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UPGRADING UNCONSCIONABILITY: A COMMON LAW ALLY FOR A DIGITAL WORLD

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To work, go to school, shop and even to communicate with each other, Americans live by the terms of myriad tech company contracts. Indeed, any time someone presses the "I agree" button that pops up on a website—the clicking of which is required to continue on—they have entered into such a contract. Rarely read by the consumer and often objectively one-sided in the company's favor, these contracts contain all the terms that will govern the consumer relationship to the company, including, among other things, how the company will control the use and sale of that consumer's personal data. Given the growing consumer discontent with these non-negotiated, digital contracts—the breadth of the data collection policies, the inadequate notice about important terms, and the apparent unequal enforcement of what should be standard (equally applied) terms—it is surprising that there has been so little pushback on their enforceability. To be sure, there are calls for comprehensive privacy legislation that targets objectionable data collection terms. While such legislation is necessary and welcome, there may be an under-utilized ally for consumers already well-established in our legal system—the doctrine of unconscionability. This Article argues that, correctly applied, unconscionability can serve as an effective support to privacy legislation and can protect consumers against egregious digital contracting practices.

This Article first sets out the historical roots of the unconscionability doctrine, including discussion of two seminal cases—Williams v. Walker-Thomas Furniture Co. *and* A&M Produce Co. v. FMC Corp*. This Article then highlights current contract concerns—such as privacy protections and discriminatory enforcement—and examines current digital contract problems concerning Facebook, YouTube, TikTok, and Uber and how unconscionability might apply to the benefit of consumers. To test if unconscionability is sufficiently robust to curb contractual excesses, this*

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Article presents and analyzes a novel and unique dataset of over 7,000 unconscionability court decisions. As part of the extensive data analysis, 814 court decisions on unconscionability claims were read, analyzed, and catalogued to determine the success and contours of the courts' decisions. Finally, this Article presents a possible legislative "upgrade" to the doctrine of unconscionability to refocus, where necessary, courts' deployment of it in cases of digital contracting.

INTRODUCTION

The news of the day is filled with concerns about the market power, influence, and capricious behavior of online platforms and applications—Facebook, Google, and Twitter to name a few. Although there is arguably much to be concerned about, the impact these large digital companies have on the day-to-day lives of most Americans is felt primarily through the legal contracts signed with these behemoths. These contracts, rarely read and often objectively one-sided, control the flow of personal data among corporations and affect the ability for individuals to earn a living. Given the widely growing consumer discontent with these privacy policies, the poor notice given as to their contractual terms, and the apparent unequal enforcement of these terms, it is surprising that there has been so little cohesive pushback on the enforceability of these standardized, nonnegotiable contracts—so-called contracts of adhesion. To be sure, there are calls for comprehensive privacy legislation that targets these objectionable terms.[1] However, while such legislation is necessary and welcome, there may be an under-utilized ally for consumers already entrenched in our legal system—the doctrine of unconscionability. Correctly applied, this doctrine can serve to support privacy legislation and to protect consumers against egregious contracting practices.[2]

Modern day courts have most often considered the doctrine of unconscionability in a review of contracts of adhesion and the doctrine has historically been used to restrain overreaching, standardized agreements by finding certain contract terms to be "unreasonable."[3] This doctrine has long roots in the common law but rose to greater prominence in the 1970s as a

1. *See infra* Part III. Examples of a statutory approach include the California Consumer Privacy Act ("CCPA") and the General Data Protection Regulation ("GDPR"). *See infra* Sections II.B.2–II.B.3.

2. *See infra* Part V.

3. *See* Shute v. Carnival Cruise Lines, 897 F.2d 377, 386–87 (9th Cir. 1990).

means of consumer protection.[4] Indeed, many first-year U.S. law students are familiar with the stark facts of *Williams v. Walker-Thomas Furniture Co.*,[5] which led the court to void a collateralization term in a rent-to-own furniture contract. In doing so, the court examined, among other things, the unequal bargaining power of the parties, the lack of notice and potential impact of the collateral term, and the level of understanding of Williams (the unconscionability claimant). When projecting these considerations onto contracts commonly available for digital platforms and applications, clear parallels arise. Both the contract in *Walker-Thomas* and many modern, standardized agreements are characterized by: (i) unequal bargaining power; (ii) a lack of notice before collecting personal data (mere browsing on a site is taken as "acceptance"); (iii) terms that are difficult to understand; and (iv) unequal or arbitrary enforcement of terms among unequally situated parties. These modern characteristics appear to echo historical concerns over the unconscionability of a standardized form contract.[6]

Because take-it-or-leave-it standardized agreements, those that permit no input or bargain from one of the contracting parties, already stretch the boundaries of conventional contractual assent, might unconscionability be a useful tool to identify those terms or contracts where the myth of acceptance is not merely stretched but severed? Wouldn't unconscionability be useful to void terms or contracts where the presumption that terms are the same for others in type and application is rebutted by direct experience? Wouldn't the application of unconscionability to void those terms and to void those contracts serve as relief to the claimant and a warning to the drafter and others?

Moreover, the benefit of a common law doctrine is that it can both support a statute enacted to define and control particular terms (such as those that touch on informational privacy) and can also be applied to new situations and terms that develop over time. Unconscionability is an attractive device for all these reasons, but there may be one problem—although taught in every law school in the United States, commentators claim that the application of unconscionability is so rare that it is, so to speak, the last refuge of fools.[7]

4. *See infra* Section I.A.

5. 350 F.2d 445 (D.C. Cir. 1965).

6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981). Indeed, standardized forms are typically found enforceable in part because the cost-saving benefits may adhere to all who enter into such contracts and at least all adherents can presume that everyone will receive the same terms and, arguably, the same treatment under those terms. *See* Brandon L. Grusd, *Contracting Beyond Copyright:* ProCD, Inc. v. Zeidenberg, 10 HARV. J.L. & TECH. 353, 361–62 (1997) (stating that the "regime of enforceable" standardized form "shrinkwrap licenses" produces "cost savings" benefits for consumers and "save[s] both producers and consumers time and money in negotiating individual contracts").

7. *See, e.g.*, Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L.

That is, of course, an empirical question and one that this Article is the first to extensively test. As shown in Part IV, while the results are mixed, the data show that reports of the death of unconscionability are most definitely premature.[8] There is a small but significant number of cases where unconscionability was successfully used to void certain non-arbitration contract terms. In addition, in several states, such as California, there are a significant number of cases where unconscionability was used to void arbitration clauses.[9] The latter use of unconscionability is all the more remarkable given there is a federal statute which directs courts to find certain arbitration clauses presumptively valid. That courts continue to apply the doctrine of unconscionability to void arbitration clauses, even in the face of a federal statute declaring legislative support for such clauses, further demonstrates the continuing vitality of the unconscionability doctrine.

Although the data show unconscionability is not dead, it cannot be denied that the doctrine may need to be reinvigorated and directed toward protecting consumers from onerous terms and the discriminatory application of digital contracts. That is not an impossible task and, as argued here, can be accomplished by simple, uncomplicated direction from state legislatures.

This Article progresses as follows. Part I addresses the historical roots of the unconscionability doctrine, including discussion of two seminal cases—*Walker-Thomas* and *A&M Produce Co. v. FMC Corp.*[10] Part II describes digital contracts and two key contractual concerns—privacy protections and discrimination among parties. This Part looks extensively at existing statutory privacy protections and the shortcomings of this regulatory scheme. Part III then looks to examples of current digital contract problems concerning Uber, TikTok, YouTube, and Facebook and examines how unconscionability might apply to the benefit of consumers.[11]

Part IV of this Article presents a novel and unique data set of all unconscionability cases listed in the Westlaw databanks.[12] This data set is then presented by year, state, and type of unconscionability claim (arbitration versus non-arbitration clauses). In addition, as part of the data analysis, 814 court decisions were read, analyzed, and catalogued to determine the number of decisions where the unconscionability claim itself was successful or aided in the court's ruling. Finally, Part V presents a possible legislative "upgrade"

REV. 751, 756–57 (2014) ("[S]ome state courts have rarely, if ever, used the unconscionability doctrine to invalidate contract provisions, whether or not the challenged provisions are associated with arbitration . . . .").

8. *See infra* Part IV.

9. *See infra* Section IV.B.

10. 186 Cal. Rptr. 114 (Cal. Ct. App. 1982). These cases are empirically studied in Part IV.

11. *See infra* Part III.

12. *See infra* Part IV.

to the doctrine of unconscionability to refocus courts' use of it in cases of digital contracting.[13]

I. DEFINING UNCONSCIONABILITY

A. Unconscionability's Early Beginnings in English Common Law

It has long been regarded by scholars and practitioners alike that "contract law, is, in its essential design, a law of strict liability."[14] While that may be true of contract law as a whole, the equitable doctrine of unconscionability has found its way into the field as a tool to invalidate terms or entire contracts deemed too unfair to enforce—essentially assigning liability to parties who participate in particularly sharp contract dealings.[15]

Previously, though English common law courts were reluctant to evaluate contracts for substantive unfairness, English courts of equity refused to enforce a contract or provision that was "so unfair as to 'shock the conscience of the court.'"[16] Rarely applied to commercial contracts, the English doctrine of unconscionability mainly served as a defense to prevent quasi-fraud, preserve estates, protect individuals in vulnerable positions, and invalidate foolish agreements, beginning in the seventeenth-century case of *Berney v. Pitt*.[17] There, Lord Jeffreys spawned the notion of an "unconscionable bargain" when he declared that a debt with a 250% interest rate granted to a plaintiff in dire straits was "corrupt and fraudulent"[18] and that "the relief of the court ought to be extended to meet with such corrupt and unconscionable practices."[19] From there, the seventeenth- and eighteenth-century English courts of equity predominantly applied the doctrine to cases involving family estates, blatantly deceitful bargaining, and dramatic betrayals.[20] While these cases laid the foundation for the doctrine of unconscionability known today, they have limited applicability in

13. *See infra* Part V.

14. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 195–96 (3d ed. 2004).

15. Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1415 (2009).

16. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 573 (3d ed. 2004).

17. (1686) 23 Eng. Rep. 620 (Ch), 2 Vern. 14. *See also* Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275, 309 (1998) (stating that "[t]he history of the equitable doctrine [of unconscionability] reveals . . . that . . . [it] served vastly different social purposes than" our modern application of it). Rather than "serv[ing] to invalidate commercial contracts that stepped outside of accepted trade norms," the "English doctrine concerned the preservation of estates, the protection of those in vulnerable circumstances, the invalidation of really stupid bargains, and the prevention of quasi-fraud." *Id.* at 309–10.

18. *See* Kamp, *supra* note 17, at 310 (quoting *Berney*, 23 Eng. Rep. at 621, 2 Vern. at 15).

19. *Id.* (quoting Twisleton v. Griffith (1716) 24 Eng. Rep. 403 (Ch), 1 P. WMS 310).

20. *Id.* at 310–12.

commercial contexts because these cases only addressed bargains between parties of unequal bargaining power that often arose under highly emotional situations.[21]

B. Unconscionability in American Courts of Equity

Derived from this early English case law, the American doctrine of unconscionability was "historically restricted to equity" and contracts scholars cited to it sparingly or not at all.[22] However, in the early nineteenth century, Chief Justice Marshall invoked unconscionability as an equitable remedy.[23] He said that while an "[e]xcess of price over value" weighed toward finding a contract unconscionable, alone it was not enough for a court to set aside a contract.[24] Rather, ordering specific performance of an allegedly unconscionable contract required more in the form of "[o]mission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness."[25] From these beginnings, unconscionability evolved from a creature of equity into a contracts principle.

Indeed, early on in its application to contract law, the principle of unconscionability locked horns with the classic contracts bargain principle—the concept that "bargains are enforceable according to their terms, without regard to fairness."[26] This dispute was implicitly recognized by American legal authorities, one of whom remarked that courts need not grant equitable relief even when "the contract itself is unfair, one-sided, unjust [or] unconscionable."[27] Though the threshold to obtain equitable relief under the doctrine of unconscionability was amorphous, it was clear that to preserve the most basic contract principles the substantive fairness of a contract could not be the sole standard for relief.[28] To set aside a contract as unenforceable under the doctrine of unconscionability, courts of equity examined the contract at the time of formation and required that the "bargain [was] usually

21. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 533 (1967).

22. Kamp, *supra* note 17, at 308–09. *See also* 21 CORPUS JURIS: EQUITY § 87 (1920) (citing to the equitable doctrine of unconscionability); 13 CORPUS JURIS: CONTRACTS §§ 214–34 (1917) (failing to establish a contractual unconscionability doctrine); 2 THEOPHILUS PARSONS, LAW OF CONTRACTS 411, 418 n.g (3d ed.1857) (mentioning the term unconscionable twice).

23. *See* Cathcart v. Robinson, 30 U.S. 264, 276–77 (1831).

24. *Id.* at 264.

25. *Id.*

26. Eisenberg, *supra* note 15, at 1415 (citing Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982)).

27. J. POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941).

28. FARNSWORTH, *supra* note 16, at 574.

infected with something more than substantive unfairness."[29] That something more was typically "an absence of bargaining ability that does not fall to the level of incapacity or with an abuse of the bargaining process that does not rise to the level of misrepresentation, duress, or undue influence."[30] Notably, this pliable doctrine allowed courts of equity to gap-fill the no man's land between rigidly defined contract defenses and mere bargaining foolishness. To the benefit of practitioners, unconscionability has remained a flexible standard, serving to address a variety of circumstances that "shock[] the conscience."[31] However, although amorphous and flexible, this doctrine is not completely without guideposts.

C. U.C.C. § 2-302: The Codification of Unconscionability

In the twentieth century, Karl Llewellyn[32] saw the need for "distinguishing merchants from housewives and from farmers and from mere lawyers" and set out to form rules designed to resolve commercial disputes in order to "achieve doctrinal unity in commercial law."[33] Llewellyn felt that when faced with unconscionable commercial contracts, courts of law lacked a straightforward approach and instead relied on "covert tools" to dismantle unfair contracts.[34] In 1949, Llewellyn unveiled his solution: Section 2-302 of the Uniform Commercial Code (U.C.C.).[35] There, Llewellyn codified the equitable doctrine of unconscionability into a commercial standard that has been coined "one of the most innovative sections of the Uniform Commercial Code" and was described by Llewellyn himself as "perhaps the most valuable section in the entire Code."[36] Through U.C.C. § 2-302, the doctrine of

29. Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 212 n.99 (1985) (citing E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 304 (1982)).

30. FARNSWORTH, *supra* note 16, at 573–74.

31. Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 471 (1995) (stating that, "[t]o meet the court's definition of unconscionability," a term or agreement must be "distinctly beyond the permissible range of advantage . . . so that the bargain shocks the conscience of the court").

32. *See* William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIA. L. REV. 119 (1993). Llewellyn, a "leading interpreter and prophet of the American Realist Movement," is "remembered as the outstanding commercial lawyer of his time." *Id.* at 120–21. "The Uniform Commercial Code, his seminal casebook on Sales, and at least a dozen articles on different aspects of commercial law and contracts are all lasting monuments to his achievements." *Id.* at 120.

33. Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1168 (1985) (quoting 1 STATE OF NEW YORK LAW REVISION COMMITTEE REPORT, HEARINGS ON THE UNIFORM COMMERCIAL CODE 108 (1965)).

34. *Id.* at 1170.

35. *Id.*

36. FARNSWORTH, *supra* note 16, at 577–78 (citations omitted).

unconscionability broke free from the courts of equity and courts of law were invited "to police bargains overtly for unfairness."[37] While U.C.C. § 2-302 was vaguely worded and governed only "transactions in goods," it provided businessmen with direction in drafting contracts and was applied as a general doctrine to many contracts beyond the sale of goods.[38] U.C.C. § 2-302(1) read:

> 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.[39]

While indeed a brilliant repurposing of an equitable principle, U.C.C. § 2-302 failed to address the dichotomy that haunted unconscionability, as Chief Justice Marshall referenced in his nineteenth-century opinion.[40] As noted, in order to reconcile (i) the bargaining principle of contracts, which permits parties to agree to contract terms as they see fit for their own circumstances, with (ii) the judicial doctrine of unconscionability, which permits a judge to impose a limit on what parties may agree to, courts have determined that the mere unfairness of terms is insufficient for the court to void the term or contract.

D. The Two-Part Analytical Structure: Substantive and Procedural Unconscionability

In his esteemed 1967 critique of the U.C.C., Arthur Leff[41] addressed the need to clarify the doctrine of unconscionability and introduced the terms "substantive unconscionability" and "procedural unconscionability," to formally categorize the elements that judges had long discussed in the doctrine's application.[42] Referencing the process of contracting and the terms of the contract respectively, Leff described procedural unconscionability as "bargaining naughtiness" and substantive unconscionability as "evils in the

37. *Id.*

38. *Id.*; *see also* Hillinger, *supra* note 33, at 1141–70.

39. U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 1952).

40. *See* Cathcart v. Robinson, 30 U.S. 264 (1831).

41. *See* Ellen A. Peters, *Arthur Leff as a Scholar of Commercial and Contract Law*, 91 YALE L.J. 230 (1981). Leff's "work in the field of commercial and . . . contract law" are best remembered by his critique of the U.C.C.'s unconscionability provision in *Unconscionability and the Code—The Emperor's New Clause*. *Id.* at 230. However, his transactional work also "transcended that article's necessarily narrow focus" by "illuminating . . . the readiness with which so-called rational contracting parties succumb to self-delusion and to greed" and "reinforc[ing] his. . . view[] that healthy skepticism [is] the proper vantage point from which to view many claims of . . . unfair dealing." *Id.* at 231–32.

42. Leff, *supra* note 21, at 487.

resulting contract."[43] Leff opined that the failure of Llewellyn and his fellow draftsmen to codify this two-part analytical structure left far too much room for judicial discretion, as judges could merely claim an "overall imbalance" existed such that the contract should be set aside.[44]

In defining procedural and substantive unconscionability, Leff and the courts turned to the language set forth in an official comment of U.C.C. § 2-302 that articulated the criteria for finding unconscionability:[45]

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . .[46]

Leff construed this as distinguishing substantive unconscionability, defined as "substantive oppression," from procedural unconscionability, defined as "procedural surprise."[47] As an example, consider a standardized employment agreement that contains a non-compete clause. Assume that the non-complete clause is to be in effect for ten years after employment ends and it prohibits the employee from working for any of the company's rivals anywhere within 100 miles of the company. Assume further that the non-compete clause was written in small print, buried deep within a long provision setting forth unrelated, employee handbook provisions. The length of time the non-compete is in effect, the vast geographic scope of the clause, and the potential breadth of the term "rival" are all likely examples of substantive unconscionability. The small font, the burying of the term with unrelated provisions, the lack of highlighting such a material employment condition are likely examples of procedural unconscionability.

Courts quickly adopted the substantive, procedural unconscionability construct, and it quickly became clear that the majority of cases would require a showing of both substantive and procedural unconscionability to invalidate a contract.[48] Indeed, while cases of "purely substantive" unconscionability exist, some courts have gone as far as insisting that elements of procedural *and* substantive unconscionability be present in order to set aside a contract or provision as unconscionable.[49] In fact, it has become the "conventional

43. *Id.*
44. *Id.* at 511, 488–516.
45. JOSEPH M. PERILLO, CONTRACTS 348–49 (7th ed. 2014).
46. U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 1952).
47. PERILLO, *supra* note 45.
48. *Id.* at 355.
49. *Id.* at 349–55.

approach" to invalidate a contract or term *only* in these instances.[50] In a slight departure from the conventional approach, many courts now use a two-prong "sliding scale approach."[51] While the conventional approach requires strong evidence of both procedural and substantive unconscionability, the sliding-scale approach merely requires a minimum of each.[52] Thus, "a relatively large quantum of one type of unconscionability can offset a relatively small quantum of the other," permitting courts to invalidate a contract or term if the evidence as a whole weighs toward finding the contract or term is unconscionable.[53]

Again, this procedural and substantive categorization of unconscionability had existed prior to Leff's clarification. But why did it take contracts scholars nearly twenty years from the inception of U.C.C. § 2-302 to demand the subsections of unconscionability be distinguished? Arguably, because since its codification, unconscionability was not of much judicial focus until it was dragged into the legal spotlight two years *prior* to Leff's article. This key case shining that spotlight was decided by Judge Skelly Wright of the D.C. Circuit, who capitalized on the doctrine's malleability and applied it to invalidate an installment sales contract granted to a poor single mother.[54]

E. Williams v. Walker-Thomas Furniture Co.

In 1965, Judge Skelly Wright penned the opinion for the seminal unconscionability case—*Williams v. Walker-Thomas Furniture Co*. There, an underprivileged single mother of seven entered into a contract to purchase

50. Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 11 (2012).

51. *Id.* at 12.

52. *See* Michelle M. Mello & Rebecca E. Wolitz, *Legal Strategies for Reigning in "Unconscionable" Prices for Prescription Drugs*, 114 NW. U. L. REV. 859, 912–13 (2020) (showing that many courts use a sliding-scale approach to unconscionability which requires there to be "some quantum of *both*" procedural and substantive unconscionability) (quoting Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U.L. REV. 1067, 1073–74 (2006)).

53. Lonegrass, *supra* note 50, at 12.

54. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1385 (2014). In the years leading up to *Walker-Thomas*, the District of Columbia courts had "unwittingly . . . become collection agents for low-income market retailers" similar to Walker-Thomas Furniture Co. *Id.* at 1407–08. During this period, "low-income retailers employed 'a marketing technique [that] include[d] actions against default as a normal matter of business rather than as a matter of last resort," which often resulted in District of Columbia courts entering "judgement for the merchant." *Id.* The decision by Judge Skelly-Wright in *Walker-Thomas* can be viewed as a reaction to this trend. *Id.*; *see also* J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. TIMES (Mar. 9, 1969), https://www.nytimes.com/1969/03/09/archives/the-courts-have-failed-the-poor-the-courts-have-failed-the-poor.html.

a stereo on credit from Walker-Thomas Furniture Co.[55] The contract contained a cross-collateral clause[56] providing that each installment payment made would be credited on a pro-rata basis to all debts owed to the store.[57] When Williams defaulted on a payment for the stereo, the furniture store claimed the right to repossess everything she purchased from it over the last five years.[58]

Just the year before the court heard *Walker-Thomas*, President Lyndon B. Johnson had declared a War on Poverty across the United States.[59] As part of this war, attorneys began providing free legal assistance to low-income Americans, and judges took notice.[60] The D.C. Circuit referenced U.C.C. § 2-302 and prior cases utilizing the common law doctrine of unconscionability, to find Walker-Thomas's installment contract unconscionable.[61] Judge Wright's opinion in *Walker-Thomas* was a unique exercise of judicial discretion that he hoped would mark a turning point in the law of the poor,[62] or the "body of decisions that defined the relationship between poor families and the government officials, landlords, and merchants who served them."[63] Once again, unconscionability served as a gap-filler in another chasm in the law. Judge Wright envisioned widespread use of the unconscionability doctrine to protect the poor from harsh practices.[64] However, the spotlight on *Walker-Thomas* drew attention to problems in the low-income marketplace, rather than on unconscionability alone, and ultimately sparked substantive legislative reform that displaced the need for unconscionability.[65] Though the impact of the case may not have

55. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447–48 (D.C. Cir. 1965).

56. *See* James Chen, *Cross Collateralization*, INVESTOPEDIA (Aug. 31, 2021), https://www.investopedia.com/terms/c/cross-collateralization.asp (stating that cross-collateralization involves using an asset that is already collateral for one loan as collateral for a second loan). The risk of cross-collateralization is that it increases the ways that the loan recipient can lose the asset. *Id.*

57. Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* William v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441, 441–42 (2004).

58. Fleming, *supra* note 54, at 1385.

59. *See* NPR Staff, *For LBJ, The War on Poverty Was Personal*, NPR (Jan. 8, 2014, 3:31 AM), https://www.npr.org/2014/01/08/260572389/for-lbj-the-war-on-poverty-was-personal.

60. Fleming, *supra* note 54, at 1385.

61. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448–50 (D.C. Cir. 1965).

62. Fleming, *supra* note 54, at 1385 (quoting Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614, 614 (1965)).

63. *Id.* at 1386.

64. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1263 (1983) (showing that the court in *Walker-Thomas* emphasized the inherent "unfair[ness]" of the contract between Walker-Thomas Furniture Co. and its low-income purchaser and "suggested [that] an inquiry into [the] commercial practice" of the party with greater bargaining power be "one element in determination of what was fair").

65. Fleming, *supra* note 54, at 1385–90.

met Judge Wright's expectations, it is one of the most famous unconscionability cases to date and elaborated on the dichotomy that Leff later titled.[66]

F. A&M Produce Co. v. FMC Corp.

The California Court of Appeals adopted the sliding-scale approach in a commercial context in the 1982 case *A&M Produce Co. v. FMC Corp*. There, by likening California case law governing a form contract used by a music promoter to a contract for tomato seeds, the Court effectively expanded the sliding-scale approach to apply to the sale of goods as well as services.[67] Moreover, the court in *A&M Produce Co.* noted that the U.C.C. did not "attempt to precisely define" the two prongs of unconscionability, thereby proceeding to do so itself.[68] Marking a shift from Leff's original characterization of the two prongs, the court defined procedural unconscionability as focusing on both oppression and surprise. Oppression arose from an inequality of bargaining power resulting in no negotiation and an absence of meaningful choice, and surprise examined the extent to which the contract's terms are "hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms."[69] Regarding substantive unconscionability, the court pointed to cases speaking of "overly-harsh" or "one-sided results," alongside objectively unreasonable or unexpected reallocations of risk.[70] However, the court was careful to point out that it considered these prongs on a sliding scale where "the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated."[71] The clear delineation of the sliding-scale approach soon gained popularity and became frequently cited amongst courts applying the doctrine of unconscionability.

G. The Restatement (Second) of Contracts and Unconscionability

While the subject of *A&M Produce Co.* was a contract for seeds, a good governed by the U.C.C., it is worth noting that only one year prior, in 1981, the American Legal Institute published the *Restatement (Second) of Contracts*, containing § 208, a statute mirroring U.C.C. § 2-302, that was

66. 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 659 (3d ed. 2010).
67. A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 117–25 (Cal. Ct. App. 1982).
68. *Id.* at 121–22.
69. *Id.* at 122.
70. *Id.*
71. *Id.*

specifically applicable to service contracts.[72] Though unconscionability had already been applied to the general law of contracts and "numerous transactions outside the coverage of Article 2 of the UCC," this enactment reinforced unconscionability's flexible application.[73] Moreover, while legislative reform subsequent to *Williams v. Walker-Thomas Furniture Co.* addressed many of the issues unconscionability would have otherwise been applied to, the doctrine of unconscionability saw another increase in use—this time to invalidate arbitration agreements.[74]

H. Unconscionability and Arbitration Agreements

As the data presented in Part IV displays, courts have continually applied unconscionability to arbitration clauses.[75] This is particularly interesting in the face of the articulated federal preference for the validity of such clauses. The Federal Arbitration Act (FAA) was enacted in 1925.[76] The key purpose of the FAA was to ensure that arbitration agreements involving a "maritime transaction or a contract . . . involving commerce" were considered "valid, irrevocable, and enforceable" except upon grounds that "exist at law or in equity for the revocation of any contract."[77] Even so, as one of the few defenses not preempted by the FAA, unconscionability once again stepped in to gap-fill the shadowy areas statutory law failed to reach.[78]

Initially, in *In re RealNetworks*,[79] the court clarified that neither an arbitration clause's presence in a form contract nor the high cost of arbitration alone was sufficient to find an arbitration provision unconscionable.[80] Later that same year, the court in *Armendariz v. Foundation Health Psychcare Service's, Inc.*[81] held that an arbitration clause in a form contract was unconscionable because it required the employee, but not the employer, to

72. *See* Lonegrass, *supra* note 50, at 8 n.32; W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 30–33, 33 n.48 (1985).

73. PERILLO, *supra* note 45, at 352.

74. Fleming, *supra* note 54, at 1386.

75. *See infra* Section IV.A.

76. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (stating that "[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements").

77. 9 U.S.C. § 2 (2015). *See generally* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2–7 (2017) (describing the Federal Arbitration Act in detail and shows that "the FAA preempts state laws or judicial rules that interfere with" arbitration agreements).

78. Fleming, *supra* note 54, at 1386 n.16.

79. In re RealNetworks, Inc., Priv. Litig., No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

80. *Id.* at *5–7.

81. 6 P.3d 669 (Cal. 2000).

arbitrate claims.[82] Subsequently, the court in *Gatton v. T-Mobile USA, Inc.*[83] decided that a form contract's arbitration clause drafted by a corporation in a position of superior bargaining power was enough to establish a minimal degree of procedural unconscionability. The court noted, however, that based on the sliding-scale approach, to be invalidated, the provision must be substantively unconscionable as well.[84] Meanwhile, in *Discover Bank v. Superior Court of Los Angeles*,[85] the California Supreme Court held that waivers of class arbitration in a consumer contract of adhesion may be unconscionable and that the FAA did not preempt prohibition of class action arbitration waivers.[86] But that decision was abrogated a few short years later in *AT&T Mobility LLC v. Concepcion*.[87] There, the Supreme Court held that the FAA did, in fact, preempt state laws prohibiting class action arbitration waivers.[88] The Supreme Court went on to clarify that, although the FAA preempted state law, the second portion of the FAA reading—"save upon such grounds as exist at law or in equity for the revocation of any contract"[89]—served as a savings clause allowing for the application of contract law defenses, including unconscionability.[90] Since then, unconscionability has been primarily used to invalidate arbitration agreements, but the doctrine's versatility begs the question: How can we use this adaptability to our advantage?

If anything can be gleaned from the history of unconscionability it is the doctrine's ability to adapt to modern circumstances. Unconscionability has leapt from the courts of equity into modern contract law, where it has repeatedly served to address issues that statutes have not. From contracts managing disposal of family estates, to commercial contracts, to modern-day arbitration agreements, unconscionability has proved itself a useful addition to any practitioner's doctrinal toolbelt.

II. DIGITAL CONTRACTS: PRIVACY, DISCRIMINATION, AND OTHER SHORTCOMINGS

When it comes to digital contracts, one option when there is societal discontent with certain contract terms—for example, the extensive collection

82. *Id.* at 689–94.

83. No. SACV 03-130 DOC., 2003 WL 21530185, at *10–13 (C.D. Cal. Apr. 18, 2003).

84. *Id.*

85. 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

86. *Id.* at 1104–18.

87. 563 U.S. at 352.

88. *Id.*

89. 9 U.S.C. § 2.

90. *Concepcion*, 563 U.S. at 336–52.

of personal information—is to statutorily void or limit the rights of companies to contract for certain types of data.[91] Statutes such as the California Consumer Privacy Act ("CCPA") are useful in establishing new rights and identifying contract provisions that will be rendered voidable under the statute. However, a statute's strength is also its weakness—in defining what cannot be contracted for, these statutes run the risk of being overly restrictive. If established, an overly broad ban on particular activities or practices may thereby limit productive exchanges that increase personal benefits and may even diminish spillover effects that increase social welfare. But statutes such as the CCPA and the European Union's General Data Protection Regulation ("GDPR") may also favor incumbent companies that can afford the associated compliance costs and litigations risks. This, in turn, may lead already dominant market players to increase their market power, creating a host of other societal concerns.

Importantly, statutes that seek to regulate an innovative, dynamic industry may quickly show their age. New technology or new business models not anticipated at the time of enactment may outpace a statute.[92] It is the simple problem of a static statute in a dynamic space. That temporal dissonance inevitably leads to the statute's decreased effectiveness over time and its potential obstruction of beneficial market changes.[93]

To illustrate how statutes may control the use of unconscionable contract terms, the discussion below examines several approaches to informational privacy in digital contracts. In general, the development of law in this area can be divided into two categories: (1) Federal Trade Commission ("FTC") "common law" derived from Section 5 of the FTC Act and (2) other privacy statutes. The two statutes examined under (2) are the GDPR[94] and

91. *See infra* Part V. Examples of a statutory approach include the California Consumer Privacy Act and the General Data Protection Regulation. *See infra* Sections III.B.2–III.B.3.

92. For example, Bitcoin, the first established cryptocurrency, was established in 2009. Bernard Marr, *A Short History of Bitcoin and Crypto Currency Everyone Should Read*, FORBES (Dec. 6, 2017, 12:28 AM), https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/?sh=429fc8243f27. However, federal and state governments in 2021 are continuing to update and increase cryptocurrency regulation. *See* Jamie L. Boucher et al., *Cryptocurrency Regulation and Enforcement at the US Federal and State Levels*, SKADDEN (Sept. 28, 2021), https://www.skadden.com/en/insights/publications/2021/09/quarterly-insights/cryptocurrency-regulation-and-enforcement-at-the-us-federal-and-state-levels.

93. Uber is an example of a company that openly defies regulations in cities where it wants to launch its services, and when the law enforcement responds, Uber actively fights to stay active in those cities. *See* PUBLIC CITIZEN, DISRUPTING DEMOCRACY 5 (2016), https://www.citizen.org/wp-content/uploads/uber-disrupting-democracy-corporate-power-report.pdf. If a local government tries to force Uber to follow standards similar to taxicab and limousine companies, Uber engages its large consumer population and lobbyists to lobby for regulations Uber supports. *Id.*

94. Although the GDPR is not the law of the United States, it is an example of the type of extensive, national privacy laws some advocates favor for the United States. *See* RACHEL F. FEFER

the CCPA. When examining these approaches through the lens of unconscionability, familiar concepts arise. For example, both the FTC common law and the privacy statutes emphasize the importance of notice and transparency so that consumers know what they are agreeing to. This is much like the analysis of procedural unconscionability. Indeed, the basis of the FTC common law is its statute which prohibits "unfair methods" and practices. The statutes in particular define what practices are permitted or outright prohibited, thereby codifying what is considered off limits or substantively unconscionable.[95] Yet as is explained throughout this Part, there are still gaps and limits to these areas of law where the doctrine of unconscionability would prove a useful ally.

A. Informational Privacy

The amount of personal data created every day is staggering and increasing every year.[96] And while the products we consume benefit us, it is no secret that online platform companies like Amazon, Facebook, and Google harvest and commercialize the information freely supplied in exchange for using their products.[97] Consequentially, the problems regarding informational privacy[98]—data about individual people—are growing continually more difficult to navigate.[99]

So too are the connections between people, their data, and notions of privacy becoming increasingly muddy. Today, as the value of individual data continues to rise,[100] information that one would think to be anonymous in

& KRISTIN ARCHICK, CONG. RSCH. SERV., IF10896, EU DATA PROTECTION RULES AND U.S. IMPLICATIONS 2 (2020), https://sgp.fas.org/crs/row/IF10896.pdf. The analysis of the GDPR is presented as an example of a different statutory solution to online privacy than the CCPA.

95. *See* Federal Trade Commission Act, 15 U.S.C. § 45(a) (2018).

96. Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=4f69c73e60ba (stating that, "[o]ver the last two years alone 90 percent of the data in the world was generated").

97. Steve Lohr, *Calls Mount to Ease Big Tech's Grip on Your Data*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/business/calls-mount-to-ease-big-techs-grip-on-your-data.html.

98. *See* Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1103 n.2 (2018) (showing that, while "technically the term 'informational privacy interest' has been invoked in relation to government collected data," it can be spoken of more broadly, assuming that an informational privacy interest exists in the myriad of ways companies track and collect data regarding individuals for any number of purposes—such as targeted advertising).

99. Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880 (2013). The complicated nature of the issue arises alongside "the ascendance of Big Data and fusion centers, the tsunami of data security breaches, the rise of Web 2.0, the growth of behavioral marketing, and the proliferation of tracking technologies." *Id.*

100. Isabella Anderson, *The Threat of Data Misuse as an Injury-In-Fact: Establishing a Uniform Framework for Constitutional Standing in the Privacy Era*, 123 W. VA. L. REV. 263, 264 (2020).

nature, such as the advertisements a person clicks on or the websites they frequent (likely outside the realm of information one needed to be overly concerned about for privacy purposes), can be used by intelligent programmers and turned into usable identifiable data of individuals.[101]

It is important to note from the outset that, as a general matter, a legal person's privacy interest in data is difficult to define because each individual, company, and even each country may define privacy interests differently.[102] Unlike the approach of other countries, where the privacy interest of citizens is recognized and actively protected,[103] the United States has largely taken an unregulated approach to informational privacy.[104] Under the current framework, the law furnishes people with various rights—namely the "rights to notice, access, and consent regarding the collection, use, and disclosure of personal data"—meant to empower individuals to direct how companies manage their data.[105] Consent is a major focal point within this self-management approach. The process by which a person manifests consent to specific terms necessitates the opportunity to understand what the terms mean. This process, however, is not respected by tech companies who aggregate, use, and sell consumer data in complex transactions either not explained or vaguely alluded to in a given standardized contract.[106] Perhaps too much of a burden has been placed upon individuals to make informed privacy choices, given the fact that most application and website users do not read privacy policies in their entirety (if at all), do not understand them if they do read them, and face the seemingly impossible task of understanding how all of their different privacy choices work together.[107] That being said,

101. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1827–28 (2011).

102. *See, e.g.*, *Factsheet on the "Right to be Forgotten" Ruling (C-131/12)*, EUR. COMM'N, http://ec.europa.eu/justice/data-protection/files/factsheets/fact-sheetdataprotection-en.pdf [https://web.archive.org/web/20140708142544/http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf] (last visited Feb. 26, 2021) (explaining a case in which a Court of Justice of the European Union ruled on data privacy interests).

103. *See id.* (explaining the Court of Justice of the European Union's recognition of the right to be forgotten in certain circumstances); *see also* Alex Hem, *Google Takes Right to be Forgotten Battle to France's Highest Court*, GUARDIAN (May 19, 2016, 8:20 AM), https://www.theguardian.com/technology/2016/may/19/google-right-to-be-forgotten-fight-france-highest-court [https://perma.cc/Z778-7MR9] (describing Google's appeal of France's recognition of the right to be forgotten).

104. *See* Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKLEY J. INT'L L. 161, 166, 166–67 n.20 (2012).

105. Solove, *supra* note 99.

106. *See, e.g.*, *Peacock Terms of Use*, PEACOCK, https://www.peacocktv.com/terms (Mar. 18, 2021) (hiding a "recipe inspired by Kevin's famous chili from The Office" in Peacock's Terms of Use).

107. *See* Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-

consent is still important. To move away from this model reduces autonomy in an area where people, should they have the full opportunity to exercise informed choices, might have different preferences.[108] So how do we address these issues?

As we look at the informational privacy approaches taken within the United States, it is clear that the technological realities of today have exceeded current privacy protections, leaving us scrambling to catch up. While we wait, there is increasing evidence that a growing number of Americans are concerned about who has access to their data and for what purpose.[109] In 2019, before the coronavirus ("COVID-19") pandemic hit, more than two-thirds of Americans felt their informational privacy was at a greater degree of risk than five years ago.[110] Additionally, opting out of using products based on privacy concerns is an increasing reality for many Americans.[111]

B. Current Consumer Protections: Sometimes Helpful but Incomplete

Modern concerns over individual privacy in the digital world have facilitated the development of a large and diverse body of law surrounding it. Through the examination of this already existing statutory infrastructure, with particular discussion of the various existing legal protections and their limitations, the role unconscionability could play in this area will become apparent. Applied in the right way, unconscionability can bolster consumer protections in the digital space without disturbing the potential these platforms have for innovation and increased consumer welfare. To serve as

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and-feeling-lack-of-control-over-their-personal-information/ (explaining that very few Americans carefully read privacy policies despite the fact that most are asked to); *see also* Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 208 (2001) (stating that, "[e]ven though privacy policies are just a click away, users may rarely read them"). As a result, any discussion of the implications of contracting in the digital space "must account for the fact that people do not read privacy policies." *Id.*

108. Solove, *supra* note 99, at 1894.

109. *See* Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RSCH. CTR. (May 20, 2015), http://www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/ (showing that surveys indicate "93% of adults say that being in control of *who* can get information about them" is either "very important" or "somewhat important").

110. *See* Brooke Auxier, *How Americans See Digital Privacy Issues Amid the COVID-19 Outbreak*, PEW RSCH. CTR. (May 4, 2020), https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/.

111. Andrew Perrin, *Half of Americans Have Decided Not to Use a Product or Service Because of Privacy Concerns*, PEW RSCH. CTR. (Apr. 14, 2020), https://www.pewresearch.org/fact-tank/2020/04/14/half-of-americans-have-decided-not-to-use-a-product-or-service-because-of-privacy-concerns/ (describing research that reveals that more than half of Americans choose not to use certain products or services because of fears "about how much personal information would be collected about them").

a guide, this Article discusses existing legal protections provided by (1) the general consumer protections enforced by the FTC[112] and (2) more particularized protections provided by statutes such as (a) Europe's General Data Protection Regulation[113] and (b) two California Consumer Privacy Acts.[114] Each of these approaches has emerged over the last five years and presents differing paths taken to protect consumer privacy in the digital space. By discussing their general framework, and the holes that exist in this framework, predicting a possible space for unconscionability to work in conjunction with them naturally arises.

1. The Federal Trade Commission

The FTC is the primary United States federal law enforcement agency entrusted with protecting consumers.[115] As such, it has taken an active role in protecting the privacy of consumers, primarily through the use of its "general consumer protection authority and its litigated and stipulated enforcement resolutions . . . creat[ing] what is essentially a common law of U.S. data privacy enforcement."[116] This scheme relies heavily on Section 5 of the Federal Trade Commission Act (FTCA), "which prohibits unfair or deceptive practices in the marketplace," and achieves enforcement through sector-specific laws.[117]

The FTC's "principal tool" in this work is bringing enforcement actions aimed to stop companies from violating the law and requiring them to remediate conduct deemed unlawful.[118] At times, this remediation includes requiring "implementation of comprehensive privacy and security programs, biennial assessments by independent experts, monetary redress to consumers,

112. *See infra* Section II.B.1.

113. *See infra* Section II.B.2.a.

114. *See infra* Section II.B.2.b.

115. *See generally* FTC, *Privacy and Data Security Update: 2019*, at 1 (Feb. 25, 2020), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2019/2019-privacy-data-security-report-508.pdf ("The Federal Trade Commission . . . is an independent U.S. law enforcement agency charged with protecting consumers and enhancing competition across broad sectors of the economy.").

116. Rebecca Kelly Slaughter, FTC, *Data Privacy Enforcement: A Time of Change* 1 (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf.

117. FTC, *Privacy and Data Security Update: 2019*, *supra* note 115, at 1. Several sector specific laws that the FTC enforces include:

> [T]he Gramm-Leach-Bliley Act, the Truth in Lending Act, the Controlling the Assault of Non-Solicited Pornography and Marketing . . . Act, the Children's Online Privacy Protection Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Telemarketing and Consumer Fraud and Abuse Prevention Act.

Id.

118. *Id.*

disgorgement of ill-gotten gains, deletion of illegally obtained consumer information, and providing robust transparency and choice mechanisms to consumers."[119] The FTC can seek and obtain civil monetary penalties in cases where a company violates an FTC order or where the company violates certain privacy statutes the FTC has authority to enforce.[120] In addition to the guidelines laid out by the FTC, Congress has granted the commission authority to police certain consumer privacy and security areas.[121] The FTC has created many types of consumer protection guidelines such as: notification requirements for consumers whose health information is breached; identity theft identification and prevention program requirements for financial institutions and creditors; regulations mandating parental consent for the collection of the personal data of minors under age thirteen; and telemarketing rules.[122] The FTC uses its authority to bring enforcement cases in areas of general privacy,[123] data security and identity theft,[124] credit reporting and financial privacy,[125] international enforcement,[126] children's

119. Chinmayi Sharma, *Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability*, 50 U. MEM. L. REV. 441, 504 n.278 (2019) (citation omitted).

120. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 605 (2014) (stating that while possible, the FTC "rarely fines companies for privacy-related violations under privacy-related statutes or rules that provide for civil penalties").

121. *See* Lauryn Harris, *Too Little, Too Late: FTC Guidelines on "Deceptive and Misleading" Endorsements by Social Media Influencers*, 62 HOW. L.J. 947, 977–78 (2019) (advocating for the expansion of the powers of the FTC to "issue civil fines for social-media influencer related violations"); *see also* Elias Wright, *The Future of Facial Recognition Is Not Fully Known: Developing Privacy and Security Regulatory Mechanisms for Facial Recognition in the Retail Sector*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 677 (2019) (advocating for the expansion of the powers of the FTC "to directly regulate the facial recognition sector").

122. FTC, *Privacy and Data Security Update: 2019*, *supra* note 115, at 13–14.

123. *Id.* at 2. The FTC brought eleven general privacy cases in 2019. *Id.* at 2–5. A notable case the FTC brought in 2019 concerned a complaint against Facebook alleging that it "violated the Commission's 2012 order against the company by misrepresenting the control users had over their personal information, and failing to institute and maintain a reasonable program to ensure consumers' privacy," in addition to claiming Facebook used phone numbers from its two-factor authentication for targeted advertisements without disclosure to users. *Id.* at 2.

124. *Id.* at 5. The FTC has brought over seventy cases against companies since 2002 in the area of data security and identity theft in order to combat "unfair or deceptive practices involving inadequate protection of consumers' personal data." *Id.*

125. *Id.* at 7. The FTC's enforcement in this area covers violations of the Fair Credit Reporting Act ("FCRA") and the Gramm-Leach-Bliley ("GLB") Act. *Id.* The FCRA "sets out requirements for companies that use data to determine creditworthiness, insurance eligibility, suitability for employment, and to screen tenants." *Id.* The GLB Act "requires financial institutions to send customers initial and annual privacy notices and allow them to opt out of sharing their information with unaffiliated third parties," as well as "requires financial institutions to implement reasonable security policies and procedures." *Id.* The FTC, in total, has brought over 100 cases for violation of the FCRA, and, since 2005, thirty-five cases for violation of the GLB Act. *Id.*

126. *Id.* at 8. Enforcement of the various agreements that govern the transfer of data by companies between different global regions (the EU-U.S. Privacy Shield Framework, the Swiss-

privacy,[127] and privacy protections from telemarketers.[128] However, it is important to highlight that the FTC acknowledges its gap in protection in regards to consumer privacy and advocates for Congress to pass comprehensive privacy and data security legislation.[129]

2. Particularized Statutory Protections

a. Europe's General Data Protection Regulation

The GDPR, the most recent privacy and security law passed by the European Union ("EU"), universally applies to any organization (whether inside or outside the EU) that engages in the targeting or collecting of data connected to people within the EU.[130] The GDPR seeks to protect personal data, defined by the European Commission as "any information that relates to an identified or identifiable living individual."[131] The European Parliament passed the GDPR in 2016 and required any organization to which the law applied to comply with its requirements by May 2018.[132]

The European Commission describes the law as "an evolution of the existing set of [privacy] rules, based on the strong data protection principles set out in the Data Protection Directive" (passed in 1995).[133] In passing the GDPR, the EU sought to update privacy laws to reflect the modern data collection processes that exist within online activity.[134] The GDPR sets out seven principles that guide its view of protection and accountability:[135] (1)

U.S. Privacy Shield Framework, and the Asia-Pacific Economic Cooperation Cross-Border Privacy Rules System) make up the FTC's international work. *Id.*

127. *Id.* at 9. The FTC has brought almost thirty cases since 2000 under the Children's Online Privacy Protection Act of 1998 ("COPPA"), which "generally requires websites and apps to obtain verifiable parental consent before collecting personal information from children under [thirteen]." *Id.*

128. *Id.* at 10. The Do Not Call Registry was created from the 2003 amendment to the Telemarketing Sales Rule and prohibits "sellers and telemarketers from engaging in certain abusive practices that infringe on a consumer's right to be left alone." *Id.* The FTC has pursued 147 cases under this provision. *Id.*

129. *Id.* at 1.

130. Ben Wolford, *What is GDPR, the EU's New Data Protection Law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/?cn-reloaded=1 (last visited Oct. 2, 2021).

131. *What is Personal Data?*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en (last visited Feb. 26, 2021) (emphasis omitted). This includes pieces of information which, when used together, make identification of a person possible. *Id.* Examples provided by the European Commission are a first or last name, home address, email address of an individual (as opposed to a generic informational address for a company), location data, cookie ID, and more. *Id.*

132. Wolford, *supra* note 130.

133. *Mythbusting: General Data Protection Regulation*, EUR. COMM'N 1 (2019), https://ec.europa.eu/info/sites/info/files/100124_gdpr_factsheet_mythbusting.pdf.

134. Wolford, *supra* note 130.

135. Commission Regulation 2016/679, art. 5, 2016 O.J. (L 119).

lawful, fair, and transparent process; (2) purpose limitation; (3) data minimization; (4) accuracy; (5) storage limitation; (6) integrity and confidentiality; and (7) accountability.[136] The GDPR gives individual consumers enforceable rights, such as "access, rectification, erasure, the right to object, portability, and enhanced transparency."[137] Consent is a central piece of the changes made by the GDPR to the prior law.[138] Under the GDPR, "the request for consent"—which companies typically bury within long terms and conditions that hardly anyone reads—"shall be presented . . . in an intelligible and easily accessible form, using clear and plain language."[139] Additionally, the GDPR makes it just as easy to withdraw consent as it is to grant it.[140] To enforce this law, each EU Member State must set up a Data Protection Authority (meant to work in partnership with each other), which is an independent public authority tasked with supervision through investigating and correcting violations of the law.[141] Should a company fail to adhere to the GDPR's strict standards, these authorities possess the power to levy fines, issue warnings or reprimand the company, bring orders to correct, orders to erase, restrict or limit processing, or even ban a company altogether.[142]

b. The California Consumer Privacy Act and the California Privacy Rights Act

The CCPA was passed in 2018 in response to a ballot initiative put forward by Californians for Consumer Privacy.[143] Alastair Mactaggart, a real estate developer in the Bay Area of Northern California, founded Californians for Consumer Privacy.[144] Mactaggart coupled his financial abilities with his concern over the treatment of privacy issues, or lack thereof, to take action in the form of a California ballot initiative. In so doing, he

136. Wolford, *supra* note 130; Commission Regulation 2016/679, art. 5, 2016 O.J. (L 119).

137. *GDPR—The Fabric of a Success Story*, EUR. COMM'N (June 24, 2020), https://ec.europa.eu/info/sites/default/files/gdpr_factsheet-09_en.pdf.

138. Commission Regulation 2016/679, art. 7, 2016 O.J. (L 119).

139. *Id.*

140. *Id.*

141. *What are Data Protection Authorities (DPAs)?*, EUR. COMM'N, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-are-data-protection-authorities-dpas_en (last visited Feb. 26, 2021). These authorities also provide expert advice and are the vehicle through which complaints can be lodged. *Id.*

142. *GDPR—The Fabric of a Success Story*, *supra* note 137.

143. Paul W. Sweeney, Jr., Tara C. Clancy & Gregory T. Lewis, *California Voters Approve (Another) Overhaul of California Consumer Privacy Laws: Meet the California Privacy Rights Act*, NAT'L L. REV. (Jan. 13, 2021), https://www.natlawreview.com/article/california-voters-approve-another-overhaul-california-consumer-privacy-laws-meet.

144. *About Us*, CALIFORNIANS FOR CONSUMER PRIV., https://www.caprivacy.org/about-us/ (last visited Feb. 26, 2021).

sought to bring the privacy question directly to Californians.[145] After qualifying the proposition for the November 2018 ballot, the California State Legislature intervened to work with Mactaggart to pass a state bill that would assuage the worries of tech companies while still appeasing privacy advocates like Mactaggart. The legislature's preventative methods arose out of fear as to the harshness of Mactaggart's proposal and concern about the votes that would have to be mustered to change the proposition should it pass.[146] This compromise, which led to Mactaggart's withdrawal of his ballot initiative, was passed in June 2018 as the CCPA.[147] This law, the first of its kind in the United States, allows online users to see the data companies are collecting about them and stop their sale.[148] Under the CCPA, businesses are required to inform users of the categories of data they are collecting and how they will use those data.[149] Armed with this newly available information, consumers have the option to opt out of the sale of their data.[150]

The intended goal of the CCPA is "to further the constitutional right of privacy and to supplement existing laws relating to consumers' personal information."[151] It defines a "[c]onsumer" as "a natural person who is a California resident."[152] In broad strokes, the law grants consumers the right to request disclosure of information collected by businesses,[153] the right to be informed by businesses of the categories of information that will be collected,[154] certain rights to request deletion of personal information collected,[155] certain rights to opt out of a business selling the personal information collected about the consumer,[156] and the right not be discriminated against should a consumer choose to exercise any of the above rights.[157] For the purposes of these rights, the term "collection" refers to "buying, renting, gathering, obtaining, receiving, or accessing any personal

145. *See* Nicholas Confessore, *The Unlikely Activists Who Took on Silicon Valley—and Won*, N.Y. TIMES MAG. (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/magazine/facebook-google-privacy-data.html (detailing the path Mactaggart took to propose the policy).

146. *Id.*

147. CALIFORNIANS FOR CONSUMER PRIV., *supra* note 144.

148. Tony Romm, *California Adopted the Country's First Major Consumer Privacy Law. Now, Silicon Valley is Trying to Rewrite It*, WASH. POST (Sept. 3, 2019), https://www.washingtonpost.com/technology/2019/09/02/california-adopted-countrys-first-major-consumer-privacy-law-now-silicon-valley-is-trying-rewrite-it/.

149. Sweeney, Jr. et al., *supra* note 143.

150. Romm, *supra* note 148.

151. CAL. CIV. CODE § 1798.175 (West 2020).

152. *Id.* § 1798.140(g).

153. *Id.* § 1798.100(a).

154. *Id.* § 1798.100(b).

155. *Id.* § 1798.105(a).

156. *Id.* § 1798.120.

157. *Id.* § 1798.125.

information pertaining to a consumer by any means. This includes receiving information from the consumer, either actively or passively, or by observing the consumer's behavior."[158]

While revolutionary, the bill itself has been criticized as being "a law riddled with drafting errors and unresolved issues over what kind of information it covers and how consumers could stop the sale of their data."[159] As a result, in the time between its passage and its implementation lobbyists on both sides of the issue attempted to shore up some of the holes in the bill and Big Tech made considerable attempts to weaken the protections available to consumers under the law.[160] This led to a new ballot initiative, also championed by Californians for Consumer Privacy, which was passed overwhelmingly by Californians in the November 2020 election.[161] That bill, called the California Privacy Rights Act ("CPRA"), will replace the CCPA, but its key provisions will not go into effect until the year 2023.[162]

Proposition 24, which instituted the CPRA, made modifications to the CCPA in an effort to strengthen privacy protections for consumers. One of the important CPRA modifications is the creation of a new information category, referred to as "sensitive personal information." This category provides additional rights and limitations on how a company can use that information;[163] establish the definition of consent;[164] give California's attorney general power to introduce regulations regarding use of precise geolocation data and automated decision-making technology as it relates to

158. *Id.* § 1798.140(e).

159. Romm, *supra* note 148.

160. *Id.*

161. Sweeney, Jr. et al., *supra* note 143.

162. *Id.*

163. *Id.*

164. *See* Letter from Alastair MacTaggart on Submission of Amendments to The California Privacy Rights and Enforcement Act of 2020, Version 3, No. 19-0021, and Request to Prepare Circulating Title and Summary (Amendment), to Initiative Coordinator, Office of the Attorney General of California 22 (2019), https://oag.ca.gov/system/files/initiatives/pdfs/19-0021A1%20%28Consumer%20Privacy%20-%20Version%203%29_1.pdf.

> "Consent" means any freely given, specific, informed and unambiguous indication of the consumer's wishes by which he or she, or his or her legal guardian, by a person who has power of attorney or is acting as a conservator for the consumer, such as by a statement or by a clear affirmative action, signifies agreement to the processing of personal information relating to him or her for a narrowly defined particular purpose. Acceptance of a general or broad terms of use or similar document that contains descriptions of personal information processing along with other, unrelated information, does not constitute consent. Hovering over, muting, pausing, or closing a given piece of content does not constitute consent. Likewise, agreement obtained through use of dark patterns does not constitute consent.

Id. (emphasis omitted).

opt-out rights;[165] enhance protection for children under sixteen;[166] and create a privacy protection agency to enforce the privacy protections of the state.[167] Overall, the CPRA strengthens some rights—adding clarification and modification of definitions, etc.—but it also weakens some of the CCPA by narrowing the number of businesses that are subject to the privacy laws in question.[168]

As demonstrated above, the GDPR, CCPA, and now the new CPRA are extensive pieces of legislation that have changed the way businesses handle consumer privacy.[169] Businesses and consumers alike are still trying to navigate these changes and consumers are trying to determine how these new laws practically affect their rights on an individual level.[170] Under the GDPR, remedies available to consumers when their privacy rights are violated include the ability to lodge a complaint and the right to an "effective judicial remedy" against a supervisory authority, controller, or processor.[171] Under the CCPA, consumers can bring a private right of action against a company, but the company is allowed a thirty day period to "cure" the violation and avoid litigation.[172] Otherwise, the California Attorney General takes action on behalf of the consumers harmed as a whole.[173] These complicated statutes seem to have created more rights for consumers; however, determination of the actual scope of these new rights requires litigation.[174]

165. Sweeney, Jr. et al., *supra* note 143.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See, e.g.*, Elaine F. Harwell, *What Businesses Need to Know About the California Consumer Privacy Act*, ABA (Oct, 7, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/10/ca-consumer-privacy/ (stating that, at the time, the CCPA was "the most comprehensive privacy legislation in the United States, with extensive new compliance requirements and liabilities" and was enacted to have significant reach).

170. *See, e.g.*, Chanley T. Howell & Maxwell S. Harwitt, *Remote Working in the Coronavirus Economy Reveals Potential GDPR and CCPA Compliance Issues*, NAT'L L. REV. (Oct. 30, 2020), https://www.natlawreview.com/article/remote-working-coronavirus-economy-reveals-potential-gdpr-and-ccpa-compliance-issues (stating that working from home through a company VPN can cause potential CCPA or GDPR compliance issues when these individuals appear to be working from the location of the VPN rather than their actual location).

171. *See* Commission Regulation 2016/679, art. 78, 2016 O.J. (L 119) (explaining effective judicial remedies); Commission Regulation 2016/679, art. 79, 2016 O.J. (L 119) (same); *see also* Commission Regulation 2016/679, art. 77, 2016 O.J. (L 119) (explaining that once a complaint is lodged the right to an effective judicial remedy attaches).

172. CAL. CIV. CODE § 1798.150 (West 2020).

173. *Id.* § 1798.155(b).

174. *See, e.g.*, Kathryn M. Rattigan, *What Does 2020 Have in Store for CCPA Enforcement and Litigation?*, NAT'L L. REV. (July 16, 2020), https://www.natlawreview.com/article/what-does-2020-have-store-ccpa-enforcement-and-litigation. "To date, the CCPA has yet to be interpreted in court. However, some of the recent case filings indicate that plaintiffs are attempting to interpret the CCPA's private right of action very broadly." *Id.*

Though all of these different laws attempt to strengthen privacy protection of consumers by reinforcing consent, they still place a heavy burden on consumers to understand privacy terms often written beyond the knowledge of normal users. Additionally, current statutory protections do little to protect against the one-sidedness of many privacy terms within user contracts. Adding the doctrine of unconscionability on top of continued statutory protections, however, could create an avenue for holding tech companies accountable in a meaningful, workable way.

III. APPLYING UNCONSCIONABILITY TO DIGITAL PROBLEMS

In the face of existing statutory protections regulating digital operators, the question of why use unconscionability arises. Of all the contractual doctrines that can be used to avoid unsavory terms in agreements, what aspects of the unconscionability doctrine make it a perfect fit for our current digital dilemma? First and foremost, because unconscionability is an already established common law doctrine with deep roots in our legal system, applying it in the digital contracting space minimizes the need for legislatures to rewrite specific statutes or create new ones. As has been the case for the doctrine throughout its history, it serves as an effective gap-filler to seal up holes in the existing statutory scheme. In addition, the doctrine protects court experimentation by the very nature of its malleable application. This malleability, in conjunction with the "low-hanging unconscionable fruit" that have been identified through centuries of application, renders the doctrine easily moldable to resolve some of the egregious current practices of digital operators. By declaring certain provisions of these contracts void as unconscionable, acceptable contract terms and practices can be developed through common law adjudication—similar to the FTC's common law development but extended throughout many courts. To illustrate the possible benefits the application of unconscionability in this manner can have, a few modern examples are instructive.

A. Uber

As data privacy issues have become increasingly prevalent, unconscionability's gap-filling potential has concurrently increased. While most practitioners have yet to effectively employ unconscionability in the data privacy context, some recent cases show that unconscionability is an effective tool against tech companies' consumer contracts.[175] Other cases

175. *See* Uber Techs. Inc. v. Heller, 2020 SCC 16, para. 94 [2020] (Can.) (finding for Plaintiff where the company's service agreement was "improviden[t]").

still illustrate instances in which unconscionability could have been effectively utilized.[176]

For instance, in June of 2020, the Supreme Court of Canada held that an arbitration clause in Uber's services agreement was unconscionable in *Uber Technologies Inc. v. Heller*.[177] There, Plaintiff David Heller, an UberEats[178] driver, challenged Uber's alleged failure to meet minimum wage guidelines under Ontario's Employment Standards Act.[179] Uber relied on Heller's acceptance of its services agreement in moving to stay the proceeding in favor of arbitration in the Netherlands.[180] However, the Court invalidated the arbitration provision, stating that the unnegotiated nature of the contract and the "significant gulf in sophistication" between the parties created too great an inequality in bargaining power.[181] According to the Court, "[a] person in Heller's position could not be expected to appreciate the financial and legal implications of [the arbitration clause]."[182] The Court further held that the clause was "improviden[t]" because the arbitration process required the plaintiff to pay $14,500.00 in administrative fees up front.[183] These excessive fees made it entirely possible that Heller's challenge to the clause's validity, as well as his challenge to Uber's employment practices, would never even reach an arbitrator.[184] Heller's success in using the doctrine of

176. *See infra* Parts III.B–C (illustrating how unconscionability could have been used to invalidate TikTok's and Facebook's terms of service).

177. 2020 SCC 16, para. 98–99.

178. Uber Eats is a food delivery service owned by Uber Technologies. UBER EATS, https://www.ubereats.com/ (last visited Sept. 27, 2021). Uber Eats delivery driver positions, like David Heller's job, are described as "flexible," allowing drivers to sign up via the Uber Eats website and select if they would like to be "a traditional full-time or part-time delivery driver," or "an independent contractor doing app-based delivery whenever and wherever." *Looking for Delivery Driver Jobs?* UBER, https://www.uber.com/us/en/deliver/ [https://web.archive.org/web/20210927061032/https://www.uber.com/us/en/deliver/] (last visited Sept. 27, 2021).

179. Tara Deschamps, *Supreme Court Sides with Uber Driver Seeking Better Pay, Benefits*, CTV NEWS (June 26, 2020, 5:03 AM), https://www.ctvnews.ca/canada/supreme-court-sides-with-uber-driver-seeking-better-pay-benefits-1.5000856. Mr. Heller initiated the claim as a class-action suit. *Id.* Plaintiffs are bringing similar claims against Uber across the United States as well. *See* Capriole v. Uber Techs., Inc., 7 F.4th 854 (9th Cir. 2021) (asserting Uber's policies violate labor laws and challenging the arbitration clause in Uber's services agreement); Singh v. Uber Techs. Inc., 939 F.3d 210 (3d Cir. 2019) (same).

180. *Heller*, 2020 SCC 16, para. 13.

181. *Id.* para. 93.

182. *Id.*

183. *Id.* para. 94.

184. *Id.* para. 324 (Côté, J., dissenting). The $14,500 fees consist of only filing fees and the amount represents most of Heller's income. *Id.* What is more, Heller would be required to foot legal fees and other costs in addition to the $14,500. *Id.* para. 2 (majority opinion).

unconscionability against a largely successful tech giant highlights that the doctrine is not only malleable—it is powerful.[185]

B. TikTok and Privacy

Given the potential force of the doctrine of unconscionability, practitioners would be wise to invoke the doctrine in the data privacy context. For example, in May 2020, dozens of parents of minors filed a class action lawsuit against TikTok,[186] alleging that the application collects information about their children's "facial characteristics, locations and close contacts," and then "quietly sends that data to servers in China."[187] While the complaint alleged violation of various privacy acts, this sort of litigation may prove to be fertile ground for implementing unconscionability as well.[188]

TikTok's attorneys argue that its privacy policy fully discloses that "user data will be shared with TikTok's corporate affiliates and third-party business partners and service providers, as is standard with free social networking apps that have a business model based on advertising."[189] But this disclosure fails to effectively convey to users that ByteDance, TikTok's China-based parent company, has full access to all the information that TikTok collects—thereby giving the Chinese government that same access as well.[190] Indeed, though TikTok denies capturing user information and sending it to the Chinese Government, the platform's legal team argues that TikTok "can transfer data to Beijing, if it so chooses, without breaking any laws."[191]

Analogous to *Uber Technologies Inc. v. Heller*, there is a similar "gulf in sophistication" between minors agreeing to TikTok's privacy policy and TikTok's drafting attorneys, who acknowledge that this agreement allows TikTok to pass along the identifying information of its users to a foreign

185. *Id.* para. 98–99.

186. TikTok is a platform for "short-form mobile video." *Our Mission*, TIKTOK, https://www.tiktok.com/about?lang=en (last visited Oct. 2, 2021).

187. Bobby Allyn, *Class-Action Lawsuit Claims TikTok Steals Kids' Data and Sends It to China*, NPR (Aug. 4, 2020, 1:39 PM), https://www.npr.org/2020/08/04/898836158/class-action-lawsuit-claims-tiktok-steals-kids-data-and-sends-it-to-china.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* On February 26, 2021, TikTok settled the case for $92 million dollars and an agreed to modify their data usage practices. Bobby Allyn, *TikTok to Pay $92 Million to Settle Class-Action Suit Over 'Theft' Of Personal Data*, NPR (Feb. 26, 2021), https://www.npr.org/2021/02/25/971460327/tiktok-to-pay-92-million-to-settle-class-action-suit-over-theft-of-personal-data. "Under the proposed terms of the settlement, TikTok will no longer record a user's biometric information, including facial characteristics . . . . TikTok also committed to stop sending U.S. users data overseas . . . ." *Id.*

government with no legal repercussions whatsoever.[192] Moreover, it would be largely unpersuasive for TikTok to assert that these children, or even their parents, had the capacity to "appreciate"[193] the ramifications of this agreement at the time of signing when it fails to specify the nature of the "corporate affiliates and third-party business partners and service providers" receiving the information.[194] Further reinforcing unconscionability's potential efficacy, just like in *Uber Technologies Inc. v. Heller*, TikTok's privacy agreement is a standard, unnegotiated form contract.[195] Thus, there is an inequality in bargaining power between the plaintiffs and TikTok that mirrors the inequality in *Heller*.[196]

Moreover, while the prohibitive cost of arbitration in *Heller* led to the "improvident"[197] result of potentially barring resolution of Heller's claims, if TikTok's privacy policy does in fact allow it to legally transfer user data to Beijing, then the agreement completely bars litigation—an even more improvident result than the potential roadblock to arbitration in *Heller*.[198] Even further, this bar on litigation has graver consequences than the inability to pursue employment claims in *Heller*, as preventing TikTok users from bringing their claims gives the Chinese government unfettered access to the appearance, location, and communication contacts of minors throughout the United States.[199] Thus, because TikTok's privacy policy contains elements of both procedural and substantive unconscionability analogous to, or more egregious than, those in *Heller*, plaintiffs could likely prevail on an unconscionability claim against the tech company.

192. Uber Technologies Inc. v. Heller, 2020 SCC 1693, 477 D.L.R. 4th 179 (Can).

193. *Id.*

194. *See* Allyn, *supra* note 187.

195. *Id.*

196. *Heller*, 2020 SCC 16, para. 93.

197. *Id.* para. 91. *See supra* Section III.A (describing the Canadian Supreme Court's reasoning in finding Uber's terms of service unconscionable in *Heller*).

198. Allyn, *supra* note 176.

199. *Id.* The United States has prioritized protecting minors' privacy online for over twenty years. *See* Children's Online Privacy Protection Act (COPPA) of 1998, 15 U.S.C. §§ 6501–6505 (2012). "COPPA imposes certain requirements on operators of websites or online services directed to children under [thirteen] years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under [thirteen] years of age." *Children's Online Privacy Protection Rule ("COPPA")*, FTC, https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule (last visited Nov. 14, 2021). Additionally, in May of this year, Senators Edward J. Markey and Bill Cassidy introduced a new privacy bill, the Children and Teens' Online Privacy Protection Act, that would update COPPA and add protections for children ages thirteen to fifteen. *See* Children and Teens' Online Privacy Protection Act, S. 1628, 117th Cong. (2021).

C. Facebook and Privacy

Further illustrating the dire state of data privacy, Facebook, notorious for its abuse of consumer data, has made common practice of harvesting data through third-party sites—allowing Facebook to obtain the private data of those who do not even have Facebook accounts.[200] Indeed, in a paltry attempt to improve public relations after Mark Zuckerberg testified in front of Congress, Facebook released a series that "addresses the impact of [their] products on society."[201] In this series, Facebook explained that when an individual visits a site or application that uses Facebook's services, Facebook "receive[s] information even if you're logged out [of Facebook] or don't have a Facebook account."[202]

Facebook services include social plugins, Facebook login abilities, Facebook analytics, and Facebook ads and measurement tools.[203] Perhaps the most disturbing aspect of Facebook's data collection is "[s]ocial plugins," or the Facebook "Like" or "Share" buttons on third-party sites that enable users to quickly share the site's content to Facebook.[204] These social plugins allow Facebook to access the user's data through their mere existence on the page. This means that by simply using the site and without any affirmative clicking on those plugins, the website user's data is exposed to Facebook regardless of whether they have a Facebook account.[205] Further, websites and applications that "show ads from Facebook advertisers," "run their own ads on Facebook," or merely use Facebook's ad measurement tools pass off user information to the tech giant as well.[206]

In fact, many of these third-party websites contain their own privacy policies or terms of service.[207] But given the public's shock at these practices,

200. David Baser, *Hard Questions: What Data Does Facebook Collect When I'm Not Using Facebook, and Why?*, FACEBOOK (Apr. 16, 2018), https://about.fb.com/news/2018/04/data-off-facebook/.

201. *Id.* (emphasis omitted). Interestingly, the series preemptively states that Zuckerberg answered more than five hundred of Congress's questions, and that Facebook is "following up with Congress" on the forty or so questions Zuckerberg could not answer. *Id.*

202. *Id.*

203. *Id.* Facebook Login allows users to use their Facebook accounts to log into other websites and applications, while Facebook Analytics helps websites and applications "better understand how people use their services." *Id.*

204. *Id.*

205. *Id.*

206. *Id.* Facebook receives users' IP addresses, what operating system is in use, and browsing history. Jason Murdock, *Facebook Is Tracking You Online, Even If You Don't Have an Account*, NEWSWEEK (Apr. 17, 2018, 6:53 AM), https://www.newsweek.com/facebook-tracking-you-even-if-you-dont-have-account-888699. Facebook allegedly uses this to obtain user demographic data and insists it does not "sell people's data. Period." Baser, *supra* note 200.

207. *See, e.g.*, *Terms of Service*, INSIDER INC. (Nov. 11, 2019), https://www.insider-inc.com/terms (setting forth the terms that govern the "access and use" of a website featuring

it is clear that these websites' agreements are not adequately informing users that by clicking "agree," they are allowing their information to be funneled directly to Facebook.[208] Even further, these third-party website agreements are nonnegotiable and users who do not wish to share their information with Facebook must simply forfeit use of the third-party website.[209] Because these users clearly cannot "be expected to appreciate"[210] the implications of these agreements that are offered on a take-it-or-leave-it basis, unconscionability once again has the potential to invalidate them.[211]

Indeed, similar to the Uber and the TikTok illustrations, third-party websites are pressing users into agreements that are both substantively and procedurally unconscionable by failing to adequately inform consumers that they are relinquishing their data to Facebook in their nonnegotiable form contracts.[212] In addition, similar to TikTok, where the actual impact of the contract is revealed after it is too late to prevent the data sharing, here, once users access these websites their information is immediately exposed to Facebook.[213] Prior to Facebook's public admission of these data collection practices, consumers had nearly no way of knowing their information was being collected.[214] Even today, only those who have been exposed to Facebook's public relations efforts realize such data sharing is occurring.[215] As a result, attacking these third-party website agreements with claims of unconscionability can serve as an indirect way to thwart Facebook's data-collection efforts and encourage websites to provide agreements that are clear and candid.[216]

Facebook plug-ins); *Terms of Service*, N.Y. TIMES (Sept. 1, 2021), https://help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-service (same).

208. *See, e.g.*, Kate O'Flaherty, *All The Ways Facebook Tracks You And How To Stop It*, FORBES (May 8, 2021, 8:00 AM), https://www.forbes.com/sites/kateoflahertyuk/2021/05/08/all-the-ways-facebook-tracks-you-and-how-to-stop-it/?sh=16e870885583 (telling readers that "Facebook does know everything about you. Sometimes, it knows what you are going to say, do—or buy—even before you do."); Murdock, *supra* note 206 (explaining that Facebook "admitted" to tracking internet users who do not have Facebook accounts or are logged out after "unprecedented controversy" arose when Facebook allegedly facilitated a data breach of their information).

209. *See* Baser, *supra* note 200.

210. Uber Technologies Inc. v. Heller, 2020 SCC 16, para. 93, 477 D.L.R. 4th 179 (Can).

211. *See id.*

212. *See id*.

213. *See* Baser, *supra* note 200.

214. *See id.*

215. *See id.*

216. *See generally* Mark Jamison, *What Happens When the EU and Biden Redesign Big Tech?*, AEI (Jan. 15, 2021), https://www.aei.org/technology-and-innovation/what-happens-when-the-eu-and-biden-redesign-big-tech/.

D. YouTube and Discriminatory Treatment

Big Tech's unconscionable practices are not limited to Facebook's notorious activities.[217] YouTube posted a monetization policy that reads in part: "YouTube has the right to monetize all content on the platform and ads may appear on videos from channels not in the YouTube Partner Program."[218] YouTube's policy provides content providers with two options: either designate their content to be monetizable and join its Partnership Program or designate their content as nonmonetizable.[219] Additionally, YouTube can remove content creators from its Partnership Program for making "multiple or egregious attempts to monetize unmonetizable content," thereby encouraging content creators to claim limited or no monetizability as a preventive measure.[220]

But pressuring content providers to designate their content as nonmonetizable is not the most egregious element of the YouTube terms. YouTube reserves and exercises the right to monetize content that creators self-rate as nonmonetizable. Further, if a creator designates its content as monetizable, YouTube may still deem that content nonmonetizable and prevent the creator from profiting off of it. But YouTube can then turn around and monetize the same content it just deemed "nonmonetizable" to profit off of a creator's content, while preventing that creator from profiting off of that same content. This point merits repetition: YouTube exerts extreme pressure on content providers not to monetize their own content so that YouTube itself can earn money from that content without making any payments to the content providers.

The economic incentive for YouTube is clear: YouTube profits most when it can (i) strongly discourage creators from designating content as monetizable, or (ii) add administrative hurdles for creators to challenge a nonmonetizable review so that YouTube itself can monetize the content. YouTube has, in essence, created the modern economic equivalent of the company town. In the company town of old, the employer paid wages to employees, but the employees paid all their wages back to the employer because the employer forced employees to rent housing and purchase stables from the company properties. So too YouTube promises the opportunity of

217. *See id.*

218. *See* Viva Frei, *Why YouTube's NEW Monetization Policies Are Totally DECEPTIVE – Viva Frei Vlawg*, YOUTUBE (Nov. 21, 2020), https://www.youtube.com/watch?v=wPwbagAhqfY. YouTube often monetizes content by running advertisements on the videos. *Id.*; *see also YouTube Channel Monetization Policies*, YOUTUBE HELP, https://support.google.com/youtube/answer/1311392 (last updated Oct. 2021).

219. *Id.* The content providers' designation of monetizable or nonmonetizable is the difference between earning or not earning income from that content.

220. *Id.*

monetary reward if users join their creator community, but it also takes creator profits back through a backdoor process facilitated by YouTube's own nonnegotiable contract.

This illustrates yet another way in which consent is twisted and extended beyond recognition in the digital world.[221] YouTube recently e-mailed notification of this policy update to content creators. In turn, YouTube considers consent to the update to merely be continued use of the platform.[222] In other words, content providers are not asked for affirmative consent (e.g. clicking an "I agree" button) but rather are considered to have consented by using the platform whether or not they have even seen the policy update. Given the implications of YouTube's convoluted rating system and Partnership Program, it does not follow that simply using the platform can reasonably serve as consent to YouTube's rather unconscionable new terms that permit YouTube to redirect users' profits to YouTube itself.[223]

The practical effect of YouTube's policy is akin to the substantive unconscionability seen in other Big Tech cases—creators can easily end up having no say in who is reaping the benefits of their content. This parallels the predicament of TikTok and Facebook users who have no say in who obtains their personal data.[224] Similarly, the procedural unconscionability regarding YouTube's terms of service is analogous to that in *Heller* because the plain wording of the policy does not make the reach of YouTube's monetization powers abundantly clear to creators.[225] To make matters worse, mirroring the Uber, TikTok, and Facebook illustrations, this agreement is nonnegotiable and is offered to users on a take-it-or-leave-it basis.[226] Given

221. *See* Frei, *supra* note 218.

222. *See Terms of Service*, YOUTUBE, https://support.google.com/youtube/answer/1311392. There is nothing in the terms of service that requires consumers to affirmatively click to assent to the change of terms. No accounts are deactivated or locked if no affirmative acceptance is granted. It is presumably the case that continued use is assumed to be acceptance of the modified terms.

223. *See id.*

224. *See supra* Sections III.B–III.C.

225. *See* Mehab Qureshi, *YouTube's New Monetization Policy Flawed: Indian Creators*, QUINT (May 1, 2021), https://www.thequint.com/cyber/youtubes-new-monetization-policy-flawed-indian-creators#read-more (referring to YouTube's new monetization policy as "flawed and confusing"); Frei, *supra* note 218 (explaining the effect of the combination of various clauses in YouTube's new monetization policy, though not explicitly stated in the policy's text, is that YouTube can declare a creator's content nonmonetizable and then go forward with monetizing it); Roberto Blake, *YOUTUBE "NOT PAYING CREATORS" – YouTube Monetization 2021 Terms of Service Update*, YOUTUBE (June 4, 2021), https://www.youtube.com/watch?v=Usl8Bf4zNQI (detailing how YouTube's new monetization policy "affects a lot of different things that [creators] may not be aware of" based on the policy's language alone).

226. *See Terms of Service*, *supra* note 222 (when creating a YouTube account, one must agree to the terms of service in order to use the platform, making it a take-it-or-leave-it contract); Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, INSIDER (Nov. 15, 2017, 7:30 AM), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 ("Of course, consumers don't have much of a choice. If they don't agree

the parallels to the prior illustrations, this particular YouTube policy provides yet another instance in which an examination of contract terms under an unconscionability analysis could break through the one-sided, self-dealing incentives YouTube has imposed on creators.[227] Indeed, given that there is essentially no real way for content creators to consent to this YouTube policy in any meaningful sense, courts should find the trampling of traditional consent principles so procedurally unconscionable as to require only a minimal factual showing as to substantive unconscionability.[228]

E. Facebook and Discriminatory Treatment

Although the above illustration demonstrates that notice and transparency requirements are not sufficient to protect contracting parties from egregiously one-sided contracts, there is no doubt that demanding "Big Tech companies [to be] clear, candid, and consistent with customers about their terms of service"[229] is an important step. Lack of clarity has consistently haunted Big Tech's consumer agreements and has led to seemingly contradictory public responses.[230] After the 2016 election, "Facebook users were caught flatfooted" by Cambridge Analytica's improper access to tens of millions of Facebook users' data, used to support Donald Trump's 2016 presidential campaign.[231] Interestingly enough, in 2012, the Obama campaign "suck[ed] out" Facebook's social graph, essentially downloading "everything that connected people, including their friends, photos, events, internet pages visited, who they listened to, what music they listened to, their likes, and places they had been," without any resulting public outrage.[232] Even worse, Facebook "didn't stop [the Obama Campaign] once [it] realized" what it was doing "because Facebook favored it" and "was siding with the Obama campaign in its competition with Republicans."[233] Indeed,

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[to terms of services agreements], they don't get access to the wireless network, new app or whatever it is they want to use—and there's nothing they can [do] about it.").

227. *See* Frei, *supra* note 218 (describing how YouTube's monetization policy can disadvantage content creators while allowing YouTube to profit from these creators' videos).

228. *See id.*

229. Jamison, *supra* note 216.

230. *See* Mark Jamison, *Political Use of Facebook Data Is Old Hat but Still Creates Problems*, AEI (Mar. 29, 2018), https://www.aei.org/technology-and-innovation/political-use-of-facebook-data-is-old-hat-but-still-creates-problems/ [hereinafter Jamison, *Political Use of Facebook Data*]; Mark Jamison, *What to do About Facebook? Let Users Decide*, AEI (May 17, 2018), https://www.aei.org/technology-and-innovation/what-to-do-about-facebook-let-users-decide/ [hereinafter Jamison, *What to do About Facebook?*].

231. *See* Jamison, *supra* note 216; *see also* Jamison, *Political Use of Facebook Data*, *supra* note 230; Jamison, *What to do About Facebook?*, *supra* note 230.

232. *Cambridge Analytica and the Future of Data Privacy: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (responses for the record from Dr. Mark Jamison, responding to questions from Sen. Charles E. Grassley).

233. *Id.*

the only difference between Cambridge Analytica's actions and the Obama Campaign's actions is that the Obama Campaign "acted with Facebook's blessing."[234]

The contrast in public reaction to both instances is surprising—though perhaps understandable in light of ignorance regarding data practices and personal political preferences. Perhaps the public is fine with Facebook knowingly allowing its preferred politicians to access user data, but failing to protect its users' data from being improperly accessed by corporations and then used to aid politicians is cause for outrage.[235] However, consumers who view these incidents as different fail to realize that Facebook more or less allowed the Obama Campaign to do exactly what Cambridge Analytica did, only with consumers' permission via Facebook's terms of service.[236] The practical effect of both instances is the same, but in the former instance, users' unknowing consent resulted from lack of clarity in Facebook's terms of service—terms which Facebook could have used to allow Cambridge Analytica to access and use such data in nearly the exact same manner.[237]

F. COVID-19 and the Rise of Digital Contracts

During the lockdowns associated with the COVID-19 pandemic, much of American life moved online—increasing the volume of digital contracts. Indeed, during lockdowns that require online work and online school (let alone online shopping), standard service agreements may be less of a choice and more of a "take it" necessity. Therefore, at a minimum, transparency and clarity of terms is of paramount importance. *The New York Times* recently noted that, "[t]hough courts have held terms of service contracts to be binding, there is generally no legal requirement that companies make them comprehensible."[238] Unfortunately, "[i]t is understandable, then, that companies may feel emboldened to insert terms that advantage them at their customers' expense."[239] This results in companies "includ[ing] provisions that most consumers wouldn't knowingly agree to," such as "an inability to delete one's own account, granting companies the right to claim credit for or alter their creative work, letting companies retain content even after a user

234. Jamison, *What to do About Facebook?*, *supra* note 230.

235. *Id.*

236. *See id.*

237. *See id.*

238. *What Happens When You Click 'Agree'?*, N.Y. TIMES (Jan. 23, 2021), https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html?action=click&module=Opinion&pgtype=Homepage.

239. *Id.*

deletes it, [giving] access to . . . a user's full browsing history and giving them blanket indemnity."[240]

These examples of terms that "most consumers wouldn't knowingly agree to" are eerily similar to YouTube's new monetization policy and Facebook's data-collection policy and are not limited to just terms of service agreements.[241] The fact that *The New York Times* can come to the conclusion that this type of contracting is occurring on a mass scale among digital operators points to a failure of the courts. As a legal fact, unconscionability is meant to apply to such situations that "shock[] the conscience."[242] It is presumed that standard agreements will be void if the drafter knows or has reason to know that the consumer would not sign the contract if they knew certain terms were included.[243] That judges have not stepped forward to void such provisions is arguably evidence that unconscionability needs to be revitalized and refocused in just such contexts.

In fact, studies have found that "[u]nderstanding a typical company's terms . . . requires [fourteen] years of education, which is beyond the level most Americans attain."[244] Nearly a decade ago, a "Carnegie Mellon study found that the average American would have to devote [seventy-six] work days just to read over tech companies' policies."[245] Given how use of online services has increased over the past decade, as well as the recent heightened use of online services in the COVID-19 pandemic, it follows that this number is probably much higher today.[246] That understanding these contracts requires more education and time than the vast majority of Americans have further shows that this "arrangement is unbalanced, putting the burden on consumers to read through voluminous, nonnegotiable documents, written to benefit corporations in exchange for access to their services."[247]

Put in a more real-world context, the outrageousness of these agreements becomes even more apparent.[248] For instance, "[i]t's hard to imagine, by contrast, being asked to sign a [sixty]-page printed contract before entering a bowling alley or a florist shop."[249] But given our increasing

240. *Id.*

241. *Id.*

242. Prince, *supra* note 31, at 471.

243. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981).

244. *What Happens When You Click 'Agree'?*, *supra* note 238.

245. *Id.*

246. *See id.*; *see also Adult Internet Usage Penetration in the United States From 2000 to 2021, by Age Group*, STATISTA, https://www.statista.com/statistics/184389/adult-internet-users-in-the-us-by-age-since-2000/ (last visited June 26, 2021) (showing that, between 2009 and 2021, the percentage of U.S. adults who are "online users" increased from seventy-six percent to ninety-three percent).

247. *What Happens When You Click 'Agree'?*, *supra* note 238.

248. *See id.*

249. *Id.*

reliance on tech companies like DoorDash, Handy, Uber, and Lyft, we now enter lengthy contracts just to have our food delivered, our homes cleaned, or get a ride to the airport.[250] What is more, as noted by Northeastern University law professor Woodrow Hartzog, not only are these agreements "written to discourage people from reading them," but many of these contracts also include a clause "that the terms can be updated at any time without prior notice."[251] Professor Nancy Kim from California Western School of Law states that these agreements, "[w]ith their constant updates to terms and conditions . . . amount[] to a massive bait-and-switch."[252] Unfortunately, these types of contracts have become the norm for us, and as aptly summarized by Professor Hartzog, "[w]e have become so beaten down by this that we just accept it."[253] The increased need for tech companies' services during the COVID-19 pandemic should encourage consumers to protest these companies' absurd contracting practices.[254] And using unconscionability to invalidate these agreements would be a step in the right direction. What could be more unconscionable than nonnegotiable agreements designed so that few, if any, consumers will have the time or capacity to understand their terms?

IV. WHY UPGRADE UNCONSCIONABILITY?

Unconscionability, as outlined in the Introduction, has a long doctrinal history as a gap-filler in voiding contractual terms that consumer laws fail to statutorily invalidate. However, the doctrine is not used pervasively. While beneficial in the sense that its limited application preserves the fundamental freedom to contract, this limited application may also be detrimental in the digital world. Pre-digital contracts, even those of adhesion, had firm consent requirements and consumers could clearly signal non-acceptance by simply

250. *See id.*; *see also Terms and Conditions Agreement*, DOORDASH, https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en_US (last visited Oct. 22, 2021) (stating DoorDash's Terms of Service); Levi Sumagaysay, *The Pandemic Has More Than Doubled Food-Delivery Apps' Business. Now What?*, MARKETWATCH (Nov. 25, 2020, 4:36 PM), https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169 (showing that DoorDash and UberEats have experienced steep increases in business and revenue since the beginning of the COVID-19 pandemic).

251. *What Happens When You Click 'Agree'?*, *supra* note 238.

252. *Id.*

253. *Id.*

254. *See id.*; *see also COVID-19 Is Accelerating the Rise of the Digital Economy*, BDO (May 2020), https://www.bdo.com/getattachment/07e769aa-5755-4151-9b52-4eeccfe61710/attachment.aspx?ADV_DTS_COVID-19-is-Accelerating-the-Rise-of-the-Digital-Economy_Web.pdf ("If there were any lingering doubts about the necessity of digital transformation to business longevity, the coronavirus has silenced them. In a contactless world, the vast majority of interactions with customers and employees must take place virtually.") (emphasis omitted).

leaving the deal. How is that possible in the contracts of our modern digital world? The fundamental consent requirement underpinning any valid contractual agreement has been eroded by modern technology, with consumers often ensnared in a contract—without even realizing it has occurred.[255] The substantiality of this shift in the nature of modern contracting—particularly in regard to concepts of assent and notice—require courts and state legislatures to reexamine the role of the unconscionability doctrine. In particular, using the subsequent data as a guide for best implementing the doctrine, this Article suggests that state legislatures should require courts to consider unconscionability as a means to void egregious terms and contractual practices of digital operators.[256]

This Part is laid out in two subsections. The first lays out a description of the data set. As described further in Section IV.A, the data were collected in two phases and the search criteria and summary statistics for each phase are provided and described in the text, tables, and figures. Section IV.B examines in detail the question set out in this Article, to what extent is the doctrine of unconscionability currently a viable judicial mechanism for voiding egregious terms in standardized digital contracts.

A. The Data

As has been noted, some speak of unconscionability as the last refuge of fools.[257] However, the doctrine has not gone undiscussed or unenforced throughout history. The data collected here, involving a comprehensive look at cases that alleged unconscionability, was divided into two phases. In Phase I, a comprehensive Westlaw search was conducted and all contracts cases alleging unconscionability in federal and state courts were pooled together.[258] This collected data were then further sorted into several categories of interest

255. *See* Federal Trade Commission Act, 15 U.S.C. § 45(a) (declaring "[u]nfair methods of competition" and "unfair or deceptive acts or practices" unlawful).

256. *See infra* Part V.

257. *See supra* note 7 and accompanying text.

258. Phase I was divided into two comprehensive searches of the West digest. The first search concentrated on a Westlaw Key Number search on 95k1.11 to retrieve cases published in a West digest that an editor has decided to correspond to the legal issue or topic of unconscionability. All searches were performed in and around July 2020.

First Phase I search command:

https://www.westlaw.com/Browse/Home/KeyNumber?guid=I0544f1d416171ee307a41cdd76a9a67c&transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

Second Phase I search command:

https://www.westlaw.com/SharedLink/659b5666ce454daaaa0ee3b8d81ffa3d?VR=3.0&RS=cblt1.0

based upon whether there was an arbitration clause,[259] where the state court was located,[260] and what year the case was heard (the date range presented here is from 1785–2019).[261]

In Phase II, a selective query traced the impact and lineage of two seminal unconscionability cases[262]—*A&M Produce* and *Walker-Thomas*. Each court decision that cited to either of these was then catalogued and read to determine (i) what terms were alleged to be unconscionable (arbitration clause or other) and (ii) what the court's determination was on the issue of unconscionability. The results of both Phase I and Phase II of the data collection process are in the analyses that follow.

B. The Results

In the comprehensive Phase I analysis, the first search retrieved 7,496 court decisions that mentioned unconscionability.[263] Federal courts had 3,381 decisions that alleged unconscionability and the state courts had 4,114. Among the decisions implicated in the search, New York, California, Texas, Illinois, Florida, Ohio, and West Virginia heard the most unconscionability cases. In a second parallel search, which retrieved 7,745 court decisions that mentioned unconscionability—2,628 in federal courts and 5,115 in state courts[264]—most unconscionability claims were brought in New York, California, Texas, Illinois, Florida, and New Jersey.

The data from the second search was further separated into claims attempting to invalidate arbitration clauses and those not involving arbitration clauses. Of the 7,745 court decisions noting unconscionability, twenty-two percent (1,705) had an arbitration clause at issue and seventy-eight percent (6,040) did not. Once divided, the non-arbitration decisions were categorized by year from 1785–2020. The graph below shows the yearly results from 1900 to 2019:

259. The arbitration clause cases were cordoned off from second Phase I search, *see id.*, advanced: (DI(unconscionab!) & TO(contracts)) % (DI(arbitrat!) OR TO(alternative dispute resolution))
Westlaw search command:
https://www.westlaw.com/SharedLink/961a5bbe914343b5a7544aaf98ce6f0d?VR=3.0&RS=cblt1.0

260. Results reported from both first and second Phase I search commands. *See supra* note 258.

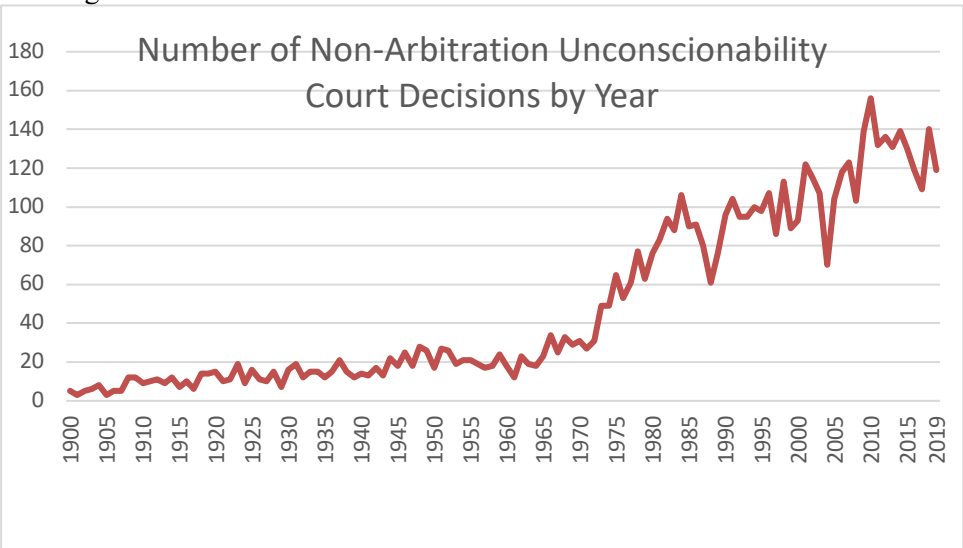
261. Westlaw command:
https://www.westlaw.com/SharedLink/961a5bbe914343b5a7544aaf98ce6f0d?VR=3.0&RS=cblt1.0

262. The selection of seminal cases is based on the number of times a case was cited in Westlaw, referenced in Contracts hornbooks, and referenced in casebooks.

263. *See* First Phase I search command, *supra* note 258.

264. *See* Second Phase I search command, *supra* note 258.

Figure 1



Although the maximum number of court decisions in any given year does not exceed a total of 160, it is interesting and unsurprising to see an uptick in unconscionability decisions in 1970.[265] This coincides with the development of the line of unconscionability cases that followed *Walker-Thomas*. This lineage of cases was partly used as protection for low-income, ill-informed consumers—in some ways a pre-cursor to state consumer protection laws.[266]

Because Phase I looked only to the number of judicial decisions in which an unconscionability claim was raised, it did not answer the question of whether the unconscionability claim was successful. That question is answered in Phase II of the data analyses. However, in turning to Phase II, the first step was to limit the number of cases in the query based upon specific criteria. First, Walker-Thomas was selected as it is the perennial favorite of contract law casebook and hornbook authors and is known to law students across the country for its defining analysis of unconscionability. Second, A&M Produce was selected as one of the three most cited cases that analyzes

265. *See* Figure 1. This is an absolute number as opposed to a percentage of total cases.

266. Fleming, *supra* note 54.

unconscionability for a contract term other than an arbitration clause.[267] The results follow.

Walker-Thomas was cited 364 times in the data set, while *A&M Produce* was cited 450 times in the data set.[268] Of those decisions that cited either of these lineal descendants, the results displayed below were first separated by whether the claim was based upon an arbitration clause and then the likelihood of success regarding the unconscionability claim was determined in each of these two scenarios.

Figure 2

WALKER-THOMAS

Was the unconscionability claim successful?	Non-arbitration term at issue		Arbitration term at issue		**Total %**
	No.	**% of total**	**No.**	**% of total**	
Total cases	286	78.6%	78	21.4%	
Yes	54	14.8%	17	4.7%	19.5%
No	156	42.9%	56	15.3%	58.2%
Other	1	0.3%	0	0%	0.3%
Not applicable*	75	20.6%	5	1.4%	22%

N=364 court decisions (primarily NY and DC but heavily mixed)

* Repetitive decisions—rehearings or lower court decisions decided later on appeal—are included in the "not applicable" category.

267. The other two most cited cases are Bradford v. Vento, 48 S.W.3d 749 (Tex. 2001) and Tenzer v. Superscope, Inc., 702 P.2d 212 (Cal. 1985).

268. Of the decisions that cited *Walker-Thomas* and *A&M Produce*, there were nineteen decisions that cited both cases. Of these nineteen decisions, the court in twelve did not find unconscionability, the court in four found unconscionability, there was no unconscionability claim at issue in two of the decisions, and one decision was remanded for reconsideration of the unconscionability claim. The "N" value for *Walker-Thomas* and *A&M Produce* respectively each contains these nineteen decisions.

Figure 3

A&M PRODUCE

Was the unconscionability claim successful?	Non-arbitration term at issue		Arbitration term at issue		**Total %**
	No.	**% of total**	**No.**	**% of total**	
Total cases	226	50.2%	224	49.8%	
Yes	24	5.3%	103	22.9%	28.2%
No	93	20.7%	103	22.9%	43.6%
Other	3	0.7%	5	1.1%	1.8%
Not applicable*	106	23.5%	13	2.9%	26.4%

N=450 court decisions (predominately CA (89%))

* Repetitive decisions—rehearings or lower court decisions decided later on appeal—are included in the "not applicable" category.

One key distinction between the cases is that *Walker-Thomas*, decided by the D.C. Circuit, is widely cited in a variety of jurisdictions.[269] *A&M Produce*, decided in California, remains primarily a California precedent. Looking first at the *Walker-Thomas* jurisprudence, the success rate of non-arbitration unconscionability claims in all judicial decisions is 14.8%. Given that unconscionability is a judicial balancing of the equities to determine fairness, this is arguably a small but significant percentage of terms that the court has determined unconscionable. Therefore, looking at the *Walker-Thomas* lineage, it would be difficult to characterize an unconscionability claim as the last refuge of fools.

Next, this Article examines the contrast between the *Walker-Thomas* results with those of the *A&M Produce* jurisprudence. Again, *A&M Produce* is largely precedential for California only. While intriguing as a state study in and of itself, it is also of interest because California is one of the jurisdictions most likely to find arbitration clauses to be unconscionable. As the data shows, California courts are aggressively skeptical of arbitration clauses. However, in the more varied non-arbitration category of judicial decisions, only 5.3% of unconscionability claims were successful. The range between the two cases is notable. If the default expectation for a successful unconscionability claim is 5.3%, it is arguably almost a random probability

269. At least forty-six different jurisdictions cited to *Walker-Thomas* (including Washington, D.C., and the Virgin Islands).

that it will be successful—making it truly the last refuge of fools. However, if the default expectation for a successful claim is higher, at approximately fourteen percent, that carries a potential disciplining effect to contract drafters. As borne out by the data, many state courts have honed a healthy skepticism of arbitration clauses—even after the passage of the FAA that sets forward a legislative preference for the validity of such clauses.[270] This same healthy skepticism could provide a helpful aid to consumers seeking equity in the area of online user contracts, specifically privacy.

V. THE UPGRADE

As argued above, a small but significant success rate of unconscionability claims involving certain online contract terms could be a powerful ally in the protection of privacy and the defense against arbitrary and capricious changes or denial of service.[271] Moreover, the conclusions drawn from the data set demonstrate two key points. First, use of unconscionability may be more successful in some jurisdictions than others.[272] Second, courts may be more skeptical of certain contract terms—like arbitration clauses—than of others.[273] To revitalize unconscionability for the digital era, it may be necessary to revitalize and refocus unconscionability for particularized concerns. And that may require legislative action.[274]

A. Legislative Push

As described above, courts and commentators alike have attempted to carve out a definition of unconscionability through various measures.[275] As

270. *See* 9 U.S.C. § 2 (discussing that arbitration agreements are "valid, irrevocable, and enforceable" unless there is a reason at law or in equity to revoke a contract); *see also* Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–63 (2015) (discussing state courts' hostility towards federal application and interpretation of the FAA).

271. *See supra* Section IV.B.

272. *See supra* Section IV.B; *see also supra* Figures 2 & 3 (demonstrating the unconscionability cases citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) were primarily located in New York and Washington, D.C., and the cases citing A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (Ct. App. 1982) were predominately California-based cases).

273. *See* Figure 2 (showing 21.4% of total cases addressing unconscionability under *Walker-Thomas* have the arbitration clause at issue); Figure 3 (showing 49.8% of total cases addressing unconscionability under *A&M Produce* have the arbitration clause at issue).

274. *See supra* note 273 and accompanying text. The proposed legislative action would hopefully encourage courts to be skeptical of certain problematic contractual terms, as they are already skeptical of arbitration clauses, where one party—potentially a large tech company with greater bargaining power—offers the consumer no choice but to agree to the company's terms or refrain from using the company's services.

275. *See supra* Part I.

stated, an unconscionability analysis is generally considered to be a two-prong test consisting of substantive and procedural unconscionability.[276] While procedural unconscionability has been defined as "unfair surprise" and substantive unconscionability as "substantive oppression,"[277] it is not always clear what this means.[278] Additionally, the bar for finding unconscionability is quite high.[279] By crafting a clearer definition of unconscionability, the courts will be able to apply the doctrine in a more straightforward manner.

Additionally, the current protections in place for the privacy of citizens are inadequate.[280] A possible solution is to protect vulnerable consumers by creating a statutory definition for unconscionability in unnegotiated digital contracts, when drafted and enforced by corporations of far superior bargaining power.[281] Statutorily defining unconscionability will help to pave a clear path for courts in identifying the appropriate circumstances under which unconscionability should be used as a means to void egregious data collection policies, contracts with evidence of capricious enforcement, provisions without proper consumer notice, or other highly problematic contractual terms.[282] Courts will then be able to apply the doctrine of unconscionability more consistently in unconscionable situations. This Section will analyze three situations where unconscionability is defined in statute, including the Ohio Revised Code discussion of unconscionable consumer sales acts or practices, Maryland's House Bill 631, and the use of unconscionability in price gouging statutes.

276. *See supra* Part I.

277. *See* PERILLO, *supra* note 45, at 348–49.

278. *See, e.g.*, Wingard v. Exxon Co., U.S.A., 819 F. Supp. 497, 502 (D.S.C. 1992) (applying the two-prong test set out in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), but also applying three additional factors to offer more clarification including "(1) exertion by one party of unusually strong bargaining power in formulating the lease; (2) failure on the part of the weaker party to read or understand the lease; or (3) formulation of an extreme lease when compared with similar leases in the business community").

279. *See supra* Figures 2 & 3. Out of 814 judicial decisions analyzed that cited the seminal unconscionability cases A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (Ct. App. 1982) and *Walker-Thomas*, there were 512 non-arbitration cases. Within those, there were 249 instances where the court did not find unconscionability, 78 instances where the court did find unconscionability, and 185 instances classified as other or not applicable.

280. *See supra* Section II.B.

281. *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 2-801(f) (West 2017) (defining the phrase "unconscionable increase" as an "excessive" increase that leaves consumers with "no meaningful choice" in relation to prescription drugs); Ass'n for Accessible Meds. v. Frosh, No. MJG-17-1860, 2017 WL 4347818, at *1 (D. Md. Sept. 29, 2017), *rev'd*, 887 F.3d 664 (4th Cir. 2018). For further discussion of Section 2-802 of the Maryland Health Code, see *infra* Section V.A.2.

282. *See infra* Section V.C.

1. Ohio Statute: Unconscionable Acts or Practices

An example of a state that outlines a set of circumstances for applying contractual unconscionability is the Ohio statute for "Unconscionable acts or practices."[283] The statute makes it unlawful for a supplier to "commit an unconscionable act or practice in connection with a consumer transaction."[284] Importantly, the statute outlines seven circumstances to consider when determining whether the act or practice in question is unconscionable.[285] The seven circumstances appear to emphasize that the supplier *knowingly* put the consumer at a disadvantage.[286]

An example of a case that discusses the Ohio statute is *Frank v. WNB Group, LLC*.[287] In this case, appellant Brian Frank hired appellee WNB Group to transport and install a ceramic fountain.[288] During delivery, appellee dropped and damaged the fountain.[289] Appellant signed the delivery document with the understanding that appellee would cover the damage.[290] Ultimately, the insurance company denied appellee's request for insurance coverage and appellant had to pay to fix the fountain himself.[291] On appeal, appellant claimed that appellee engaged in an unconscionable act or practice when they did not disclose the "limited scope of its insurance coverage; by

283. OHIO REV. CODE ANN. § 1345.03 (West 2017).

284. *Id.* § 1345.03(A).

285. *Id.*

> (1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement; (2) [w]hether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers; (3) [w]hether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction; (4) [w]hether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer; (5) [w]hether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier; (6) [w]hether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment; (7) [w]hether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

Id. §§ 1345.03(B)(1)–(7).

286. *See id.*

287. 135 N.E.3d 1142 (Ohio Ct. App. 2019).

288. *Id.* at 1144.

289. *Id.*

290. *Id.* at 1144–45.

291. *Id.* at 1145.

telling [appellant] that the company would pay to repair the fountain, but then refusing to pay for the repairs; and by negligently unloading the fountain."[292]

When analyzing the Ohio statute, the court said that it is a "remedial law, designed to compensate for inadequate traditional consumer remedies, and must be liberally construed to achieve its remedial purpose."[293] To determine whether appellee committed an unconscionable act or practice, the court analyzed the factors laid out in the statute, which "generally sanction acts and practices of suppliers that 'manipulat[e] a consumer's understanding of the nature of the transaction at issue.'"[294] Additionally, the consumer needed to show there was sufficient knowledge to meet the scienter requirement.[295] Ultimately, appellant was unable to show that appellee knowingly misrepresented facts.[296] However, the statute is instructive in its attempt to give unconscionability some structure as it is applied to terms of commercial sales.

2. Maryland House Bill 631

Another example of a state legislature that defined unconscionability is Maryland with House Bill 631.[297] This bill was designed to prevent manufacturers or wholesale distributors of essential generic drugs from engaging in price gouging.[298] Section 2-802(a) of the bill states that "[a] manufacturer or wholesale distributor may not engage in price gouging in the sale of an essential . . . generic drug."[299] The statute defines price gouging as an "unconscionable increase in the price of a prescription drug."[300] It also defines "[u]nconscionable increase" with regards to the price of a prescription drug as "excessive and not justified," leaving the consumers with "no meaningful choice about whether to purchase the drug."[301]

292. *Id.*

293. *Id.* (citing Einhorn v. Ford Motor Co., 548 N.E.2d 933 (1990)).

294. *Id.* at 1149 (quoting Johnson v. Microsoft Corp., 834 N.E.2d 791, ¶ 24 (Ohio 2005)).

295. *Id.* at 1149–50.

296. *Id.* at 1150.

297. MD. CODE ANN., HEALTH–GEN § 2-802(a) (West 2017).

298. *Id.*

299. *Id.*

300. *Id.* § 2-801(c).

301. *Id.* § 2-801(f). The phrase "no meaningful choice" is found in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) and is a reference to procedural unconscionability. The Maryland statute further outlines that a consumer has no meaningful choice because of "[t]he importance of the drug" and "[i]nsufficient competition in the market." MD. CODE ANN., HEALTH–GEN § 2-801(f)(2) (West 2017). Additionally, the terms "excessive and not justified" in reference to the price increase could be mirroring substantive unconscionability, which refers to the actual substance of the unconscionable term. These terms demonstrate how the legislatively drafted definition for unconscionability still parallels the judicially created definitions of procedural and substantive unconscionability. This similarity reemphasizes the idea that a statutory definition is

The Maryland case *Association for Accessible Medicines v. Frosh*[302] discusses the unconscionability definition used in the statute.[303] In the case, the Plaintiff Association for Accessible Medicines ("AAM") brought action claiming HB 631 was "impermissibly vague under the Due Process Clause of the Fourteenth Amendment."[304] In response, AAM claimed that the definition of "unconscionable increase" was contingent on adjectives such as "excessive," "justified," "appropriate," and "meaningful."[305]

The court determined that there were reasonable contentions of vagueness, but that they were insufficient to deny the defendant's motion to dismiss.[306] While there was no direct ruling on this issue, the statute as a whole was ultimately deemed unconstitutional under the Dormant Commerce Clause.[307] This determination serves as a warning to legislatures attempting to define unconscionability. While unconscionability as a whole is not vague, as courts apply the doctrine regularly,[308] the goal of a statute defining unconscionability is to offer clarity, rather than create confusion.[309] Therefore, rather than including terms such as "excessive," "justified," and "appropriate" on their own, some further or alternate definition may be necessary.[310]

meant to provide guidance for the courts by creating an unconscionability definition that is a complement to current privacy laws rather than a replacement.

302. No. MJG-17-1860, 2017 WL 4347818 (D. Md. Sept. 29, 2017), *rev'd*, 887 F.3d 664 (4th Cir. 2018).

303. *Id*. at *1. While the case was reversed by Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018), the reversal was because the statute violated the Dormant Commerce Clause by trying to regulate the sale of prescription drugs in other states. *Frosh*, 887 F.3d at 674.

304. *Frosh*, 2017 WL 4347818, at *1 (citation omitted).

305. *Id.* at *10 (citation omitted).

306. *Id.* at *11.

307. *See id.* (finding that the plaintiff "has presented a plausible claim that HB 631 may be void for vagueness and [the court] shall not grant Defendants' motion seeking dismissal of the vagueness claims"); *see also Frosh*, 887 F.3d at 674 (finding HB 631 unconstitutional under the Dormant Commerce Clause).

308. *See supra* Figures 2 & 3 (listing 787 court decisions discussing unconscionability); *see also* Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, N.Y. STATE BAR ASS'N J., Feb. 2000, at 20 (stating, "[i]nherent in the statutory scheme is the assumption that unconscionability . . . actually exists").

309. *See also* Marrow, *supra* note 308, at 20 ("On its face, the legislation appears almost mystical in that it assumes that the lack of definition notwithstanding, unconscionability nevertheless exists and that courts can spot and defeat it."). The goal is to remove this mysticality and provide a clear definition.

310. *See, e.g.*, *Frosh*, 2017 WL 4347818, at *10–11 (citation omitted).

3. Unconscionability Defined in Price Gouging Statutes

A common area where state legislatures have defined unconscionability is in price gouging during times of emergency.[311] In general, price gouging is "a violation of unfair or deceptive trade practices law,"[312] and price gouging statutes are often applied during emergencies or natural disasters.[313] Multiple states have defined unconscionability in terms of price gouging and an unconscionable price increase.[314] For example, in Alabama, it is unlawful for any person to impose unconscionable prices during an emergency.[315] The price increase is determined to be unconscionable if the price during an emergency exceeds the original by twenty-five percent.[316] Meanwhile, Florida's price gouging statute[317] considers a price unconscionable if "[t]he amount charged represents a *gross disparity*" between the price of the item at issue and the average price.[318]

New York is yet another state with a price gouging statute that defines unconscionability.[319] The New York statute also prohibits unconscionable price increases during times of "disruption of the market."[320] The statute states that there is a violation if the price increase is unconscionably extreme and/or there was an exercise of unconscionable means.[321] Additionally, proof that a violation occurred will include a *gross disparity* between the amount charged for an item or service and the amount of the item or service during

311. *See* Heather Morton, *Price Gouging State Statutes*, NCSL (May 17, 2021), https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx ("Thirty-nine states, Guam, Puerto Rico, the U.S. Virgin Islands and the District of Columbia have statutes or regulations . . . defining price gouging during a time of disaster or emergency.").

312. *Id.*

313. *See* Jon B. Dubrow & Noah Feldman Greene, *Price Gouging In The Crosshairs During COVID-19*, NAT'L L. REV. (Apr. 24, 2020), https://www.natlawreview.com/article/price-gouging-crosshairs-during-covid-19 (stating because of the COVID-19 pandemic, price increases that usually would be perceived as normal due to a lack of supply are closely monitored for price gouging during the COVID-19 emergency).

314. Morton, *supra* note 311.

315. ALA. CODE § 8-31-3 (2021).

316.

> [A] price is unconscionable if any person, during a state of emergency . . . charges a price that exceeds, by an amount equal to or in excess of twenty-five percent the average price at which the same or similar commodity or rental facility was obtainable in the affected area during the last 30 days immediately prior to the declared state of emergency and the increase in the price charged is not attributable to reasonable costs incurred in connection with the rental or sale of the commodity.

Id. § 8-31-4.

317. *See* FLA. STAT. § 501.160 (2021).

318. *Id.* § 501.160(1)(b)(1) (emphasis added).

319. *See* N.Y. GEN. BUS. LAW § 396-r (McKinney 2020).

320. *Id.* § 396-r(2).

321. *Id.* § 396-r(3)(a).

the usual course of business.[322] Proof of a violation also occurs where the amount charged "grossly" exceeds the price of the good readily obtainable in the trade.[323]

An example of a case analyzing the New York price gouging statute is *People v. Wever Petroleum, Inc.*[324] In this case, respondent Wever Petroleum was found to have violated New York's price gouging statute because it charged an unconscionably excessive amount for gasoline after Hurricane Katrina.[325] Because the court upheld the statute, the unconscionability definition of "gross disparity" remains valid.[326]

Furthermore, other states, including Maine,[327] Pennsylvania,[328] Rhode Island,[329] Vermont,[330] and Virginia,[331] also include unconscionability

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322.

> [T]he amount charged represents a *gross disparity* between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market . . . .

Id. § 396-r(3)(b)(i) (emphasis added).

323. *See id.* § 396-r(3)(b)(ii) ("[T]he amount charged *grossly exceeded* the price at which the same or similar goods or services were readily obtainable in the trade area.") (emphasis added).

324. 827 N.Y.S.2d 813 (N.Y. Sup. Ct. 2006).

325. *Id.* at 816.

326. *Id.*

327. *See* ME. REV. STAT. ANN. tit. 10, § 1105 (West 2021). The Maine statute states that "a person may not sell or offer for sale necessities at an unconscionable price." *Id.* § 1105(3). The price is unconscionable when:

> [I]t *exceeds by more than 15%* the sum of: (1) The price at which similar goods or services were offered for sale or sold by that person immediately prior to the beginning date of the abnormal market disruption. . . . and (2) [t]he increased cost calculated according to the method used by that person prior to the abnormal market disruption.

Id. §§ 1105(1)(D)(1)–(2) (emphasis added).

328. *See* 73 PA. STAT. AND CONS. STAT. ANN. § 232.3 (West 2007) (defining unconscionably excessive as "when the amount charged represents a *gross disparity* between the price of the consumer goods or services and the price at which the consumer goods or services were sold or offered for sale within the chain of distribution in the usual course of business seven days immediately prior to the state of disaster emergency") (emphasis added).

329. *See* 6 R.I. GEN. LAWS ANN. § 6-13-21(b)(1) (West 1956) (defining an unconscionably high price as when "the amount charged represents a *gross disparity* between the average prices at which the same or similar commodity was readily available and sold or offered for sale within the local trade area in the usual course of business during the thirty (30) days immediately before the declaration of the market emergency") (emphasis added).

330. *See* VT. STAT. ANN. tit. 9, § 2461d(c) (West 2005).

331. VA. CODE ANN. § 59.1-527 (West 2004). The statute outlines a set of four considerations to help determine whether there was an unconscionable price increase. *Id.* Those considerations include "[w]hether the price charged by the supplier *grossly exceeded* the price charged by the supplier for the same or similar goods or services during the [ten] days immediately prior to the time of disaster," and "[w]hether the price charged by the supplier *grossly exceeded* the price at which the same or similar goods or services were readily obtainable by purchasers in the trade area." *Id.* (emphasis added). The other two considerations are excluded for relevance to this article.

definitions. It is common for many of these statutes to use language such as "gross disparity"[332] or to explicitly define an unconscionable price increase with an actual percentage of an increase that the legislature determined to be unconscionable.[333] Similar language could also be helpful in defining an unconscionability defense for digital privacy.

B. Unconscionability Applied

The legislative use of unconscionability in situations such as price gouging and the pricing of essential drugs illustrates the doctrine may be statutorily defined to protect consumers of non-negotiated, digital standardized agreements.[334] Historically, price gouging refers to businesses that increase prices of essential goods during an emergency, taking advantage of consumers during a time of extreme need.[335] Additionally, extreme prices for essential drugs is an area where lawmakers have traditionally struggled to rein in costs.[336] Most people agree that drug prices are too high, however there is a lack of consensus about how to regulate this area.[337] Maryland attempted to regulate the price of essential generic drugs with their House Bill 631, discussed above.[338] The bill tried to prevent price gouging of essential generic drugs by claiming the prices were unconscionable.[339] While

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332. *See* N.Y. GEN. BUS. LAW § 396-r(3)(a) (McKinney 2020); FLA. STAT. § 501.160 (West 2020); 73 PA. STAT. AND CONS. STAT. ANN. § 232.3 (West 2007); 6 R.I. GEN. LAWS ANN. § 6-13-21(b)(1) (West 1956); VT. STAT. ANN. tit. 9, § 2461d(c) (West 2005); *see also* VA. CODE ANN. § 59.1-527 (West 2004) (considering an unconscionable price increase as a price that "grossly exceeded" the price the supplier charged during the [ten] days prior and whether the item was readily available).

333. *See* ALA. CODE § 8-31-4 (2019); ME. REV. STAT. ANN. tit. 10, § 1105(4) (West 2005).

334. *See supra* Section V.A.

335. *See, e.g.*, *FAQs on Price Gouging*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/consumers/pricegougingduringdisasters (last visited Oct. 22, 2021). For examples, see Morton, *supra* note 311; Katherine Kiziah, *Consumer Protection Tips During the COVID-19 Pandemic—A Former Enforcement Attorney Perspective: Price Gouging*, JD SUPRA (Apr. 2, 2020), https://www.jdsupra.com/legalnews/consumer-protection-tips-during-the-17065/ (discussing how price gouging statutes are "designed to curb . . . predatory tactics" utilized when businesses take advantage of consumers during an emergency). The COVID-19 situation has provided ground for the utilization of price gouging statutes different from their traditional uses. *Id.*

336. *See* Noah Weiland, *As the Coronavirus Spreads, Drug Pricing Legislation Remains Stalled*, N.Y. TIMES (Jun. 27, 2020), https://www.nytimes.com/2020/06/27/us/politics/coronavirus-drug-pricing-legislation.html.

337. *See, e.g.*, Jay Hancock, *Everyone Wants to Reduce Drug Prices. So Why Can't We Do It?*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/23/sunday-review/prescription-drugs-prices.html ("There's clearly no single solution out there that will solve this rapidly rising spending . . . [b]ut . . . there's not a lot of fundamental disagreement about the direction this needs to move.").

338. *See supra* Section V.A.2.

339. Ass'n for Accessible Med. v. Frosh, No. MJG-17-1860, 2017 WL 4347818 (D. Md. Sept. 29, 2017), *rev'd*, 887 F.3d 664 (4th Cir. 2018).

the bill was ultimately found to be unconstitutional, this was unrelated to the unconscionability component.[340]

As discussed in Section V.A., the unconscionability statutes all have similar structures and are worded similarly.[341] By drawing on those similarities, legislatures can draft laws that apply unconscionability to the review of non-negotiated, digital standardized contracts. For example, certain unconscionability statutes include components of scienter. The Ohio statute states one element of an unconscionability claim in terms of a commercial transaction as instances where the supplier has "knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's . . . inability to understand the language of an agreement."[342] While this statute is targeted to consumer transactions, the analogy is clear. A transaction between a supplier and an unknowing consumer is similar to a nonnegotiable form contract, such as Facebook's terms and conditions that require a high level of education to understand.[343] By intentionally creating such complex terms, under these statutes, Facebook arguably would have satisfied the scienter component.

Additionally, many price gouging statutes also incorporate the term "gross" or "gross disparity" in regard to the price of a good during normal business and what the supplier charges in an emergency.[344] *Gross disparity* could be used to describe the unequal bargaining power between consumers and a Big Tech company who is creating the one-sided terms and has a huge digital presence in addition to their huge pockets.[345]

Furthermore, emergency situations and access to essential drugs demonstrate situations where there is unequal bargaining power between the consumer and supplier.[346] This type of inequality in bargaining power can be analogized to the bargaining power between a huge tech company and a consumer with regards to a nonnegotiable form contract to use a certain product or platform. With regards to emergency products and essential drugs, the consumer has no other option but to buy those items.[347] Here, the consumer can technically choose not to use these platforms or websites, but only to an extent. Social media and other media platforms have become essential ways to stay connected, especially during the pandemic—merely consider the importance of Zoom, WebEx, and Google Classroom for

340. *See supra* Section V.A.2.

341. *See supra* Section V.A.

342. OHIO REV. CODE ANN. § 1345.03(B)(1) (West 2017).

343. *See supra* notes 239–245 and accompanying text.

344. *See supra* note 332 and accompanying text.

345. *See supra* notes 192–196 and accompanying text.

346. *See, e.g.*, Kiziah, *supra* note 335 (stating price gouging laws are limited to items that are "needs, not wants") (emphasis omitted).

347. *See id.*

attending school, working, or general engagement in civil society.[348] However, even if a consumer chooses not to use Facebook or another platform, their data is still not safe.[349] What else can they do?

The situations of unequal bargaining power, lack of meaningful choice, and unfair terms are all familiar situations that describe when there is procedural and substantive unconscionability[350] and, coincidentally, also describe the situation surrounding a form contract used by a Big Tech company.[351] State statutes that define unconscionability and the situations that facilitated the development of those statutes are instructive with regards to a potential unconscionability statute related to protecting informational privacy, demanding clear notice of understandable terms, and policing the arbitrary enforcement of standardized terms.

C. Drafted Example

In the case of the specific situation of informational privacy misuse as discussed in depth in Part II,[352] this Article proposes a solution in the form of a statutorily defined unconscionability provision that applies to informational privacy. Rather than creating an all-encompassing privacy statute, similar to the CCPA, state legislatures could create a specific targeted unconscionability statute to address informational privacy issues. This statute would be designed to be used alongside existing privacy statutes, to bolster rather than to replace the existing statutes. This targeted statute could be a solution that is easier to create and implement.

A possible example of a statute defining an unconscionable use of personal data is as follows:

> The following section prohibits an unconscionable use of personal data.
>
> "Unconscionable use" is defined as use of personal data that:
>
> 1) is grossly out of proportion with the individual's (expected) intended use (that is excessive) and not reasonably justified by the terms and conditions of the agreement (or when a party claims there is an agreement), and

348. *See* Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html ("With nearly all public gatherings called off, Americans are seeking out entertainment on streaming services like Netflix and YouTube, and looking to connect with one another on social media outlets like Facebook.").

349. *See supra* note 200–202 and accompanying text.

350. *See supra* Section I.D.

351. *See* Uber Techs. Inc. v. Heller, 2020 SCC 16, para. 6, 477 D.L.R. 4th 179 (Can.); Allyn, *supra* note 187; *see also supra* notes 175–199 and accompanying text (describing the unequal bargaining power between Uber and TikTok and the consumers that use the websites).

352. *See supra* Section II.A.

2) results in the consumer having no meaningful choice about the use of their data due to:

a) the unknowing and unauthorized use of the data, and
b) grossly unequal bargaining power between the parties.

For example, if a business, such as Facebook, unlawfully uses or sells a consumer's data, the consumer could bring an action in court. With this unconscionability statute in place, the court would have a clear way to apply the unconscionability doctrine. The court would consider whether the data usage is grossly out of proportion with the individual's expected use and not reasonably justified by the terms and conditions of the contract or agreement. When an individual signs an agreement with Facebook, they usually do not anticipate that their information will be sold or used in many ways Facebook ends up utilizing it.[353] The court would then analyze whether the consumer had meaningful choice regarding the use of data, by looking at whether the consumer knew or authorized the use of the data and the disparity in bargaining power between the parties. In the Facebook example, the court would analyze whether the individual knew about the use of their data or authorized it in the terms or conditions. Even if the user authorized the use, the court would also look at the bargaining power between the two and determine if there was a disparity, especially since the agreement is a non-negotiated form contract.[354] A defined unconscionability statute could be another arrow in the quiver for courts to apply against Big Tech businesses. The court could easily apply the unconscionability doctrine to determine whether the use of consumer data was procedurally and/or substantively unconscionable.

Currently, the use of unconscionability as a defense is confusing and inconsistently applied, and the bar for a term or contract to be considered unconscionable is quite high.[355] The goal of a small state legislative intervention would be to outline a specific definition of unconscionability to easily apply as a complement to current privacy laws, and to enforce expectations of non-discriminatory application of standardized terms. This provision would serve to offer guidance on how to apply the unconscionability doctrine in court with a clear definition.

353. *See supra* Section III.C (discussing Facebook's use of and access to consumer data).

354. *See supra* notes 175–199 and accompanying text (describing the unequal bargaining power between Uber and TikTok and the consumers that use the websites).

355. *See supra* note 279 and accompanying text.

CONCLUSION

In recent years, especially following the outbreak of COVID-19, the amount of time people spend online has drastically increased.[356] This fact, coupled with increasingly prominent consumer concern over data breaches, has made individuals in the United States more aware of their digital impact and how their digital data is being used.[357] This awareness has led to a push for increased privacy regulations.[358] Despite the recent push for increased regulation, individuals still continue to go online. While many Americans feel Big Tech is too powerful, most are unwilling, or simply unable, to stop using this technology.[359] Even when a consumer does try to prevent a company from using their data—for example, by deleting their Facebook account—they remain insufficiently protected because Facebook can access that data from third-party sites.[360] Most people would agree that there is something inherently wrong with that.

While recent statutes such as the CCPA, CPRA, and the GDPR address consumer privacy concerns, they are extensive and require years to implement and many amendments to correct.[361] A simple legislative fix on the state level to supplement these statutory privacy laws would allow courts to begin building a precedent that they can consistently apply to unconscionability claims arising out of overbroad data collection policies. Indeed, these ubiquitous, non-negotiated digital contracts are replete with inadequate notice of terms, incomprehensible policies, overbroad data

356. *See* Michael J. Wolf, *How Covid-19 Has Transformed the Amount of Time We Spend Online*, WALL ST. J. (Aug. 7, 2020, 12:47 PM), https://www.wsj.com/articles/how-covid-19-has-transformed-the-amount-of-time-we-spend-online-01596818846 (stating the amount of time spent by the average adult with digital media is 16:06 hours a day, up from 12:24 hours a day prior to the pandemic).

357. *See, e.g.*, Auxier et al., *supra* note 107 ("Majorities think their personal data is less secure now, that data collection poses more risks than benefits, and believe it is not possible to go through daily life without being tracked") (emphasis omittted).

358. *See* CAL. CIV. CODE § 1798.100 (West 2020).

359. *See* Sam Sabin, *Most People Don't Like Giving Big Tech More Power, but They Rely on Its Services*, MORNING CONSULT (Jan. 7, 2020, 12:01 AM), https://morningconsult.com/2020/01/07/most-people-dont-like-giving-big-tech-more-power-but-they-rely-on-its-services/ ("[E]ven those consumers who find the [Big Tech] sector's growing power an unacceptable exchange for the benefits it provides are also heavily reliant on those benefits, suggesting that . . . any regulatory action that takes them away could create a disruption that is likely to inconvenience these very consumers in a big way.").

360. *See supra* note 202 and accompanying text.

361. *See* Wolford, *supra* note 130 (stating the GDPR was created in 2016 and put into effect on May 25, 2018); *CCPA Regulations*, STATE OF CAL. DEP'T OF JUST., https://oag.ca.gov/privacy/ccpa/regs (last visited Oct. 22, 2021) (CCPA was signed into law on June 28, 2018, and went into effect on January 1, 2020); *CCPA Amendment Tracker*, IAPP.ORG, https://iapp.org/media/pdf/resource_center/CCPA_Amendment_Tracker.pdf (last visited July 5, 2021) (demonstrating the various amendments to the CCPA since its passage).

collection policies, and unequal enforcement of terms—all of which plague the everyday consumer. However, with some simple redirection and judicious application, the well-established doctrine of unconscionability can become a powerful ally to consumers and legislators alike.