the price of \$900 plus \$245.88 in credit charges, late charges, and attorney’s fees. *Id.* at 26. After paying one installment of \$32, Reynoso defaulted. *Id.* The court, noting “the principle is one of the prevention of oppression and unfair surprise,” refused to enforce the contract saying it was “too hard a bargain.” *Id.* at 28.

174. One court called unconscionability “an amorphous concept obviously designed to establish a broad business ethic.” *Lucier v. Williams*, 841 A.2d 907, 911 (2004) (quoting *Kugler v. Romain*, 58 N.J. 522, 543, 279 A.2d 640 (1971)). The court would further state that the conduct implied in such a business ethic is a lack of “good faith, honesty in fact and observance of fair dealing.” *Id.* Another court has said that a contract will only be held to be unconscionable

over the specific for reasons of convenience or perhaps flexibility.¹⁷⁵ Others seem reluctant because of a need to express moral or value judgments which are not amenable to elements and specifics.¹⁷⁶ What they share is a willingness to ask about

“when it is so unfair, one-sided, and oppressive that it violates all notions of fair play and justice.” *SI Communications, Inc. v. Nielsen Media Research*, 181 F. Supp. 2d 404, 412 (S.D.N.Y. 2002). See also *Mistry Prabhudas Manji Eng’g Pvt., Ltd. v. Raytheon Eng’rs & Constructors, Inc.*, 213 F. Supp. 2d 20, 26–27 (D. Mass. 2002).

175. Some courts do not use a specific test; rather they simply look at a series of factors in order to determine what constitutes unconscionability. *Sehulster Tunnels/Pre-Con v. Traylor Bros., Inc./Obayashi Corp.*, 111 Cal. App. 4th 1328, 1340, 4 Cal. Rptr. 3d 655, 665 (2003). A California court has gone so far as to say that the first element of an unconscionable contract is adhesion. *Id.* The second element requires the party seeking to avoid enforcement to “establish that a given term is so harsh and one-sided that it ‘shock[s] the conscience.’” *Id.* (quoting *Brutoco Eng’g & Constr., Inc. v. Superior Court*, 107 Cal. App. 4th 1326, 1331, 171 Cal. Rptr. 2d 866 (2003)). The state of New York has stated that if a contract is found unconscionable under UCC section 2-302 the court has “the power to refuse to enforce such an unconscionable 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.” *Pearson v. Nat’l Budgeting Sys., Inc.*, 297 N.Y.S.2d 59, 60 (App. Div. 1969). This is essentially the same treatment received under all common law and section 2-302 unconscionability claims. Another California court stated that “[a]nalysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion,” and, “[a] finding of adhesion is essentially a finding of procedural unconscionability.” *Flores v. Transamerica Homefirst, Inc.*, 93 Cal. App. 4th 846, 853, 113 Cal Rptr. 2d 376 (2001).

176. In attempting to define such an abstract concept courts have tended to lean more upon their moral values than true contract theory. One court defined an unconscionable contract as “one abhorrent to good morals and conscience.” *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 80 (Ga. App. 2000) (quoting *F.N. Roberts Pest Control Co. v. McDonald*, 208 S.E.2d 13, 16 (Ga. App. 1974)). “It is one where one of the parties takes a fraudulent advantage of another.” *Id.* Still other courts have appealed more to the inequality of bargaining power in saying that unconscionability is “an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it.” *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. Ct. App. 2003) (citing *State, Missouri Dep’t of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001) (en banc)). This court would further state “an unconscionable contract is one ‘such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the

procedure and substance, but in the end, make a judgment about fundamental fairness without the predicate of bargain failure which is central to adhesion. Unconscionability begins and ends with the conscience.

VI. APPLICATION: *ARMENDARIZ*¹⁷⁷ AND *CARNIVAL CRUISE LINES*¹⁷⁸

Illustration Seven

Amanda, a well-educated worker with some experience in the health care industry applied for a job at Wellsprings, a good-sized company specializing in referrals from health maintenance organizations and group plan insurers. The local and state economies are in a recession. Jobs are tight and there are several applicants for the single position. The application form contains the usual information-gathering questions and also a description of the job and a provision concerning arbitration as the only method for resolving any claim of wrongful termination.¹⁷⁹ Amanda is selected as the successful candidate after her interview. Salary and benefits are established and among the terms of the multi-page agreement is the same clause on arbitration. Amanda signs the agreement and later complains she was uncertain of its meaning, considered it unimportant given her need for the job, and that it is unfair as a limitation of only her rights.

A. *Armendariz v. Foundation Health Psychare Services, Inc.*¹⁸⁰

Marybeth Armendariz (Armendariz) and a co-plaintiff were employees of Foundation Health Psychare, Inc. (Foundation).¹⁸¹ Armendariz served the Foundation as a low-level supervisor; she had been employed for about a year before her position was

other.” *Id.* (quoting *Liberty Fin. Mgmt. v. Beneficial Data*, 670 S.W.2d 40, 49 (Mo. Ct. App. 1984)). In molding a test for unconscionability courts have struggled in determining how to look for something they cannot truly define. See note 174 and accompanying text.

177. *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (2000).

178. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991).

179. The full provision is reproduced *infra* note 188.

180. 24 Cal. 4th 83, 6 P.3d 669.

181. *Id.* at 91, 6 P.3d at 674.

eliminated.¹⁸² During her employment, Armendariz alleged that she received numerous, uninvited sexual advances from fellow employees and supervisors and that she was discriminated against because of her heterosexuality.¹⁸³

Armendariz's allegations included violations of the California Fair Employment and Housing Act (FEHA).¹⁸⁴ She sought to maintain the court action despite a mandatory arbitration clause that appeared twice in her hiring paperwork.¹⁸⁵ The first was in the application of employment filled out by Armendariz prior to her hire.¹⁸⁶ The second was in the employment agreement written by the Foundation and signed by Armendariz.¹⁸⁷ She alleged that the arbitration clause was unenforceable because it required her to arbitrate any wrongful termination claim, but left the Foundation free to litigate any claim against her.¹⁸⁸

182. *Id.*, 6 P.3d at 674-75.

183. *Id.* There is no evidence in the record that Armendariz was specifically targeted because she was a heterosexual. It seems more likely that her sexual orientation was included to trigger the provisions of the California Fair Housing and Employment Act (FEHA), California Government Code § 12900. This is more plausible since the California Supreme Court has ruled that same-sex harassment and discrimination is unlawful under the FEHA. *Id.* at 92, 6 P.3d at 675 n. 1 (citing *Mogilefsky v. Superior Court*, 20 Cal. App. 4th 1409, 26 Cal. Rptr. 2d 116 (1993)).

184. California Fair Housing and Employment Act (FEHA), Cal. Gov. Code § 12900.

185. *Armendariz*, 24 Cal. 4th 83, 6 P.3d 669.

186. *Id.* at 91, 6 P.3d at 675.

187. *Id.* at 91-92, 6 P.3d at 675.

188. *Id.* The arbitration clause, in relevant part, is as follows:

I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions of covenants or employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at

The trial court held that the arbitration agreement was unconscionable as a matter of law.¹⁸⁹ Rejecting Foundation's argument that any unconscionable provision should be severed and the rest of the agreement enforced, the trial court invalidated the entire agreement.¹⁹⁰ The California Court of Appeals, however, disagreed with the trial court; it held that the specific provision concerning the limitation of damages was unconscionable,¹⁹¹ but the rest of the agreement could survive if the offending provisions

law or in equity, including but not limited to reinstatement and/or injunctive relief.

Id. As a statistical aside, the author submitted this provision to the readability system included in Corel © WordPerfect 12 ©, which utilizes the Flesch-Kincaid method for determining readability. That system calculated that this provision was written at a sixteenth grade level (high school education plus a baccalaureate degree); the sentence complexity was scaled at eighty-one out of a possible 100; and the word complexity was scaled at fifty-seven out of 100. For comparison, the instructions for the 2003 1040EZ form was rated at a 10.5 grade level; sentence complexity of twenty-seven; and a word complexity of forty-two. For a general discussion of the statistical reliability of readability tests generally, see William H. DuBay, *The Principles of Readability*, available at <http://www.impact-information.com/impactinfo/readability02.pdf> (unpublished working paper) (last visited March 8, 2005).

189. *Armendariz*, 24 Cal. 4th at 92, 6 P.3d at 675. All discussion of *Armendariz*'s statutory claims and the court's holdings about whether an individual may indeed arbitrate these statutory rights has been omitted. For a detailed discussion of that portion of the opinion, see 24 Cal. 4th at 93–113, 6 P.3d at 676–89. To summarize, the California Supreme Court held that one can indeed arbitrate non-waivable statutory rights under the FEHA so long as the arbitration adheres to certain minimum “fairness” requirements: “(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the arbitration forum.” 24 Cal. 4th at 102, 6 P.3d 682 (quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (interpreting the Federal Arbitration Act, 9 U.S.C. § 1 et seq., in the context of Title VII claims)). The California Supreme Court also discussed the similarities and differences between the Federal Arbitration Act and the California Arbitration Act (Cal. Code Civ. Proc. § 1280) as an integral part of this analysis. See 24 Cal. 4th at 96–100, 6 P.3d at 678–81.

190. *Armendariz*, 24 Cal. 4th at 92–93, 6 P.3d at 675.

191. *Id.*

were stricken.¹⁹² This was the issue taken to the California Supreme Court.

The California Supreme Court applied a two-prong analysis to determine whether the arbitration agreement was unconscionable.¹⁹³ First, the court considered whether the arbitration agreement was a contract of adhesion.¹⁹⁴ The California definition of the term is, "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."¹⁹⁵ Second, if the contract is adhesive, the court considers whether (1) the contract or the particular provision does not "fall within the reasonable expectations of the weaker . . . party"¹⁹⁶ and (2) the contract or provision, even if consistent with the weaker party's expectation, is on the whole "oppressive or 'unconscionable.'"¹⁹⁷ If either factor is present, then a court can, under established rules of law, elect not to enforce the agreement.¹⁹⁸ This begs the question, "What is unconscionability?"¹⁹⁹

192. *Id.*

193. *Id.* at 113, 6 P.3d at 689. The trial court applied this same two-prong analysis in its determination. The analysis is derived from *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807 (1981).

194. *Armendariz*, 24 Cal. 4th at 113, 6 P.3d at 689.

195. *Id.* (quoting *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961)).

196. *Id.*

197. *Id.* (quoting *Neal*, 188 Cal. App. 2d at 694). Interestingly, the California Supreme Court, to this point, has failed to offer a workable definition of the term "unconscionable." Moreover, note the language, "'reasonable expectations' of the weaker party" the court uses. *Id.*

198. *Id.* The court goes to some length to stress the notion that its rule announced here, and earlier, is not capricious. The next paragraph of the opinion is devoted to setting out the California Legislature's unconscionability principle. The legislature has codified, "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." Cal. Civ. Code § 1670.5(a).

199. Although not stated explicitly in the brief, the court made the required bridge between contracts generally and arbitration agreements. First, it held that the CAA provides that courts do not have to enforce arbitration agreements when "such grounds as exist for the revocation of any contract" are present. 24 Cal. 4th at 114 (quoting Cal. Code Civ. Proc. § 1281). Additionally, the court

The court defined unconscionability as two distinct, but related, concepts: (a) procedural unconscionability and (b) substantive unconscionability.²⁰⁰ Procedural unconscionability focuses on “oppression” or “surprise” arising from the unequal bargaining power of the parties, while substantive unconscionability focuses on “overly harsh” or “one-sided” results.²⁰¹ To prevail, the aggrieved must show that both factors are present in some inversely proportional degree.²⁰²

The bulk of the court’s opinion was a careful application of the two-prong analysis to the Armendariz-Foundation agreement.²⁰³ While the court appeared eager to invalidate the arbitration provision, it seemed to curb its enthusiasm in order to avoid the criticism that the court was singling out arbitration agreements for disparate treatment as a suspect class.²⁰⁴ The court moved very carefully toward its goal, relying on well-beaten paths in precedent, legislative authority, and traditional equity.²⁰⁵

To begin, the court considered whether the arbitration agreement was adhesive. “There is little doubt that it is.”²⁰⁶

noted a United States Supreme Court decision to a similar effect. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656 (1996).

200. *Armendariz*, 24 Cal. 4th at 114, 6 P.3d at 690.

201. *Id.* Seemingly, their meaning is common knowledge such that further explanation is not necessary. It is curious, though, that substantive unconscionability is defined in terms of results since there can be an unconscionable agreement in substance that fails to produce “overly harsh” or “one-sided” results. Consider, however, that the court stated, “[e]ssentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.” *Id.* (quoting 15 Williston on Contracts § 1763A, at 226–27 (3d ed. 1972)) (emphasis added).

202. *Id.* When, for example, there is ample evidence of procedural unconscionability, a correspondingly smaller amount of substantive unconscionability is necessary and vice versa. *Id.*

203. *Id.* at 115–22, 6 P.3d at 690–96.

204. The United States Supreme Court has ruled that states cannot invalidate arbitration agreements based on state law applicable only to arbitration provisions. *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652 (1996). The California court contrasted its view with that of an Alabama case, which “flies in the face” of *Doctor’s Associates*. *Armendariz*, 24 Cal. 4th at 119, 6 P.3d at 693.

205. *Id.* at 115–19, 6 P.3d at 690–94.

206. *Id.* at 114–15, 6 P.3d at 690.

Noting the economic pressure exerted on an individual who does not usually have the luxury of shopping for employment without an arbitration requirement and the inherent, potential downside of arbitration,²⁰⁷ the court reached this conclusion easily. While arbitration is encouraged as a matter of California policy, it is not to be used as a leverage device by an employer; and when it appears to a court that arbitration is being abused, a court should step in and return fairness to the system.²⁰⁸

The court then turned to Armendariz's allegation that the arbitration agreement was substantively unconscionable because of its "lack of mutuality."²⁰⁹ Armendariz relied primarily on an earlier California Court of Appeals opinion, *Stirlen v. Supercuts, Inc.*, in which a chief financial officer's employment agreement was held unconscionable because of a clause that required him to arbitrate claims arising from his termination.²¹⁰ In *Stirlen*, the employer specifically excluded some circumstances, such as its protection of trade secrets, etc.,²¹¹ and the clause also limited the amount of damages available to the employee.²¹² Despite the employee's high-level status, the court of appeals concluded the contract was adhesive because of a lack of bargaining opportunity.²¹³ Considering the lack of the employer's obligation and the limitation of damages, the court of appeals concluded that

207. See Farnsworth, *supra* note 12. Some of the downsides of arbitration include waiver of a trial by jury, limited discovery, and limited judicial review; the upsides are efficiency, informality, and lower cost. *Armendariz*, 24 Cal. 4th at 115, 6 P.3d at 690.

208. *Id.*, 6 P.3d at 690-91 (quoting *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 989, 938 P.2d 903, 927 (1997) (Kenard, J., concurring)).

209. *Id.* at 115-16, 6 P.3d at 690-91. The court makes no mention of the procedural unconscionability in the arbitration agreement. Clearly, this is to be inferred from the adhesive nature of the contract. What is puzzling is that the two-prong analysis starts with a determination of adhesion and then moves to unconscionability, parsed into the procedural and substantive. Thus, it seems like the first prong informs or overlaps the procedural element of unconscionability required in the second prong. If this is true, then either the court will sustain an action whenever a contract of adhesion is substantively unconscionable (unlikely and in fact disclaimed in the opinion) or the court announced a superfluous (or confusing) test.

210. *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997).

211. *Armendariz*, 24 Cal. 4th at 116, 6 P.3d at 691 (citing *Stirlen*, 51 Cal. App. 4th at 1528, 60 Cal. Rptr. 2d at 142).

212. *Id.* (citing *Stirlen*, 51 Cal. App. 4th at 1529, 60 Cal. Rptr. 2d at 143).

213. *Id.* (citing *Stirlen*, 51 Cal. App. 4th at 1541, 60 Cal. Rptr. 2d at 151).

the agreement was substantively unconscionable because it lacked even a “modicum of bilaterality.”²¹⁴

Not every agreement must produce symmetrical results. But, asymmetrical results require some objective, legitimate business need over and above an employer’s desire to have a friendly forum.²¹⁵ The court also cited *Kinney v. United HealthCare Services, Inc.*,²¹⁶ which held that a unilateral arbitration agreement between an employer and an employee was substantively unconscionable for lack of mutuality. Consequently, since there was no objective, legitimate business need on which Foundation could justify the lack of mutuality, the court concluded that the arbitration agreement (like the ones in *Stirlen* and *Kinney*) was substantively unconscionable and, therefore, unenforceable.²¹⁷ While this conclusion is apparent from precedent, the court was very careful to dispel any notion that it singled out arbitration agreements as a suspect class; this justification occupied a fair amount of the court’s subsequent opinion.²¹⁸

To counter, Foundation cited cases where the “lack of mutuality” did not render an arbitration agreement illusory since

214. *Id.*

215. *Id.* at 117. Interestingly, the *Stirlen* court noted that the terms of the arbitration clause were outrageous enough “as to appear unconscionable according to the mores and business practices of the time and place.” 51 Cal. App. 4th at 1542, 60 Cal. Rptr 2d at 152 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965)).

216. 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348 (1999). The *Kinney* court was particularly harsh to arbitration and may have crossed some line. The *Kinney* court, for example, noted, “Faced with the issue of whether a unilateral obligation to arbitrate is unconscionable, we conclude that it is. The party who is required to submit his or her claims to arbitration forgoes the right . . . to have those claims tried before a jury. Further, except in extraordinary circumstances, that party has no avenue of review for an adverse decision, even if that decision is based on an error of fact or law . . .” *Id.* at 1332, 83 Cal. Rptr. 2d at 355, quoted in *Armendariz*, 24 Cal. 4th at 117, 6 P.3d at 692. The *Armendariz* court appeared to be working hard to retrench, terming these disadvantages as possible ones. 24 Cal. 4th 83, 6 P.3d 668.

217. *Id.* at 118, 6 P.3d at 692.

218. See *id.* at 118–21, 9 P.3d at 693–95. The discussion of the Alabama case, *Ex Party McNaughton*, 728 So. 2d 592 (Ala. 1998), is confusing, especially since the *Armendariz* court cites the prior Alabama case *Northcom, Ltd. v. James*, 694 So. 2d 1329 (Ala. 1997), intermittently. It appears that the California court wants to avoid singling out arbitration as a suspect class and discourages this as an interpretation of their position by using the Alabama cases as a “contra positive.”

the employers bound themselves to the determination of the arbitrator.²¹⁹ The court found these to be inapplicable since those cases, and the thrust of Foundation's argument, used "lack of mutuality" as a proxy for "lack of consideration," in the classical contract formation sense.²²⁰

In holding this arbitration agreement substantively unconscionable, the court considered only this agreement, and did not pass judgment on arbitration generally.²²¹ The essence of the holding was simply that an arbitration agreement that lacks, say, mutuality, is substantively unconscionable unless the lack of mutuality is justified with an objective, legitimate business need.²²² "It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense."²²³ Moreover, the court offered in dictum that not all claims between an employer and an employee must be arbitrated for the agreement to be enforced. Instead, when the parties "agree" that one class of dispute shall be sent to arbitration, both parties must submit to that jurisdiction.²²⁴

In the final part of the opinion, the court considered whether the unconscionable provisions of the arbitration agreement could be separated from the rest allowing the other terms to be saved.²²⁵ To aid its determination the court analogized it to separating illegal provisions from a contract and enforcing the rest of the agreement.²²⁶ The court, however, offered two reasons why severance was impractical in this situation.²²⁷ First, there were

219. *Id.* at 118, 6 P.3d at 692. It seems that Foundation incorrectly used the traditional definition of "lack of mutuality" as being a harbinger for lack of consideration. The court dispelled this notion. *Id.*

220. *Id.* at 119, 6 P.3d at 693.

221. *Id.* at 121, 6 P.3d at 694.

222. *Id.*

223. *Id.* at 120, 6 P.3d at 693.

224. *Id.*, 6 P.3d at 694. Quotations are the author's, supplied for lack of a better word since the parties do not agree, by definition, in the classical sense to a contract of adhesion.

225. *See generally id.* at 121-27, 6 P.3d at 695-99.

226. *Id.* at 122, 6 P.3d at 695.

227. *Id.* at 124-25, 6 P.3d at 696-97. In instances where the court could first find the original purpose or subject of the agreement and effectively separate the illegal (or unconscionable) portions from the rest, California courts have opted for severance. *Cf. Keene v. Harling*, 61 Cal. 2d 318, 38 Cal. Rptr. 513 (Cal. 1964) (allowed severance because the value of the illegal machines could be

numerous provisions that were unconscionable.²²⁸ Removing one provision alone would not have cured the unconscionability present in the agreement. Second, the lack of mutuality permeated the agreement to such an extent that the court could not identify one single provision to strike for the cure.²²⁹ Consequently, the court would have been required to rewrite the entire agreement in order to provide some mutuality in the arbitration agreement.²³⁰ The court demurred, stressing that courts do not have “any such power under their inherent limited authority to reform contracts.”²³¹ The court noted that there was also justice in this refusal.²³² The court’s denial of reformation may have been the rejection of a token concession offered only after the employer’s failed attempt impose the one-sided bargain.

*B. Carnival Cruise Lines v. Shute*²³³

The Shutes bought cruise tickets through a travel agent in Arlington, Washington.²³⁴ The cruise was aboard the *Tropicale*, sailing from Los Angeles. The *Tropicale* sailed from Los Angeles to the waters of Mexico and returned to Los Angeles seven days

determined and the illegal consideration could be identified and effectively excluded); *Werner v. Knoll*, 89 Cal. App. 2d 474, 476–77, 201 P.2d 45 (Cal. 1948) (holding that the valid portion of an exculpatory clause in a lease agreement should be enforced, absent the illegal portions). However, when the sole object or inducement of the agreement is illegal and permeates the agreement to the degree that the illegal and the legal cannot be separated, the court should void the entire agreement. *Armendariz*, 24 Cal. 4th at 123, 6 P.3d at 696; see, e.g., *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319 (Cal. 1917) (court voided a lease purchase agreement because a provision about the transfer of a liquor license was an integral part of the agreement and illegal).

228. *Armendariz*, 24 Cal. 4th at 124, 6 P.3d at 696–97. Among these were the lack of mutuality and the limitation of damages. The court invalidated the agreement based on the lack of mutuality idea, not even considering whether the limitation on damages alone would suffice. *Id.*, 6 P.3d at 696 n.13.

229. *Id.* at 124–25, 6 P.3d 696–97.

230. *Id.* at 125, 6 P.3d 697.

231. *Id.* (citing *Kolani v. Gluska*, 64 Cal. App. 4th 402, 75 Cal. Rptr. 2d 257, 260 (1998)) (“[The] power to reform [is] limited to instances in which parties make mistakes, not to correct illegal provision.”)

232. See *id.* at 125–27, 6 P.3d at 697–98.

233. 499 U.S. 585, 111 S. Ct. 1522 (1991).

234. *Id.* at 587, 111 S. Ct. at 1524.

later.²³⁵ While on board Eulala was given a tour of the ship's galley where she tripped over a floor mat and was injured.²³⁶ When the Shutes returned to Washington they sued Carnival in the federal court for the Western District of Washington. Their claim was negligence.²³⁷ Carnival moved for summary judgment on the basis that the tickets contained a forum-selection clause and that clause required that the suit be brought in Florida.²³⁸

This was not your ordinary contracts case. The United States Supreme Court granted a writ of certiorari to address the question of whether the forum-selection clause signed by the Shutes was enforceable and constitutional.²³⁹ The Court wrote:

We granted certiorari to address the question whether the Court of Appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize.²⁴⁰

So began, and ended, the Court's discussion of the minimum contacts issue. Although not much more than a jumping-off point, it provided a boundary to the Court's discussion of forum-

235. *Id.* at 588, 111 S. Ct. at 1524.

236. *Id.*

237. *Id.*

238. *Id.* In the alternative they sought dismissal on the basis of lack of sufficient contacts to permit personal jurisdiction to be asserted by the Washington courts over the cruise line. *Id.* The district court dismissed on this alternative basis of a lack of minimum contacts. *Id.* The Ninth Circuit Court of Appeals reversed reasoning that "but for" Carnival's solicitation of business through independent travel agents there would have been no cruise for Mrs. Shute and no injury. *Id.*, 111 S. Ct. at 1524-25. This is significant. The court of appeals and the parties treated this matter as one in which the issue was the presence or absence of personal jurisdiction through minimum contacts sufficient to allow the jurisdiction consistent with principles of due process. In other words it was not the central issue nor was it of much concern that the contract specified a forum.

239. *Id.* at 589, 111 S. Ct. at 1525.

240. *Id.* at 589-90, 111 S. Ct. at 1525.

selection.²⁴¹ While the issue of enforceability was said to raise federal procedure questions rather than principles of contract law, the Court never stated how common law contract analysis should differ.²⁴² As the Court also pointed out, *Carnival Cruise Lines* was an admiralty case. Because the suit was brought in admiralty, it invoked principles of federal admiralty law, rather than the common law.²⁴³

Much of the attention of the Court and the parties focused on admiralty law and particularly the opinion in *Bremen v. Zapata Off-Shore Co.*²⁴⁴ In *Bremen*, a forum clause between two corporations doing business internationally was attacked by the American company.²⁴⁵ Zapata, the American company, sued Unterweser, a German company, in federal court in Florida over the performance of an ocean-going tow contract.²⁴⁶ The drilling rig was damaged by a storm while under tow by a ship in the Gulf of Mexico.²⁴⁷ It was then towed to Tampa, Florida on the orders of Zapata and suit was brought there by Zapata.²⁴⁸

The United States District Court in Florida refused to dismiss the action and the Fifth Circuit Court of Appeal affirmed.²⁴⁹ As a matter of contract law, the dispute was quite narrow. There was no issue of offer and acceptance, formation, and likewise no controversy over the consideration offered and accepted. While the quality of performance was at the heart of the dispute, the *Bremen* decision was about the contractual limits of setting the site

241. *Id.* The Ninth Circuit's opinion was eight and one-half pages. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1439-48 (9th Cir. 1988), *rev'd*, 499 U.S. 585, 111 S. Ct. 1522 (1991). Seven and one-half pages dealt with the due process issue of minimum contacts. *Id.* at 1439-47. Less than one full page covered the effect of the forum-selection clause. *Id.* at 1447-48. The space in the Supreme Court's majority opinion devoted to the issue of due process, minimum contacts, was less than a full paragraph. *Carnival Cruise Lines*, 499 U.S. at 589-90, 111 S. Ct. at 1525. Seven pages addressed the validity of the forum-selection clause. *Id.* at 589-97, 111 S. Ct. at 1525-29.

242. *Id.*

243. *Id.* at 590, 111 S. Ct. 1525.

244. 407 U.S. 1, 92 S. Ct. 1907 (1972).

245. *Carnival Cruise Lines*, 499 U.S. at 591, 111 S. Ct. at 1526.

246. *Id.*

247. *Id.*

248. *Id.* The district court denied Unterweser's motion to dismiss based on the forum-selection clause which called for resolution of disputes in the London Court of Justice. *Id.*

249. *Id.*

for the resolution of the substantive dispute over quality.²⁵⁰ Thus, *Bremen* presented a relatively clean-cut discussion of the validity of a forum-selection clause negotiated in an admiralty context in which the parties then diverged over the power of that clause. The *Bremen* Court noted that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."²⁵¹ This represented a substantial shift. No longer would forum-selection clauses be disfavored for the sole reason that they denied a court jurisdiction. Instead, they would be enforced unless "enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."²⁵² Absent "some compelling and countervailing reason it should be honored by the parties and enforced by the courts" as it was the choice of experienced and sophisticated businessmen dealing at arm's length.²⁵³

How sophisticated bargaining equates with reasonableness was not made clear; but, it is apparent that the equation (free bargaining by sophisticated and experienced business people = reasonableness) was made,²⁵⁴ and that equation was carried over to *Carnival*.²⁵⁵ While the Court did not offer a complete definition of reasonableness, it did emphasize several factors in its reversal of the lower courts and its enforcement of the forum-selection clause.²⁵⁶

The Supreme Court refused to adopt the court of appeal's determination that the Shute-Carnival Cruise Line clause was unenforceable under the holding in *Bremen*. The Court began by explaining the cruise line's special interest in including a forum-selection clause in the contract. That interest was to establish Florida as the forum to prevent hundreds of passengers from suing in multiple jurisdictions over a catastrophic incident at sea. The Court also offered a neutral reason arguing that limiting the forum to Florida reduced cost for both parties, providing certainty as to

250. *Id.* at 591-95, 111 S. Ct. at 1526-28.

251. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1915-16 (1972).

252. *Id.* at 10, 92 S. Ct. at 1913.

253. *Id.* at 12, 92 S. Ct. at 1914.

254. *Id.* at 10-12, 92 S. Ct. at 1913-14.

255. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591, 111 S. Ct. 1522, 1526 (1991).

256. *Id.*

where the lawsuit would be brought.²⁵⁷ And last, the Court offered a rationale of passenger benefit.²⁵⁸

The Court then discussed the reasonableness of the forum selection clause in the context of this commercial setting. The Court noted the likelihood that a forum-selection clause would reduce prices. It also noted the overwhelming burden for the cruise line to defend suits in a multitude of jurisdictions.²⁵⁹ The majority wrote, “[F]inally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”²⁶⁰ In other words, the Court appeared sanguine about the enforcement of a clause that was not bargained for and perhaps not even known by the passengers because of the likelihood that it would produce savings.²⁶¹

Much of *Carnival Cruise Lines* can be explained as a too-quick conclusion about reasonableness. In part this is understandable

257. *Id.* at 593–94, 111 S. Ct. at 1527.

258. The Court asserted that the forum-selection clause reduced fares by reflecting the savings that the cruise line would enjoy by limiting the forum to Florida. *Id.* at 594, 111 S. Ct. at 1527. The Supreme Court did not take the position that forum-selection clauses are not subject to the usual review for fairness. Instead, it concluded that this clause was not the product of bad faith and was fair. *Id.* at 595, 111 S. Ct. at 1528. In addition, the Court rejected the Ninth Circuit’s finding that the Shutes were financially and physically incapable of pursuing their case in Florida. *Id.* at 594, 111 S. Ct. at 1528. In what can only be called a remonstrative slap at the lower court, Justice Blackmun wrote, “the Court of Appeals’ conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience. Furthermore, the Court of Appeals did not place in proper context this Court’s statement in *Bremen* that ‘the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause.’” *Id.* On the positive side of the ledger the Court offered the economic function of lowering costs and the apparent good faith of the cruise line in limiting plaintiffs to the Florida forum. *Id.* at 593–95, 111 S. Ct. at 1527–28.

259. *Id.* at 593–94, 111 S. Ct. at 1527.

260. *Id.* at 594, 111 S. Ct. at 1527.

261. *Id.* This economic claim is controversial. Setting aside this controversial claim for the moment, the Court does not resolve the fundamental issue of whether a contract provision can be deemed to be reasonable if it is not the product of any bargaining whatsoever. Here is where the Court’s opinion is weakest in its analysis. What the Court does not do is a standard contract analysis of adhesion or unconscionability. It is not as if the Supreme Court did not have other models from past decisions in which determination was made about adhesion or unconscionability.

because of the coincidence in language of "reasonableness" in forum-selection clause analysis and the reasonableness so dominant in objective contract doctrine. Caught up in the forum selection analysis, the Court forgot the fundamental proposition that underlies *Bremen*. In *Bremen* there was a freely negotiated private agreement "unaffected by . . . overweening bargaining power."²⁶² Not so in *Carnival*. The failure was the failure to search for the presence of adhesiveness, of overweening bargaining power, and it was clearly present in abundance.

What was different in *Carnival* was the quality of the Shutes' assent. The forum-selection clause was imposed on the Shutes and therefore was neither fair nor reasonable under the standards of *Bremen*. That is not to say that in a proper case a similar forum-selection clause could not be negotiated freely and be reasonable and fair. To accomplish this, the Court needed to ask about the parties' bargaining power. Instead it asked about the substance of forum-selection clauses in general, thereby conflating substantive fairness with reasonableness. *Bremen* did not suggest this conflation which creates something akin to a test of unconscionability. *Bremen* asked about the nature of the bargaining, suggesting a conflation more akin to adhesion and fairness. The distinction between substance and procedure, between classic adhesion and the nouveau unconscionability analyses, is not given its due in *Carnival*. Parse the opinion in search of a recognition of both doctrines and the lack of reflection becomes apparent. What *Carnival* demonstrates is years of indifferent differentiation by the courts. Here is what the Court said in its closest approach to the issue:

In contrast, respondents' passage contract was purely routine and was nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of

262. *Bremen v. Zapata Off-Shore Co*, 407 U.S. 1, 12, 92 S. Ct. 1907, 1914 (1972).

Appeals' analysis seems to us to have distorted somewhat this Court's holding in *Bremen*.²⁶³

Here is a missed opportunity to recognize the influence adhesion should have in this test of reasonableness. For this reason the Ninth Circuit actually did a better job of addressing the apparent bargain by the Shutes with Carnival Cruise Lines.²⁶⁴ That court came to a quite different conclusion about its contractual effect. The circuit court noted the Shutes' claim of unreasonableness based on the parties' disparity in bargaining power. The disparity had an unreasonable impact on their ability to pursue the case on its merits.²⁶⁵ The Ninth Circuit properly set the stage by reference to *Bremen*'s test of contract validity saying that a forum-selection clause should not be set aside unless the party challenging it could clearly show its enforcement was unreasonable and unjust.²⁶⁶ The court went on to say that even if the Shutes had notice of the provision, which they did not concede, that there was nothing in the record to suggest that the Shutes could have bargained over this language. The Ninth Circuit presumed the bargain to be adhesive and then inquired as to the presence of other factors to balance out the lack of bargaining and make the forum-selection clause reasonable. It found none.

The gist of the Court's opinion is that it was a reasonable bargain because the clause was a good faith economic measure with a goal of shared savings.²⁶⁷ The Court chided the Ninth Circuit for its lack of evidence as to unreasonableness.²⁶⁸ Yet it was the Supreme Court that did not consider the clause in its full context. It was the Supreme Court that did not carefully examine all of the provisions and did not consider the implication of a nonrefundable ticket that contains terms available to the Shutes only after they had paid. A more careful examination of the ticket would not have suggested neutral or positive cost-sharing

263. *Carnival*, 499 U.S. at 593, 111 S. Ct. at 1527 (citations omitted).

264. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387–88 (9th Cir. 1990), *rev'd*, 499 U.S. 585, 111 S. Ct. 1522 (1991).

265. *Id.* at 388.

266. The Ninth Circuit's analysis focused on the actual appearance of bargaining between the parties. The court noted, "First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." *Id.*

267. *Carnival*, 499 U.S. at 593–95, 111 S. Ct. at 1527–28.

268. *Id.* at 594, 111 S. Ct. at 1528.

rationales. Such an examination would have demonstrated bad faith.²⁶⁹

1. *So Who Reads the Boilerplate Anyway?*

Even more damaging to the Supreme Court's position is the lack of support for its conclusion that the clause was offered in good faith. The quote from the Court is:

In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.²⁷⁰

This conclusion of good faith by the Court is astonishing. Carnival had attempted to fully exculpate itself from liability in another paragraph on the same page of the ticket. This attempt at full exculpation was not even mentioned in the majority opinion.

269. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 (9th Cir. 1990), *rev'd*, 499 U.S. 585, 111 S. Ct. 1522 (1991). As the Ninth Circuit notes the test according to *Bremen* had not been good faith or bad faith but rather reasonableness. *Id.* On the matter of bad faith the court noted the presence of the federal statute. The Ninth Circuit said, "because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of [the federal] statute on forum selection agreements . . . [the] statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairness of this type of contract." *Id.* n. 12. This may explain the Ninth Circuit's position regarding the reasonableness of the forum-selection clause, or rather the lack of reasonableness. Nothing in the Supreme Court opinion in *Carnival Cruise Lines v. Shute* addresses the issue of free bargaining power as Congress intended it to be addressed in statute. While the Court gives lip service to examination of the statute and the forum-selection clause it is mere lip service because of the Court's failure to look at the context of the clause and the presence of other clauses. The whole demonstrates a clear intent to exculpate Carnival in violation of the statute.

270. *Carnival*, 499 U.S. at 595, 111 S. Ct. at 1528.

Federal law, specifically 46 U.S.C. § 183(c), prohibits the owner of a passenger vessel, transporting passengers between ports of the United States or between a United States port and a foreign port, to insert an exculpatory clause for bodily injury arising out of negligence or fault of the ship owner or its agents, servants, and employees.²⁷¹ The law declares all such attempts to be null and void whether they are rules, regulations, or contractual provisions.²⁷² The federal statute also prohibits liability limitations on other attempts to lessen or weaken the rights of claimants at trial. This latter, much less specific clause was the one at issue in *Carnival*.²⁷³

There is irony in the Court's reasoning. By taking up the cudgel of contract instead of the chisel of constitutional law, some sharpness was lost. Any complete analysis of contractual intent includes an examination of the language of the parties' other provisions and then a look at the circumstances and purposes to determine what is otherwise supposed to be an objective question. What the Court offers falls short of the model. How careful was the Court's examination of intent without some accounting for the exculpatory clause that was part of the boilerplate? In the appendix to the dissent in *Carnival*, there is a reproduction of the full ticket. Remarkably, neither the majority nor minority considered or even mentioned the other terms of the contract. They looked only at Paragraph eight. Paragraph four, however, is significant and was completely ignored by the Court. A number of the clauses in Paragraph four deal with limitations of rights. What damns Carnival Cruise's intentions and yet is ignored by the Court is the clause forbidden by the federal statute. Paragraph four provides:

The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied in respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are

271. 46 U.S.C. § 183(c) (2000).

272. *See id.*

273. 499 U.S. at 596–97, 111 S. Ct. at 1528–29.

or become from time to time its employees, servants or agents and all such persons shall to this extent to be deemed the parties to this Contract.

Can one imagine a more bald-faced violation of 46 U.S.C § 183(c)? It so closely reflects the language of the statute that one might think the lawyer was consulting the federal statute when drafting a provision in violation of it. There can be no doubt about its import, its intent, or its bad faith.

If one looks at the forum-selection clause in its context, one can see that the Shutes did more than acquiesce to its inclusion. There was not a bargained-for exchange except by virtue of the objective manifestation of assent that ignores their actual knowledge and intention. One must also assume that the Shutes acquiesced to the violation of federal law and chose to limit their own right to sue.

Even acquiescence is an amazing conclusion to be drawn from the objective manifestations of the Shutes and Carnival. While the intent of Carnival was plain, the intent of the Shutes was more opaque. Yet unadulterated objectivity would give us the result the Court accepts.²⁷⁴ The Court gave its imprimatur to an outrageous violation of federal policy in an attempt to pursue a fictional intent. There is nothing about the bargaining or economic justification of shared costs or the idea of a lower-price contract to justify the violation of Congressional intent. Instead, this contract is all about the bargaining power of Carnival Cruise Lines expressed through their ability to impose terms on parties who did not know of the terms and could not have learned of them until after the nonrefundable ticket had been purchased.

One last point of confusion between forum selection and contract doctrine needs to be addressed. The majority appears to rely, at least in part, on a supposed concession of notice by the Shutes. A concession of notice of the term would suggest a

274. The Shutes essentially gave up their right to sue given the three layers of protection within the provisions of the ticket: a forum-selection clause, a statute of limitations provision limiting their rights to six months, and a filing of the multiple level of exculpation. These provisions are analogous to alternative pleading by providing that you have no right to sue, but if you should sue you will lose your rights after the passing of six months, notwithstanding the fact that if you do bring suit within six months you had better be willing to travel to Florida. How can these multiple layers of protection be seen to the Court as anything in the nature of or close to good faith on the part of Carnival Cruise Lines?

concession of acquiescence to the exculpatory clauses.²⁷⁵ The Court does more than suggest the presence of notice. It takes notice and uses it as the basis for applying the *Bremen* requirement of a freely bargained exchange.²⁷⁶ This is unjustified. The majority states:

Respondents essentially have conceded that they had notice of the forum-selection provision. Brief of respondents 26. (“The respondents do not contest the incorporation of the provisions nor [*sic*] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated”).²⁷⁷

The language from the Shutes’ brief supplies more context than the Court’s opinion:

The Forum Selection Clause Is Unenforceable Because It Was Not Freely Bargained For Between The Parties To The Contract.

275. Another author has criticized the Supreme Court’s misapplication of the unconscionability doctrine in *Carnival Cruise Lines, Inc. v. Shute*. Jeffrey A. Liesemer, Note, *Carnival’s Got the Fun . . . And the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine after Carnival Cruise Lines, Inc. v. Shute*, 53 U. Pitt. L. Rev. 1025 (1992). In his Note, Jeffrey Liesemer says forum-selection clauses in form contracts are not supposed to receive favorable presumptions and thus the Court wrongly decided *Carnival Cruise Lines, Inc. v. Shute*. *Id.* at 1029. Liesemer argues that the Shutes had no real notice although the Court claims they admitted to it in their brief. *Id.* at 1049. He also noted the Court’s missed opportunity to save the clause generally while condemning its use where the Shutes had no real opportunity to negotiate and no real choice. *Id.* at 1048. He argues that because of *Shute*, the unconscionability standard in the context of forum-selection clauses is now nearly impossible to meet; thus the Court missed an opportunity to “perpetuate the benefits of forum clauses in ‘bargained for’ agreements while avoiding the harsh result rendered in this case.” *Id.* at 1059–60.

276. *Carnival*, 499 U.S. at 595, 111 S. Ct. at 1528. This is an incredible failure on the Court’s part. This is because the Court determined that it would avoid the question of minimum contacts and forum-selection clause issues on the basis that the parties freely bargained for and assented to Florida as the only forum permitted. In other words, the Court took a concession from the minimum contacts issue, used it as the basis for the contract argument and then used the contracts issue to avoid the very constitutional law issue from which the concession is derived. This is an unfair blind-side tackling of counsel as the court below was not offered an adequate opportunity to address what became the determinative matter.

277. *Id.* at 591, 111 S. Ct. at 1526.

Petitioner spends considerable time in its brief discussing whether the forum selection clause was incorporated in the ticket and that it was reasonably communicated to the respondents. These are not relevant issues in this case. The respondents do not contest the incorporation of the provisions nor that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated. The issue is whether the forum selection clause should be enforced, not whether Respondents received the ticket.²⁷⁸

The Shutes did not concede the presence of a bargain, nor did they concede notice for bargaining purposes.²⁷⁹ Their concession was made in the context of a response to an argument the Shutes' counsel thought was irrelevant. It was a response to Carnival's argument that the forum-selection clause was enforceable as a freely-bargained contract. The brief goes on to argue:

Petitioner is a large corporation while Respondents are inexperienced and unsophisticated in business matters. The forum selection clause was part of Petitioner's standard contract that had not been negotiated or modified, unlike the contract in *Bremen*, which had been negotiated and modified. As the lower court found, "the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis." The ticket contract also seems to

278. Brief of Respondents at 26, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991) (No. 89-1647).

279. The U.S. Supreme Court suggested that the Ninth Circuit conceded the presence of notice for bargaining purposes. 499 U.S. at 590, 111 S. Ct. at 1525. This was less than honest and open. Far from conceding the presence of notice, the Ninth Circuit denied its very presence. Notice was more than just doubtful, as the Supreme Court would like us to believe. However, because notice was not critical to the Ninth Circuit's determination, they left it with the tagline of doubtful rather than electing to resolve it. 897 F.2d 370, 389. Thus, the lack of bargain, the inconvenience, and the difficulty of enforcing the forum-selection clause made its enforcement unreasonable. *Id.* In recognition of the holding of *Bremen* this makes good sense. The clause should have been set aside because the party challenging it, the Shutes, "show[ed] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972). In this case it was not about notice, but a question of reason and justice. It was the lack of bargaining that combined with the incredible hardship of litigating on the Shutes to make the clause unjust and unreasonable. *Carnival*, 897 F.2d at 388-89.

prevent a refund for an unused ticket, thereby removing the passengers[sic] right to seek a refund if the clause were offensive. In light of these vast differences between the parties' bargaining positions and the nature of the contract, the lower court correctly did not enforce the forum selection clause.²⁸⁰

This is a clear concession of notice, but only in the context of the due process inquiry. To concede adequate notice for the purpose of constitutional fairness is quite different from a concession of notice as a foundation to the bargain.²⁸¹

2. *What We Have Here is a Failure to Negotiate*

Carnival Cruise Lines should have been decided differently. It is another instance of the adhesive contract in the third group of the analytical tool offered above. The Supreme Court focused on abstract "reasonableness" without connecting it to the inquiry of assent from which it originates. This overlooked the substance of

280. Brief of Respondents at 28, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991) (No. 89-1647) (citations omitted).

281. The Ninth Circuit correctly and appropriately noted that the forum-selection clause upheld in *Bremen* was the result of a "large, complex commercial contract between two sophisticated parties." 897 F.2d at 388. There was no evidence in *Bremen* that the parties were in unequal bargaining positions or that there was anything adhesive about the contract. In essence it was a thoroughly negotiated and carefully crafted contract between two sophisticated parties. Although the Ninth Circuit could have been clearer, it is obvious that their rejection of the forum selection clause in *Carnival* had two bases. The first is that the sophisticated parties and relative bargaining power of the parties in *Bremen* makes that case a particularly bad analogy to compare with someone in the situation of the Shutes. In the Shutes' case, the provision was printed on the ticket and presented to the purchaser on a take-it-or-leave-it basis. *Id.* The court then wrote about the notice and bargaining that occurred in the Shutes' case: "Even if we assume that the Shutes had notice of the provision, [here footnote 11 adds this textual statement, 'This itself is doubtful, as the Shutes apparently did not have an opportunity to review the terms and conditions printed on the ticket until after the ticket was printed in Florida and mailed to them in Washington. Thus, the transaction was completed before the Shutes ever saw the ticket's terms and conditions.'] there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not fairly bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions." *Id.* at 389, n.11. This seems a completely fair and accurate reading of what had been said in *Bremen*.

Bremen as well as classic adhesion doctrine.²⁸² The Court noted the routineness of passage contracts and the likely standardization of their terms.²⁸³ It recognized that there will be little negotiation or even the availability of bargaining.²⁸⁴ Yet the Court concluded that the crucial business context differences made a finding of unreasonableness under *Bremen's* holding a distortion of that holding.²⁸⁵

The Court appeared sanguine about the enforcement of a clause that was not bargained for and perhaps not even known by the passengers because of the likelihood that it would produce savings that the parties would share.²⁸⁶ The only authority for this is an opinion by Judge Posner in *Northwestern Nat. Ins. Co. v. Donovan*.²⁸⁷ Judge Posner gave the traditional and forceful intuitive economic defense of forum-selection clauses. He wrote:

We may assume, since the market in surety bonds is a competitive one, that the cost savings that accrue to Northwestern from contractual terms that facilitate the enforcement of one of its bonds will be passed on, in part anyway, to the purchaser of those bonds—the enterprise in which the defendants invested—in the form of lower premium. If so, the defendants were compensated in advance for bearing the burden of which they now complain, and will reap a windfall if they are permitted to repudiate the forum selection clause.²⁸⁸

282. Here is what the court said in addressing the issue:

In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *Bremen*.

499 U.S. at 593, 111 S. Ct. at 1527 (citation omitted).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* See *supra* text accompanying note 251.

287. 916 F.2d 372 (7th Cir. 1990).

288. *Id.* at 378.

There are two things to note about this support offered by the Supreme Court. The first is that Judge Posner did not suggest that forum-selection clauses always produce savings. It is critical to Judge Posner's opinion that the parties were two business entities negotiating a transaction in which there was bargaining power and an opportunity to bargain.²⁸⁹ Judge Posner's rationale would not have been applied in the *Carnival* situation.²⁹⁰ In fact the Court's invitation of Judge Posner's opinion almost rises to the level of ironic humor. Just before reaching the conclusion that the fully bargained-for and commercial transaction in *Donovan* would produce mutual savings, Judge Posner had this to say about other situations in which mutual bargaining was lacking:

Form contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs, and the abuses to which they occasionally give rise can be controlled without altering traditional doctrines, provided those doctrines are interpreted flexibly, realistically. If a clause really is buried in illegible "fine print"—or if as in *Shute* it plainly is neither intended nor likely to be read by the other party—this circumstance may support an inference of fraud, and fraud is a defense to a contract. There was no burial in fine print here. The print is small, but it is not fine; it is large enough that even the pale copies in the appendix on appeal to be read comfortably by the author of this opinion, with his heavily corrected middle-aged eyesight.²⁹¹

Judge Posner's call to traditional contract doctrines could be the Orders of the Watch in this Article. We need not do more than

289. *Id.* at 374, 378.

290. *Id.* at 377.

291. *Id.* at 377. In an even more telling passage in the opinion Judge Posner writes:

We acknowledge a tension between our approach and that of the Ninth Circuit in *Shute v. Carnival Cruise Lines* . . . which refused to enforce a forum selection clause contained in a form contract that had not been negotiated. The opinion bristles with hostility to non-negotiated form contracts, but the facts were special. A passenger was injured on a cruise ship and brought suit. The cruise line sought to dismiss the suit on the basis of a forum selection clause printed on the passenger's ticket. The ticket had not even been mailed to the passenger until after she bought it, and as a result she had had no knowledge of the clause until the transaction was complete. If ever there was a case for stretching the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary.

Id. at 376 (citation omitted).

be sensitive to traditional contract doctrine. By proper alignment of adhesion and unconscionability, we can avoid over breadth in our characterization of assent and bargaining as objective in nature. In short, there is no valid authority for the proposition that a savings can be assumed where the parties have not freely bargained for the clause. If anything, the lack of bargaining and lack of power to bargain suggest a non-competitive situation in which any resultant harsh terms will impose greater and unforeseen costs on the weaker party. They will certainly not indicate shared savings.

The opinion's weaknesses are all the more apparent when it is contrasted with the analyses found in *Armendariz* and *Henningsen*. Let us begin with the earlier of the two doctrines, that of adhesion. Classic adhesion was much more than another way to avoid an unfair contract, much more than the twin of unconscionability that *Carnival Cruise Lines* seemed to lay out. In its origins it cuts to the basis of contract.²⁹² Contract not only hinges on this exchange of promises or a bargained-for exchange, it also rests on a fundamentally objective view of the exchange.²⁹³ The opposite view, that there must be some metaphysical meeting of the minds, some subjective agreement, has long been a very minor theme.²⁹⁴ It is the appearance to the reasonable mind, the reasonable fact-finder, that there has been an exchange which is most often determinative. It is not the actual presence of an intention to exchange that is valued.²⁹⁵

We can see how this ticket to cruise became adhesive. When the ticket arrived in the mail it was already non-refundable. If the Shutes had sat down and read their tickets carefully they might have recognized the exculpatory clauses and perhaps understood them. Any enlightenment should have brought some distress. What they would not have gained is any power to alleviate the distress, at least not through bargained-for exchange. If the Shutes cared at that point to protest the terms there was no direct evidence of Carnival's response, but there was an overwhelming inference of what would happen. The almost certain response: Buzz off.

292. Restatement (Second) of Contracts § 1 and § 71 (1981).

293. Farnsworth, *supra* note 12, § 3.6, at 117-18.

294. Murray, *supra* note 12, § 30, at 63.

295. *Id.* "The controversy has been resolved. Contract law abandoned the theory of subjective intention as unworkable." *Id.*; see also, *Lucy v. Zehmer*, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954) (subjective intent to bluff or to play a practical joke is irrelevant to the question of objective manifestation of intent to make an offer).

You have paid, sail or not as you wish. Or maybe to paraphrase the Beatles, "You've got a ticket to cruise and we don't care."

This is an adhesive contract.²⁹⁶ What appears to be bargaining is in fact completely devoid of the elements of a bargained-for exchange. This is not to say there was no contract between the Shutes and Carnival Cruise Lines; to the contrary, it is almost indisputable that there was an agreement. After all, the cruise was paid for and completed. What is far less apparent is the extent to which the terms of that agreement should be enforced.

If we begin with the assumption that this was a contract of adhesion we should then ask whether it is fair to enforce the terms. Those terms which stretch our notions of objective bargaining past the breaking point are not to be included even though the agreement will be enforced. Judge Easterbrook offered the example of a packaging inset that added \$10,000 to the price of software.²⁹⁷ A bargain concluded at one time should not be modified by later terms that bear no resemblance to the original terms and cannot be said to be fair and reasonable additions given the reasonable expectations of the parties. The context of the bargain, relationship of the parties, frequency of dealings, past performance and their relative bargaining power ought to be important factors. These factors not only enhance the reasonableness of expectations, but also give objectivity the vitality it needs to allow for changing practices and to respond to obvious grabs.

Some would start with the finding of adhesion and then address the conscionability of the forum selection clause.²⁹⁸ This is overly cumbersome and confusing. It invites a repeat of the procedural question as part of the very popular Leff two-prong-test of procedure and substance. It also ignores the vital role adhesion can continue to play in modern contract law and practice. The analysis

296. The court of appeals was unimpressed with the bargained-for exchange. The court concluded that any appearance of bargaining over the forum-selection clause was a farce. The transaction was completed; the ticket price paid, and only then was the ticket issued. By issuance, when the terms were available, the price was completely non-refundable and any notice of terms offered no opportunity to bargain. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.3d 377, 389 n. 11 (9th Cir. 1990), *rev'd*, 499 U.S. 585, 111 S. Ct. 1522 (1991).

297. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

298. *See Dillard v. Merrill Lynch*, 961 F.2d 1148, 1154-55 (5th Cir. 1992). In this case the issue was the enforceability of an arbitration agreement. The court held that "[a]dhesion contracts are not automatically void. Instead, the party seeking to avoid the contract generally must show that it is unconscionable." *Id.* at 1154.

in *Carnival Cruise Lines* may have been offered in good faith. If it was, then it amounted to a frolic and a folly within contract doctrine and can be excused only by the influence of the very constitutional law issues the Court sought to avoid.²⁹⁹ Perhaps the constitutional doctrines of minimum contacts and choice of law called up "fairness," and this was allowed to influence the contract analysis. Fairness is so close to the substantive part of the Leff two-prong that it offers an easy detour after passing through the first prong, that of procedure. Bargain equals fair procedure and then cost savings equals fairness. This demonstrates the weakness of contract doctrine as much as it points out the failings of the majority opinion.

VII. CONCLUSION

Adhesion and unconscionability share much, but should not be confused. Adhesion is a fictional concept developed by certain industries that had early experience with the economy of scale. For instance, insurers, common carriers, shippers, warehousemen, and employers have all been the beneficiaries of mass marketing and therefore mass or standard form contracts—the so-called off-the-shelf deal. It is a doctrine that has developed after the rise of objectivity and asks a basic question: Can contract exist where the agreement is more about take-it-or-leave-it terms than it is about the willing exchange of mutual obligation?

Adhesion is fundamentally a question of the triumph of form over substance. In some cases, the courts decided that substance should win out and that they would not apply the doctrine of objectivity where the subject matter was a violation of public policy. The classic follow-up question to a finding of adhesion was whether adhesive contract violated public policy. That is, adhesiveness alone did not void these untraditional deals. It was the lack of genuine bargain together with a violation of some significant policy that made them unacceptable as contracts.

Unconscionability in contracts comes from quite a different tradition. It also differs from adhesion in that the court need only decide that it would shock the conscience for the court to refuse enforcement. While this has been expressed as a question of procedural and substantive limits in bargaining, no one formula is appealing enough to draw all suitors.

299. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589, 111 S. Ct. 1522, 1525 (1991).

Adhesion should be a complement to unconscionability, but used with recognition that gross unfairness and shock-the-conscience foulness are not required to void a contract term on account of adhesiveness. Adhesion should encourage us to look behind the appearance of bargaining, even when presented in an objective form if that form overrides the basic sense of justice inherent in contract law. Contract calls us to enforce promises because they carry the imprimatur of assent. We need not throw out objectivity, but we should be particularly vigilant to the absence of assent in standardized transactions like the ones in *Lockwood*, *Henningsen*, *Shute*, and *Armendariz*. All four were opportunities for abuse by way of a standard form. Standard forms allow abuses to develop as the routine is transformed by changes which, if substantial, mark a radical break from the expected. It is this element of surprise that is both inherent in their use and essential to their economy.

Validations of standard forms create a paradox in an evolving economy. Their premise is that standardization saves transactional costs. Yet standardization requires some rigidity. But goods and services change or the sophistication of the seller increases because of the large number of transactions undertaken. To be the most efficient competitor the envelope needs to be pushed. This puts the contract drafter ahead of the expectations of society and encourages changes to stay with that forward curve. Standardized forms then are typically quite a bit beyond the leading edge of public perception. The consumer of standardized deals becomes an experimental subject.

Sellers stretch to accommodate new patterns and transactions yet they continue to use the standard form. They do so while trading on a public perception of the forms as typical and ordinary. All the while, the marketer introduces inevitable change because commerce changes. The continued presumption of assent must at some point fail

For this purpose, it is helpful to look at the assent as one of three types: (1) was the deal in the nature of a take-it-or-leave-it transaction because one of the parties was unwilling to bargain and was in a position to impose, or (2) were the circumstances or process of the transaction such that no bargaining was expected, or (3) were the circumstances or process such that, despite bargaining over some terms, ignorance of other terms was the reasonable expectation of the parties. If it is concluded that one of these three patterns fits the transaction the contract ought to be viewed as adhesive. This does not mean unenforceable. We can reinforce the objective theory of contracts and come to a fairer representation of the actual agreement if we enforce the deal, but

refuse to enforce those terms which are unfair surprises or would result in unexpected harshness. At the heart of this analytical model is a recognition of the need to resolve the tension between the objective and subjective conceptions of contract by careful examination of the quality and quantity of bargaining. It is a question of reasonable expectations and therefore interpretation, construction, and gap-filling.