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UNCONSCIONABILITY AND THE CODE— THE EMPEROR'S NEW CLAUSE

ARTHUR ALLEN LEFF †

INTRODUCTION

This paper is devoted wholly to section 2-302 of the Uniform Commercial Code, the so-called unconscionability clause.¹ It is, however, not primarily an essay on commercial law. Rather it is intended to be a study in statutory pathology, an examination in some depth of the misdrafting of one section of a massive, codifying statute and the misinterpretations which came to surround it. The paper therefore is not intended as a commentary upon the content or drafting technique

† Assistant Professor of Law, Washington University Law School. B.A. 1956, Amherst College. LL.B. 1959, Harvard University.

¹ UNIFORM COMMERCIAL CODE § 2-302 (1962). This is the current version of the Code, which will be cited hereinafter as UCC. In the course of this paper various other versions of the Code and its predecessor statutes will be cited: 1) NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROPOSED REPORT ON AND DRAFT OF A REVISED UNIFORM SALES ACT (1941) [hereinafter cited as MIMEO 1941 DRAFT]. There are two versions of the 1941 draft, one mimeographed and the other printed. Only the former contains the text of the then predecessor to § 2-302. See note 12 *infra* for further details. The printed version will be cited hereinafter as PRINTED 1941 DRAFT. 2) NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM REVISED SALES ACT (Third Draft, 1943) [hereinafter cited as 1943 DRAFT]. 3) AMERICAN LAW INSTITUTE, SALES SECTIONS (SALES ACT), COUNCIL DRAFT NO. 1 (1944) [hereinafter cited as FEB. 1944 DRAFT]. 4) AMERICAN LAW INSTITUTE, UNIFORM REVISED SALES ACT (Proposed Final Draft No. 1, 1944) [hereinafter cited as MAY 1944 DRAFT]. 5) AMERICAN LAW INSTITUTE, THE CODE OF COMMERCIAL LAW (1948) [hereinafter cited as 1948 DRAFT]. 6) AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE (May 1949 Draft) [hereinafter cited as 1949 DRAFT]. 7) AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE (Proposed Final Draft, 1950) [hereinafter cited as 1950 DRAFT]. 8) AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE (Official Draft, 1952) [hereinafter cited as 1952 DRAFT].

Other drafts of the Code exist, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 n.1 (1958), but are not important in tracing the development of the unconscionability provision of the Code.

of the Code as a whole or even of the Sales article.² The focus of this study is section 2-302, and excursions into other provisions of the Code are made only to help illuminate that primary target.³ Basic to the justification of this narrow focus is the belief that such a carefully limited study will be of interest transcending that particular section's own substantive effect on the law, but that is not to say that section 2-302 was chosen at random, or that talk about its actual effect can or will be avoided here. The section was chosen because of its intrinsic interest and potential importance to both sales and contract law development,⁴ already the subject of substantial controversy.⁵ But the primary weight of the essay will be on section 2-302 as a thing-in-itself and how it got that way, rather than on what its operative effect might be.

Let us begin the story the way so many good stories begin, with ritual incantation: to make a contract one needs (i) parties with capacity, (ii) manifested assent, and (iii) consideration.⁶ This is all very simple.⁷ If these criteria are met, a party to the resulting nexus

² The Code has already occasioned one of the great outpourings of legal commentary in history. The following are the most extensive bibliographies of writings on the Code: BOSTON COLLEGE, *UNIFORM COMMERCIAL CODE CO-ORDINATOR ANNOTATED* 667-730 (1963); EZER, *UNIFORM COMMERCIAL CODE BIBLIOGRAPHY—1966* (1966) ("95% of the published materials"); GOODRICH & WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961* at 48-66 (1961); [1954] *NEW YORK LAW REVISION COMM'N REPORT* 19-46 (N.Y. Leg. Doc. No. 65(A)); WYPYSKI, *THE UNIFORM COMMERCIAL CODE, A BIBLIOGRAPHY OF LEGAL ARTICLES AND PUBLICATIONS* (1954).

³ I should not like to give the impression that I consider myself the discoverer of § 2-302. I have thus far noted in excess of 130 "discussions" of the unconscionability provision in law reviews, bar journals, practice manuals, treatises and miscellaneous studies. Most of the discussions are brief and superficially descriptive, but a number have been directed primarily to § 2-302 and the unconscionability concept. See Note, 58 *DICK. L. REV.* 161 (1954); Note, 45 *IOWA L. REV.* 843 (1960); Comment, 18 *U. CHI. L. REV.* 146 (1950); Note, 109 *U. PA. L. REV.* 401 (1961); Note, 45 *VA. L. REV.* 583 (1959); Note, 70 *YALE L.J.* 453 (1961); Note, 63 *YALE L.J.* 560 (1954).

⁴ It has been suggested that the Code's unconscionability doctrine will not be limited to the law of Sales for long, but is likely speedily to enter the general law of contracts. 5A *CORBIN, CONTRACTS* § 1164, at 223 (1964); Note, 65 *COLUM. L. REV.* 880, 891-92 (1965). See also King, *The New Conceptualism of the Uniform Commercial Code*, 10 *ST. LOUIS U.L.J.* 30, 39-41, 43 (1966).

⁵ Noting the controversy: 1 *HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* 44-48 (1964); Carrington, *The Uniform Commercial Code—Sales, Bulk Sales and Documents of Title*, 15 *WYO. L.J.* 1, 7 (1961); Hawkland, *In re Articles 1, 2 and 6*, 28 *TEMPLE L.Q.* 512, 513 (1955); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 *U. ILL. L.F.* 321, 324. Critical or at least questioning: Buerger, *The Sales Article of the Proposed Uniform Commercial Code*, 23 *N.Y.S.B. BULL.* 116, 120 (1951); Douglass, *Discussion on Sales as Proposed in the Uniform Commercial Code*, 21 *OKLA. B.A.J.* 808, 810 (1950); Goodwin, *How the Adoption of the Uniform Commercial Code Would Affect the Law of Sales in Oregon*, 30 *ORE. L. REV.* 212, 213-14 (1951); Ireton, *The Commercial Code*, 22 *MISS. L.J.* 273, 280 (1950); King, *Suggested Changes in the Uniform Commercial Code—Sales*, 33 *ORE. L. REV.* 113, 115-16 (1954); Levy, *A Study of the Uniform Commercial Code—Sales*, 58 *COM. L.J.* 329, 331 (1953).

⁶ *RESTATEMENT, CONTRACTS* § 19 (1932).

⁷ This simplicity is, of course, of a rather special kind. Robert Frost once remarked (at a "saying" of his poetry): "e equals mc²; what's so hard about that? Of course, what e, m and c are is harder."

who has made promises is obligated to carry them out, unless he can maintain successfully one of the standard contract-law defenses, such as fraud, duress, mistake, impossibility or illegality.⁸ These "defenses" might be classified in divers ways to serve various analytical purposes. For our particular needs, however, there is a simple way of grouping them which is signally illuminating: some of these defenses have to do with the *process of contracting* and others have to do with the resulting *contract*. When fraud and duress are involved, for instance, the focus of attention is on what took place between the parties at the making of the contract. With illegality, on the other hand, the material question is instead the content of the contract once "made."⁹ The law may legitimately be interested both in the way agreements come about and in what they provide. A "contract" gotten at gunpoint may be avoided; a classic dicker over Dobbin may come to naught if horse owning is illegal. Hereafter, to distinguish the two interests, I shall often refer to bargaining naughtiness as "procedural unconscionability," and to evils in the resulting contract as "substantive unconscionability."

Getting down to cases, section 2-302 of the Uniform Commercial Code provides in its entirety as follows:

Section 2-302. Unconscionable Contract or Clause.

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

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

If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of "unconscionable" except perhaps that it is pejorative.¹⁰ More particularly, one cannot

⁸ See RESTATEMENT, CONTRACTS §§ 19(d), 454-609 (1932).

⁹ It is possible in some cases for the contracting process to be illegal while performance of the contract is not. See 6A CORBIN, CONTRACTS § 1373 (1962).

¹⁰ As one would suspect from its linguistic structure alone, which is the negating of the root concept of "conscience." See WEBSTER, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2763 (2d ed. 1957). The examples of its use collected in 11 OXFORD ENGLISH DICTIONARY U-99 (1933) show the word to have been used through the ages as a rather generalized pejorative intensifier, a wide-gauge "snarl word." See HAYAKAWA, LANGUAGE IN ACTION 76-79 (1941).

tell from the statute whether the key concept is something to be predicated on the bargaining process or on the bargain or on some combination of the two, that is, to use our terminology, whether it is procedural or substantive. Nonetheless, determining whether the section's target is a species of quasi-fraud or quasi-duress, or whether it is a species of quasi-illegality, is obviously the key to the bite and scope of the provision.

One central thesis of this essay is that the draftsmen¹¹ failed fully to appreciate the significance of the unconscionability concept's necessary procedure-substance dichotomy and that such failure is one of the primary reasons for section 2-302's final amorphous unintelligibility and its accompanying commentary's final irrelevance. This I think can most clearly be shown by an examination in detail of the drafting history of the provision and its accompanying comments, from the beginning (prior to 1941) to the present version. The examination will proceed first from the point of view of what that history discloses about the transformations of procedural unconscionability, and then the focus will shift to substantive unconscionability. Thereafter, I shall examine the equity-specific performance "unconscionability" doctrine, to show its total inapplicability to the problems dealt with in the Code, hence pointing out the irrelevance of substantially all of the standard commentary on the section. I shall close by examining the reported cases thus far affected by section 2-302, and their dangerous

¹¹ I shall use "draftsmen" throughout to refer to that imaginary construct which corporately produced the final Code and the final version of § 2-302. From time to time I shall use the singular form "draftsman," to refer to the late Karl Llewellyn who, at least at the earliest drafting stages, did the major share of the actual drafting, especially of the Sales article. See Braucher, *supra* note 1, at 800; Mooney, *Old Contract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 223 (1966). And see the early and amusing evaluation in Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951), where the Code is continually referred to as the "lex Llewellyn." But see Llewellyn, *Why A Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953): "there are so many beautiful ideas I tried to get in . . . but I was voted down."

It became an article of faith for the defenders of the Code to assert that no single man or group had a monopoly of the drafting of the Code, especially (during the height of the adoption push) not law professors. There are a goodly number of articles on who "really" drafted the Code, taking somewhat divergent views. See, suggesting that the professors really ruled, Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted in Ohio*, 14 OHIO ST. L.J. 3, 6-7 (1953) (conspiracy between professors and successful lawyers); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 321-28; Levy, *A Study of the Uniform Commercial Code—Sales*, 58 COM. L.J. 329 (1953). Among the works defending against this academic-orientation canard are Godfrey, *Preview of the Uniform Commercial Code*, 16 ALBANY L. REV. 22, 25-26 (1952); Kuhns, *Uniform Commercial Code*, 16 TEX. B.J. 67, 68 (1953); Malcolm, *The Uniform Commercial Code*, 39 ORE. L. REV. 318, 323 (1960); Mentschikoff, *The Uniform Commercial Code, An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950); Note, 65 COLUM. L. REV. 880, 887 (1965).

The part Professor Llewellyn played in the final form of § 2-302 is hard to assess. In his later writings about it he expressed neither hostility to the section nor much faith in it. See LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960).

(though understandable) tendency. The central purpose of the paper will be to illustrate the progressive abstraction, attenuation and eventual destruction of meaning in an important single statutory provision, in response to pressures the nature of which can only be guessed.

PROCEDURAL UNCONSCIONABILITY

Drafting History

In 1941 there appeared publicly for the first time the provision which eventually became section 2-302 of the Code.¹² In that earliest draft at least, there was substantial evidence that the draftsman intended to provide that if a contract or portion thereof were in fact the subject of some (not quite specified) level of particularized bargaining, it would be safe from judicial rewriting. This original tack must be emphasized. From the beginning the procedural unconscionability question was not posed in terms of what bargaining conduct, if any, would vitiate the agreement, but rather in terms of whether there was bargaining conduct sufficient to *insulate* from judicial interference a contract which was, arguably, substantively "unconscionable." The draft provision at one point indicated that view quite distinctly:

When both of the parties have so directed their attention to a particular point that . . . variance from this Act may fairly be regarded as the deliberate desire of both, and as reflecting a considered bargain on that particular point . . . the legislature recognizes that policy in general requires the parties' particular bargain to control.¹³

Other portions of the provision helped to reinforce this idea that bargaining of some dimension would validate any contractual term, for instance the clear statement that the section's policy was "to aid

¹² MIMEO 1941 DRAFT § 1-C. This draft is identified in a covering letter dated September 5, 1941, from Professor Llewellyn (then at Columbia Law School) to Professor Underhill Moore at Yale Law School, as a "Second Draft of a Revised Sales Act, for the Committee's discussion . . . Sept. 19-22." Section 1-C is new in this draft. (The letter is bound in with the Yale Law School Library's copy of the mimeographed 1941 draft.)

The 1941 mimeographed version is apparently not very widely available. For our purposes the mimeographed 1941 draft is particularly important, for in the printed 1941 version (copies of which exist in abundance), § 1-C is omitted, and at the point at which the section would have appeared, there appears: "[Section 1-C. (New to Sales Act). *Form Contracts and Particularized Terms*. This section was withdrawn by the Committee]"

¹³ MIMEO 1941 DRAFT § 1-C(1)(b). Section 1-C was no ordinary statutory provision. It runs ninety-nine lines (almost three full pages), is accompanied by almost five pages of commentary and the "Report" accompanying the draft and its comment devotes the greater part of an additional four pages primarily to its explanation.

The draftsman's defense against any suggestion that such fullness might approach fulsome-ness may be found as part of § 1-C, comment B(1). It is not reprinted in PRINTED 1941 DRAFT.

and foster any considered and deliberate action of the parties.”¹⁴ Moreover, the accompanying comments further reinforced that interpretation:

The principle of freedom of bargain is a principle of freedom of *intended* bargain. It requires what the parties’ [*sic*] have bargained out to stand as the parties have shaped it, subject only to certain overriding rules of public policy. . . . Displacement of these balanced backgrounds [provided by the Code] is not to be assumed as intended unless deliberate intent is shown that they shall be displaced¹⁵

On the other hand, there were hints that perhaps there were some contracts or clauses which, under the general rubric of “unconscionability,” would not be enforced regardless of what the bargaining process was like. For instance, the sentence quoted above about the section’s policy to “aid and foster the considered and deliberate action of the parties” closed with what might have been a limiting condition: “in substituting for the general rules of this Act a fair and balanced set of provisions more particularly fitted to the needs of any particular trade or situation.”¹⁶ This might mean that “considered and deliberate action” which resulted in unfair and unbalanced provisions not required by the “needs” of any particular trade or business would not be binding on the parties. But how that situation was to be treated under the section was not clear, even to the draftsman, one suspects. The idea might have been that the unbalanced nature of the resulting terms was evidence that, despite appearances, there was *not* after all the requisite bargaining. At another point the section provided:

If the bloc [of form provisions] as a whole is shown affirmatively to work a displacement or modification of the provisions of this Act in an unfair and unbalanced fashion not required by the circumstances of the trade, then the party claiming application of any particular provision in

¹⁴ MIMÉO 1941 DRAFT § 1-C(1) (e). In addition to this picture of what man-to-man bargaining would be sufficient to validate a departure from the Code rules, the 1941 Draft also envisioned valid form contracts arrived at through groups bargaining for a particular trade or industry. If a form contract were thus arrived at to govern a particular trade, and *that* bargaining procedure were “fair,” then the modified contract would be impregnable.

The draft provided:

The legislature also recognizes that particular trades and situations often require extensive special regulation in a manner departing from the general provisions of this Act, and that speed and convenience in transacting business may require such extensive departures to be incorporated into a general form contract, or into “rules” to which particular transactions are made subject, although the details of such “rules” or forms are not so deliberated on and bargained by the two parties when they are closing an individual transaction as to become particularized terms of the bargain.

MIMÉO 1941 DRAFT § 1-C(1) (c).

This validation-by-proxy technique totally disappeared after the 1941 draft.

¹⁵ MIMÉO 1941 DRAFT § 1-C, comment A(3), at 18. (Emphasis in original.)

¹⁶ MIMÉO 1941 DRAFT § 1-C(1) (e).

such bloc must show that the other party, with due knowledge of the contents of that particular provision, intended that provision to displace or modify the relevant provision of this Act in regard to the particular transaction.¹⁷

In fact, the section and its accompanying commentary really spoke throughout as if it were inconceivable that there could exist simultaneously both particularized bargaining and an unfair contract. The idea seems almost to have been that if a clause with which businessmen have been living looks unfair to an outsider it is only because he fails to understand the particular context.

Many groups of clauses in very frequent use in the Sales field are utterly one-sided, but are, for all that, entirely fair because they correct in a reasonable way an unfortunate condition in the law.¹⁸

Thus, it is just not clear under the 1941 version what result would be reached with respect to a provision, or a block of provisions, or an entire contract which not only looked one-sided but *was* one-sided. In other words, if the complaining party, at the time he entered into the contract, knew the nature of the "intended bargain,"¹⁹ and had "due knowledge of the contents of that particular provision,"²⁰ but was in no bargaining position to get any changes made, would a contract entered into under such circumstances, no matter what its terms, be safe?

The only fair answer, I think, is that one cannot tell for sure. No doubt the overall drift of the section was that contracts ought to be "fair and balanced" no matter how the parties bargained, but at least as far as its explicit language went, the draft section also was committed to the view that explicit bargaining would insulate a contract: if A and B actually bargained over each clause of a contract, and each came out the way A wanted it, the contract would stand even if extremely onerous to B. One of the central problems of the section, therefore, arose as early as 1941: what, *if anything*, will insulate a contract from 2-302? The 1941 draft used several locutions to envisage an apparently very stringent bargaining standard which might succeed, but the problem remained radically unsolved.

The 1941 draft of the section did not survive its first exposure to the light. It was "withdrawn by the [drafting] committee" because the "machinery for administration thus far developed" was thought to be "inadequate" and "too unreckonable to be in keeping with the lines

¹⁷ Mimeo 1941 DRAFT § 1-C(2) (a) (i).

¹⁸ Mimeo 1941 DRAFT § 1-C, comment A(6), at 19.

¹⁹ Mimeo 1941 DRAFT § 1-C, comment A(3), at 18.

²⁰ Mimeo 1941 DRAFT § 1-C(2) (a) (i).

of the draft.”²¹ Perhaps because of these “machinery” and “reckonability” problems, when the third draft of the Uniform Revised Sales Act came out in August 1943, matters on the unconscionability front were materially changed. This new predecessor to 2-302 read as follows:

SECTION 24. FORM CLAUSES, CONSCIONABLE AND UNCONSCIONABLE. (1) A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing when read in its entirety including the form clauses is an unconscionable contract and he has not in fact read the form clauses before contracting, except that a merchant who signs and returns such a writing after having had a reasonable time to read it is bound by it.²²

This version clearly lacked much of the *salvator mundi* touch of the 1941 draft. The section was explicitly made applicable to “form clauses” only.²³ The power to bind someone to something which he had merely read, seemingly extinguished in the 1941 draft, was here clearly resuscitated. Moreover, for merchants,²⁴ under the 1943 version, not even reading was necessary; so long as they had had sufficient opportunity to read, they were bound. The accompanying comment²⁵ was quite explicit. Where the 1941 comment spoke in terms of “deliberate intent,”²⁶ the 1943 comment began:

The situation which gives rise to the section is the increasing use of forms prepared by one party which are not in fact *examined* by the other at the time of contracting²⁷

In short, between 1941 and 1943 the provision moved from a search for words to paint pictures of haggling to a search for words for expressing merely looking and reading.²⁸

²¹ PRINTED 1941 DRAFT 51-52.

²² 1943 DRAFT § 24. This version contained two additional subsections, subsection (2) providing that any form recital that clauses were read was to be disregarded, and subsection (3) detailing the alternative procedures open to the court once it made a finding of unconscionability (including reformation, excision and nullification).

²³ The heading of MIMEO 1941 DRAFT § 1-C read: “Declaration of Policy, and Procedure with Regard to Displacement of Single Provisions or Groups of Provisions by Agreement.” The heading of 1943 DRAFT read: “Form Clauses, Conscionable and Unconscionable.”

²⁴ See UCC § 2-104(1) for the Code’s definition of “merchant.”

²⁵ Strictly speaking, there is no “comment” to this 1943 draft. There is, however, a mimeographed document entitled *Informal Appendix to Revised Uniform Sales Act, Third Draft, 1943, Tentative Sketch of Material for Comments* (1943). This appendix was “submitted on the sole responsibility of the draftsman,” i.e., Professor Llewellyn.

²⁶ MIMEO 1941 DRAFT § 1-C, comment A(3), at 19.

²⁷ *Informal Appendix*, *supra* note 25, at 11. (Emphasis added.)

²⁸ Even here, however, one must beware. The end of that portion of the “Informal Appendix” devoted to § 24 (the then foetal form of § 2-302) referred to “matters which were not particularly *discussed* by the parties.” *Id.* at 12. (Emphasis added.) That seems to imply that the draftsman may still have had in mind something more than mere reading.

This 1943 draft, however, was destined to be the section's high point of permissiveness. By February 1944, when the next published draft was submitted to the Council of the American Law Institute, while the special merchant's provision remained intact, the clause "and he has not in fact read the form clauses before contracting" was eliminated.²⁹ By May 1944, when the draft was submitted by the Council to the Institute's membership (by which time the draftsmen had hopefully labelled it "Proposed Final Draft No. 1"), even the special merchant provision was gone.³⁰

Oddly enough, it is not immediately clear what the effect of those changes might have been. The reference to "reading" in the prior draft might have been eliminated because the draftsmen felt that mere reading ought not to be a sufficient insulating factor, but that something further ought also be shown to save the contract—perhaps that the clause not only be read but understood,³¹ or perhaps even that actual haggling have taken place. That is, the elimination of the reference to "reading" may have been an attempt merely to return the section to the stringent procedural requirements of the 1941 draft.

On the other hand, the elimination of the reference to reading might be understood more simply. When one draft of a statute provides that a clause will be vulnerable if it is *both* (1) "unconscionable" and (2) not read, and the next draft removes any reference to reading, one might fairly conclude that when a contract or clause is unconscionable, it is unconscionable, and *no* amount of reading or bargaining or understanding will make any difference. Such a reading leads, obviously, to the more radical of the positions which may have been contained in the 1941 draft, that even contracts or clauses which were expressly bargained about might be stricken or modified if "unconscionable." Admittedly this seems not to have been the major thrust of the earliest draft. Under the 1941 formulation it appeared that *some* amount of bargaining fullness would rescue *any* contract or clause.³² But the May 1944 draft might have meant that substantive unconscionability alone could vitiate any provision, and no amount of procedural "superconscionability" could save it.

This interpretation, however, runs into an objection other than radicalism. If the bargaining procedure were to be considered irrele-

²⁹ See FEB. 1944 DRAFT § 23.

³⁰ See MAY 1944 DRAFT § 23.

³¹ Cf. MIMEO 1941 DRAFT § 1-C(2)(a)(i) with its suggestive "due knowledge of the contents of that particular provision."

³² Subject, of course, to the usual illegality limitations. Cf. MIMEO 1941 DRAFT § 1-C, comment A(3), at 18:

The principle of freedom of bargain requires what the parties' [sic] have bargained out to stand as the parties have shaped it, subject only to certain overriding rules of public policy. (Emphasis in original.)

vant to the conscionability determination, why would the section be explicitly limited to "form clauses"?³³ Should a bargained-about form clause be any worse off under the section than a bargained-about clause created for the occasion? It seems somehow an unlikely result that if a party arrives with a blank sheet of paper and writes clause X upon it, clause X will be invulnerable no matter what it says, but if he comes with a form on which appears clause X, even if he and the other party dicker over it specifically, clause X may be later stricken by the court. The fact that a particular clause is part of a form has no bearing upon its effect, that is, upon its substantive conscionability; its form-genesis is relevant *only* if the nature of the bargaining process is relevant to the section.

The 1944 draft, therefore, was highly unstable. The reference to "reading" from the prior draft was gone; no new standard for sufficient bargaining was supplied; and yet the section was applicable by its terms only to form contracts, thus making procedural factors relevant. This obvious tension between per se unconscionability and unconscionability to which the bargaining process was material could not remain long unsettled. In fact, the most surprising thing is that the draftsmen managed to put off the choice as long as they did, until 1948. In that year's version of the unconscionability section the ambiguity contained in the previous drafts was dispelled. The section read in its entirety as follows:

Section 2-302. Unconscionable Contract or Clause.

(1) If the court finds the contract to be unconscionable, it may refuse to enforce the contract or strike any unconscionable clauses and enforce the rest of the contract or substitute for the stricken clause such provisions as would be implied under this Act if the stricken clause had never existed.

(2) A contract not unconscionable in its entirety but containing an unconscionable clause, whether a form clause or not, may be enforced with any such clause stricken.³⁴

There is one hint in the section (without reference to its accompanying comment) which indicates that a doctrine of per se unconscionability had been chosen: the limited application of the section only to "form"

³³ See note 23 *supra* and accompanying text.

³⁴ 1948 DRAFT § 2-302. The changes in this version may have been conceived well before 1948. There is a mimeographed version of the sales article extant dated "as of 4/1/46" which is identical with the 1948 and 1949 versions (though possessing no comments). See AMERICAN LAW INSTITUTE, UNIFORM REVISED SALES ACT (1946).

It may be well to note here that there likely are other vagrant mimeographed versions of the Code or portions thereof which I have not seen, my searching having been limited substantially to the Columbia, New York University, Yale and Washington University Law Libraries.

contracts was eliminated.³⁵ In fact, this draft's sole reference to form clauses was inserted only to make clear that whether the clause was a form clause or not was irrelevant.³⁶ Thus, though once again the language of the statute falls somewhat short of limpidity, one gains the impression that the draftsmen might have decided to make "unconscionability" in at least some cases independent of the bargaining process.

And for once the natural inference drawn from the section was clinched by the accompanying commentary. The third comment to this 1949 version dealt specifically with procedural unconscionability. It read as follows:

A common type of unconscionable clause within this section consists of cases in which the contents of the questionable clause were never actually discussed or bargained out by the parties and as a result the clause was included in the agreement without one party's attention ever having been directed specifically to it. This situation arises most frequently with respect to "form" contracts where the attention of the other party is addressed to the bargained terms which are filled in.³⁷

What is most noteworthy about this comment, I think, especially in the light of what the fourth comment was to say, is that the draftsmen apparently found it exceedingly difficult to pin down exactly what was worrying them concerning procedural unconscionability. In one short paragraph they described the bargaining vice as a failure of discussion, a failure of bargaining and a failure to have one's attention "directed specifically" to a clause. Perhaps it was this difficulty in pinning down the naughty bargaining conduct which prompted the fourth comment, which read as follows:

Another common type of situation arising in connection with unconscionable contracts or clauses consists of cases where one party has deliberately entered into a lopsided bargain with full knowledge and awareness and has actually assented to clauses which are unconscionable in effect against him. In such cases this Article goes on the theory that sales contracts have as their legally necessary effect certain minimum incidents set forth in this Article despite any agreement

³⁵ This version is the first printed version which does not mention "form" contracts in the title, but instead substitutes a reference to "unconscionable" contracts. Permit me to suggest that you close your eyes and try to *picture*, respectively, a "form" contract and then an "unconscionable" contract.

³⁶ 1948 DRAFT § 23. This, it should be pointed out, is in itself a pretty peculiar form of drafting, to negative an impression which could have been gained only by having read previous drafts of a section.

³⁷ 1949 DRAFT § 2-302, comment 3. The text of the section in the 1949 DRAFT (which contained comments) was identical with 1948 DRAFT § 23.

of the parties to the contrary. The question primarily is whether or not a contract for sale in a business sense was intended. If so, then the transaction is governed by this Article and its minimum legal effects are laid down by the law as embodied in this Article. Therefore, the court may, under this section, refuse to enforce the clause or agreement as unconscionable and declare that the provisions of this Article be made operative instead.³⁸

This comment seems to have the effect (even if not conscious) of making the immediately previous one irrelevant and atavistic. Interpreting section 2-302 along the lines suggested by this fourth comment has the natural effect of solving, at one swoop, substantially all of the problems one might have in deciding upon, classifying and conveying in language to another just what contracting *conduct* is objectionable. One merely drops the question. The process of getting the clause becomes unimportant. An unconscionable clause is unconscionable. But the price paid for this facile solution is to increase immensely the weight which has to be borne by the definition of "unconscionable" as a substantive thing, because now that decision may be made without reference to the bargaining process at all. That does not mean that it must be so made, but the net result is to make it possible under the section to strike a single provision in a contract even if it had been specifically bargained about and even if it were not forbidden by any established doctrine of illegality or public policy, solely on the basis of an *ad hoc* judicial determination of substantive "unconscionability."

Such a position, even though fraught with difficulties and somewhat radical, had all the virtues of clarity. Moreover, the world would not have come to an end if that position on the definition of "unconscionability" had been the one finally adopted. As a matter of statutory draftsmanship, after wrestling with the serious policy problems involved, one might have decided to make the bargaining process irrelevant. The draftsmen in the earlier drafts had tried to make the bargaining process relevant, and had encountered immense difficulties in describing the mechanics and details of that relevance. This 1949 draft cut the developing Gordian knot by saying, in effect, that an unconscionable clause is an unconscionable clause, no matter how it got into the contract. The policy determination was made, in effect, that one could use his superior bargaining power only so far. A legislature being presented with the 1949 draft would have had a fighting chance of knowing what it was being called upon to import into the law of Sales.

Alas, the draftsmen's impulse toward transparency of intention was but ephemeral. It lasted only until the next printed draft of the

³⁸ 1949 DRAFT § 2-302, comment 4.

Code came out in May 1950. The statute itself remained almost unchanged from its 1949 incarnation.³⁹ But the comments, oh my, the comments. As a starter, comments 3 and 4 from the prior version, the two comments which explicitly discussed and distinguished substantive and procedural unconscionability, were totally deleted. There was substituted, however, a newly minted first comment, which read in its entirety as follows:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determination that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case the clauses involved are so one-sided as not to be expected to be included in the agreement. The principal [*sic*] is one of prevention of unfair surprises and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following⁴⁰

As I shall discuss anon, this new comment raised substantial problems through its obfuscation of what "unconscionability" as a substantive thing applicable to a single contractual provision might be. But equally significant was the diffusion of the section's attitude toward contracting conduct. Briefly put, is the manner in which a provision gets into a contract relevant or not? If the contracting process is relevant, what standards does one use to judge the adequacy of that process? Is "reading" enough (can you or can't you be surprised by what you have read?) or "understanding" or "bargaining"? If some form of bargaining over a specific clause goes on, but the seller can and does adopt a take-it-or-leave-it position, is the buyer bound if he takes it? The important thing is not so much that the comment to the 1950 version does not clearly answer those particular questions, but that it clearly replaced a draft which did.

³⁹ The second subsection of the 1949 DRAFT § 2-302, see text at note 34 *supra*, was eliminated, the first subsection having added to it the language italicized below:

"If the court finds the contract *or any clause of the contract* to be unconscionable, it may" This was tighter drafting, certainly, but made no change of substance.

⁴⁰ 1950 DRAFT § 2-302, comment 1. Following the colon were the ten cases cited in the current version of the Code.

The 1949 version's confrontation of the difficulty was to be the last; succeeding drafts of 2-302 were to back further and further away from any stand on the relevance of contracting procedure to a finding of "unconscionability." While the section itself did not change in any manner material to that problem after the 1950 changes, the comments did—subtly perhaps, but importantly.⁴¹ For instance, the 1950 comment had described an unconscionable clause as one "so one sided as not to be expected." The comment to the 1952 draft, however, condemned instead clauses "so one sided as to be unconscionable."⁴² This particular transformation I find most instructive on the development of 2-302's language in general. The 1950 comment had pointed to a recognizable human situation; it had, if you will, a dramatic situation somewhere behind it. It may have been impossible to tell in advance what clause might turn out to be so unexpectable as to be *unfairly* surprising, but at least it was clear that one was looking for one of the indicia of surprise—a dropped jaw, perhaps. Some variation from what a contracting party might reasonably have been lulled into expecting (or, more likely, not expecting) was the focus. That would be a scene describing the interaction of real people. Obviously relevant to unconscionability posed as a question of "surprise" would be whether the clause ought to have been pointed out especially, or explained, or at the very least not hidden in fine print and verbal complexity. The test might have been stated, "if he had read this clause, and if he had understood it, what is it likely that he would have done?" If the answer were "exclaimed" or "questioned" or even perhaps "looked quizzical" (the expected reaction need not have been at the level of a silent-movie seduction) then there might arguably have been enough wrong with such a clause's method of importation into the contract to justify its lancing. The 1950 comment at least made the question one of a person's state of mind, and its factual justification. But when it was decided in the 1952 draft to describe unconscionability as "so one-

⁴¹ This propensity of the draftsmen to make material changes in the Code by modifying the comment rather than the statute has not gone unnoticed. See Surrency, *Research in the Uniform Commercial Code*, 1962 U. ILL. L.F. 404, 408; *Report on Article 2—Sales by Certain Members of the Faculty of the Harvard Law School* [Professors Braucher, Kaplan, McCurdy & Sutherland], 6 BUS. LAW. 151, 153 (1951); Note, 71 HARV. L. REV. 674, 686 (1958).

1950 DRAFT provided that the comments might "be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and operation." 1950 DRAFT § 1-102(2). The next draft provided that the comments might be consulted "in the construction and application" of the Code, "but if text and comment conflict text controls." 1952 DRAFT § 1-102(3) (f). The present version of the Code has no provision dealing with the status of the comments at all. Surrency, *supra* at 407-08, suggests that it was omitted after 1952 "because the old comments were out of date" and the draftsmen didn't know when they would be able to produce new ones. The present commentary to § 2-302 is substantially the same as it was in 1950.

⁴² Compare 1950 DRAFT § 2-302, comment 1, with 1952 DRAFT § 2-302, comment 1.

sided as to be unconscionable," all dramatic focus was destroyed. The movement of the drafting was from definition in terms of drama to definition in terms of abstraction. By 1952 unconscionability was defined in terms of itself.

Still another major change was made in the 1952 comment. To the draft as it appeared in 1950 the material indicated by italics below was added:

The principle is one of the prevention of *oppression and unfair surprise* (Cf. *Campbell Soup Co. v. Wentz*, 172 F. 2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power.⁴³

The relevance, if any, of the *Campbell Soup* decision and the doctrine of equity unconscionability will be discussed shortly. At this point, however, while the historical progression of the treatment of procedural unconscionability is being surveyed, it is especially illuminating to discuss what "oppression" might possibly have meant. Given the emerging diffusing trend of the statute brought to its peak in this 1952 draft,⁴⁴ it should come as no surprise to anyone to discover that the word "oppression," apparently chosen to clarify the meaning of unconscionability, should be almost perfectly ambiguous. Oppression, strictly as a linguistic and syntactical matter, might refer to what took place between the parties at the time they entered into the contract in question (a sort of quasi-duress), or it might just as well refer to the effect of that contract upon the complaining party. As it happens, it is not easy to think of a word better designed to leave in a state of perfect uncertainty whether the focus of the section was to be upon the contracting process or the contract.

If one takes the position that "oppression" refers to the nature of the contract rather than to the contracting process, then the word may add to one's feeling for what "unconscionability" might be: it is something that is not only unexpected but hard on the complaining party. That harshness should be a component of unconscionability will hardly come as startling illumination to anyone, but it does add some explicit coloration to an implicit expectation. If, however, "oppression" describes something in the bargaining process, one is merely more puzzled. Prior to its appearance one would have, under the guidance of the reference to "unfair surprises," focused his attention upon various modes of deception which might have been practiced on the

⁴³ 1952 DRAFT § 2-302, comment 1.

⁴⁴ Note, for instance, this subtle linguistic modification: the 1950 draft's "surprises" became in the 1952 draft "surprise." This is a nice example of the progressive regression of § 2-302's language from recognizable commercial "plot" to abstraction. Substituting "surprise" for "surprises" has much the same effect as substituting the abstract plural "man" for the pictorial plural "men."

complaining party. One would have looked to factors such as absence of opportunity to read or ability to read, the size of the type used, the unnecessary verbal complexity of the provision in question and so forth. What factors would suffice to do the trick might not be clear, but the relevant inquiry would have been intelligibly circumscribed.⁴⁵ With the suggestion that "oppression" was to be henceforth relevant, however, there appeared a new dimension. It was as if the comment had said that if for some reason the aggrieved party could not effectively have objected to the provision in question, even if he knew about it and understood it, that is, *even if he were not surprised*, then the provision would still be destructible as unconscionable. What could be clearer?

Well, what could be clearer, and what in fact was clearer, was the statement in the 1949 draft comment that it was the intention of the draftsmen to cover those clauses which in fact were totally bargained but just too harsh to permit.⁴⁶ That particularly explicit comment, however, was eliminated very shortly after it appeared. Is one to take that the gist of that comment was deemed to have returned with all of its vigor in this new compressed form? I am easily churlish enough to suggest that drafting compression has its limits, and that if one were trying to convey such a signally radical position it would have been well to do so in a somewhat less Delphic manner than by the unexplained insertion of the single word "oppression." Moreover, even this circuitous implication that the full meaning of "oppression" encompassed "forced by strong bargaining" is somewhat lessened by the presence in the 1952 draft of an element which did not appear in the 1949 version, the express disclaimer of any intention to meddle with "superior bargaining power."⁴⁷ Since "true" duress expectedly remained an available defense in commercial contracts even after the adoption of the Code,⁴⁸ "oppression" must lie somewhere between duress and superior bargaining power, a rather narrow niche indeed.⁴⁹ Why all this ambiguity?

⁴⁵ One would emphasize in any opinion the factors which would prevent the complaining party from reading and understanding, for instance, general mechanical reading difficulties, *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 208-10 (2d Cir. 1955) (appendix showing back of steamship ticket), or personal reading difficulties, *Fricke v. Isbrandtson Co.*, 151 F. Supp. 465, 468 (S.D.N.Y. 1957) (steamship ticket in language party didn't know). This focus is behind the baggage-check cases, see, e.g., *Klar v. H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S.2d 285 (1946), *aff'd mem.*, 296 N.Y. 1044, 73 N.E.2d 912 (1947), and the treatment often accorded generally to fine print. See Vogel & Bernstein, *Fine Print*, 21 BUS. LAW. 544 (1966); Note, 63 HARV. L. REV. 494 (1950).

⁴⁶ 1949 DRAFT § 2-302, comment 4.

⁴⁷ 1952 DRAFT § 2-302, comment 1.

⁴⁸ See UCC § 1-103.

⁴⁹ If it is intended to be a shorthand way of referring to some concept like "business duress" or "duress of goods," it is an almost grotesquely foreshortened way of

The answer, I think, is reasonably clear. The draftsmen were faced with several possibilities. They could have said that if a certain level of bargaining elaborateness were reached, *any* resulting contract (short of illegality) would be invulnerable to later judicial meddling. That, however, would most likely have necessitated some fuller description of what type of bargaining procedure was envisioned as sufficiently immunizing. That is, they would have had to return to what seems to have been the basic conception (though not necessarily to the exact language or to the discursive style) of the original 1941 version. This, as the earliest draft itself showed, presented exceedingly difficult drafting problems. Alternatively, the draftsmen could finally have espoused the position taken in the 1949 draft, that there were some contractual provisions, presently unspecifiable, which could not be permitted under the Code no matter how fully bargained between the parties. This position, however, might well have been unacceptable to important backers of the Code⁵⁰ (not to mention to legislatures) if it had been set forth in the high relief in which it was graven in the 1949 comment. Thus faced with a dilemma, the difficulty of the first alternative and the unpopularity of the second, the draftsmen opted for a third solution. They fudged.

The Official-Comment Cases

There are clues, however, that illumine the draftmen's actual conception of procedural unconscionability, public equivocating notwith-

vouching in those vexed and complex topics. On the niceties of commercial "duress," see WOODWARD, *THE LAW OF QUASI-CONTRACTS* §§ 211-18 (1913); Dalzell, *Duress by Economic Pressure*, 20 N.C.L. REV. 237, 341 (1942); Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 12 *id.* 42 (1937); Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Annot., 79 A.L.R. 655 (1932); Note, 15 N.C.L. REV. 412 (1937). Cf. Note, 20 COLUM. L. REV. 80 (1920) (threat of litigation).

Somewhat peripheral for our purposes, but of great interest on the general problem of duress and quasi-duress in a contract context, are Hale's two articles, Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), with their careful discussion of the difficulties that arise from the fact that *every* market exchange depends upon some kind of "coercion." See especially 43 COLUM. L. REV. at 612-13; 38 POL. SCI. Q. at 478.

⁵⁰ See, for instance, the position of Bernard D. Broeker, who was a member of the subcommittees of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, which considered the work on article 2 of the Code "leading to the 1958 Edition," UCC, comment to Title, at 8, and who remains at present a member of that subcommittee of the Permanent Editorial Board for the Uniform Commercial Code created to deal with possible changes in that article, *id.* at viii. At the meeting of the Larger Editorial Board of the American Law Institute on January 28, 1951, Mr. Broeker said (with respect to the 1950 version of § 2-302):

I think that is a tremendous expansion of the law, and I don't think it ought to be that. I see no reason why I should not be allowed to make an unconscionable contract.

Proceedings of the Larger Editorial Board of the American Law Institute, January 27-28, 1951, at 172, partially reprinted in 6 BUS. LAW. 164, 184-85 (1951).

standing. The first clue is the express limitation of the unconscionability section to "form" contracts until 1948.⁵¹ The second clue, which reinforces the first, is found by a study of the procedural unconscionability aspects of the ten cases which were inserted in the official comments to 2-302 in the 1950 draft,⁵² described then (and now) as illustrating "the underlying basis" of the section,⁵³ and frequently pointed to by commentators in an effort to rebut any suggestion that the meaning of the unconscionability section is not clear.⁵⁴ As might have been expected, all ten of the cases involve commercial contracting situations. But they are notably common commercial situations. One finds none of the dramatics to be encountered in the equity unconscionability cases;⁵⁵ the parties are not notably old or young, bright or stupid, drunk, needy or sick. None of the cases involves sailors, women, heirs or other presumptive incompetents. There is no flavor of fraud or duress in any individualistic sense. Nothing more seems to have happened in any of these cases (except one) than that the parties entered into a contract on a pre-prepared form supplied by one of them.⁵⁶

But one might have expected that more would have been disclosed about the contract-procuring procedure in these cases than merely that they involved form contracts. Unless all form contracts are to be deemed open to subsequent judicial rewriting under the unconscionability section, the cases illustrating the section's "underlying basis" should have given some indication of what, in addition to being printed, would make a contract vulnerable. When one examines the ten cases carefully, however, to see how many of them involved such factors, one finds, for instance, that less than half of them are merchant-consumer cases (though these would seem to furnish the best context for overreaching), the remainder being merchant-merchant trans-

⁵¹ See 1948 DRAFT § 2-302.

⁵² See 1950 DRAFT § 2-302, comment 1.

⁵³ See UCC § 2-302, comment 1. There has been absolutely no change in this portion of the comment from 1950 to date.

⁵⁴ See, e.g., HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.1603, at 47-48 (1964); Davenport, *The Nebraska Uniform Commercial Code: An Introduction and Articles 1 and 2*, 43 NEB. L. REV. 671, 702 n.165 (1964); Lattin, *Article 2: Sales*, 23 OHIO ST. L.J. 185, 189 n.25 (1962). *But cf.* Note, 45 IOWA L. REV. 843, 849 (1960), suggesting that the official-comment cases are not quite on point.

⁵⁵ See text accompanying notes 185-202 *infra*.

⁵⁶ The clear exception is *Austin Co. v. Tillman Co.*, 104 Ore. 541, 209 Pac. 131 (1922), where the governing contract was a letter composed for the occasion, by the party who ultimately successfully challenged its terms no less. The contracts in *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272 (1937), *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 Pac. 273 (1917), and *Robert A. Monroe & Co. v. Meyer*, [1930] 2 K.B. 312, were uncomplicated enough to have been constructed for the particular transaction, but, although the cases are not explicit, it is more likely that they were printed forms.

actions.⁵⁷ Moreover, in none of the cases (except one)⁵⁸ does the court suggest that the form used in the transaction was particularly complicated, involved or extensive; these do not appear to be the kinds of forms that fight from ambush in a thicket of small print. Nor do the cases serve particularly to illustrate any monopolistic or oligopolistic power. Two of the cases⁵⁹ do indeed involve motor-vehicle warranty disclaimers of the kind eventually declared against public policy in *Henningsen v. Bloomfield Motors, Inc.*,⁶⁰ and another case⁶¹ did involve a transaction between an automobile dealer and his supplier, a relationship replete with business-duress possibilities,⁶² but that is as far as things go in this line.⁶³ These ten cases, then, are not a particularly good selection if they were chosen to illustrate varieties of commercial rapacity. These are, for the most part, simple form-contract cases, with no especially striking admixtures of quasi-fraud ("unfair surprise") or quasi-duress ("oppression"). It is inconceivable, therefore, that the cases are designed to establish a picture of what kinds of bargaining will cause the voiding of a contract or a clause therein. At best they may be taken to illustrate what kind of bargaining procedure will not serve to insulate a contract from gutting pursuant to 2-302 if it turns out to be substantively unconscionable. This is quite different from describing what bargaining conduct will

⁵⁷ *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 144 S.E. 327 (1928), *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927), and *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (1922), are clear. In addition, the discontented seller in *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 Pac. 273 (1917), was apparently a farmer and one may include him among the nonmerchants even though it is arguable that a farmer selling his produce is a "merchant" under UCC §2-104. See Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 *RUTGERS L. REV.* 14, 17 (1962). *But see* 65 *MICH. L. REV.* 345 (1966).

⁵⁸ *New Prague Flouring Mill Co. v. Spears*, 194 Iowa 417, 438-39, 189 N.W. 815, 824 (1922): "if it be a contract, it is like the Apostle's conception of the human frame, 'fearfully and wonderfully made . . .'" This is a merchant-to-merchant case, by the way.

⁵⁹ *Hardy v. General Motors Acceptance Corp.*, 38 Ga. App. 463, 144 S.E. 327 (1928); *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

⁶⁰ 32 N.J. 358, 404, 161 A.2d 69, 95 (1960).

⁶¹ *Andrews Bros. v. Singer & Co.*, [1934] 1 K.B. 17 (C.A.).

⁶² See Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 *YALE L.J.* 1135 (1957); Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 *Wis. L. REV.* 483, 740. It is worth noting that a statute now to some extent regulates the manufacturers' alleged gross power to overreach. 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964).

I am assuming, just to state the case as strongly as possible, that the English automobile company in 1933 had as strong a stranglehold on its dealers as the American big four allegedly had on their dealers in the 1950's, but I would be exceedingly surprised if that were anything like the truth.

⁶³ For completeness one might include *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 Pac. 273 (1917), as a case where there might have been no real choice. I certainly do not know the state of Kansas wheat marketing in 1917, but I can conceive of an our-mill-or-none choice for a local farmer. There is no talk in the opinion of such a state of affairs, however.

void a contract; if these cases show the way, *any form contract* is up for grabs under 2-302.

The frank adoption of the position that any form contract was open to clause-by-clause policing, however, as Professor Llewellyn pointed out very early in the game, leaves this problem: the use of form contracts is a social good; it is the contracting-process component of the mass transaction, and the mass sales transaction has exceeding economic utility.⁶⁴ The form contract is designed *not* to be read or pondered; if it is or has to be it loses much of its utility. But not reading it leads to attempts at aggrandizement by form.⁶⁵ The law's problem, therefore, is to discourage dickering and overreaching simultaneously. For this it needs some new device, since in theory at least, until the time of the mass form, it was the dickering which discouraged the overreaching. If this new device, however, is making all printed forms open to after-the-fact *ad hoc* judicial second guessing, there is the danger that the efficiency of mass transactions will be seriously impaired. Moreover, once one faces the fact that the "vice" in the contracting process is nothing more than the use of a form contract, the internal justification for interfering with the parties' transaction becomes attenuated. It becomes exceedingly harder to justify suspension of the ordinary rule that a *sui juris* person who signs his name is bound to what is over his signature. After all, preprinting one's contracts is hardly *malum in se*.

This tension seems to have led some commentators on 2-302 to suggest that the contracting-procedure element which will permit scrutiny for unconscionability is not the mere use of a form but the use of a form *plus* something else. That is, they have felt impelled to find some "vice" to justify the judicial meddling.⁶⁶ And they have identified this form-plus situation with the "contract of adhesion,"⁶⁷ a

⁶⁴ Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939).

⁶⁵ See MIMMO 1941 DRAFT § 1-C, comment A(2): "A private codification, however, has dangers. It may heap all the advantages sought on one side, and heap all the burdens on the other."

⁶⁶ See, e.g., 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.1602 (1964); Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 19 n.78 (1951).

⁶⁷ The term "contract of adhesion" most likely comes from Saleilles, who speaks of contracts:

dans lesquels il y a la prédominance exclusive d'une seule volonté, agissant comme volonté unilatérale, qui dicte sa loi, non plus à un individu, mais à une collectivité indéterminée, et qui s'engage déjà par avance, unilatéralement, sauf adhésion de ceux qui voudrant accepter la loi du contrat, et s'emparer de cet engagement déjà crée sur soi-même.

SALEILLES, DE LA DÉCLARATION DE VOLONTÉ § 89, at 229-30 (1901).

Professor Patterson's translation of this passage is:

in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an indeterminate collectivity, and which in advance undertakes unilaterally, subject to the

contract to which one of the parties must either "adhere" entirely or refuse altogether. In such a contract, a party may not bargain minutely over form or content, but must take it as is, if at all.⁶⁸ In some cases (for instance transactions with regulated utilities) a party may not even be able to bargain over price.⁶⁹ The essence of the adhesion contract is not its "formishness"⁷⁰ (that is just a symptom), but the fact that one of the parties has, at least for the purposes of the transaction in question, some of the powers of a monopolist. This "monopolistic power" need not be that wielded by a "true" monopolist, legal or other. It may be. One cannot bargain, especially over the price, with the telephone company, or with one's local airline. But that is not a requisite of the adhesion contract. In some cases the "monopoly" power may be only in a certain locality, when the purchaser is not mobile enough to get another seller who will offer other terms.⁷¹ In some cases the monopoly power is really an expression of oligopoly power, e.g., contract forms containing identical clauses written by competitors who nevertheless together blanket the market.⁷² How it

adhesion of those who would wish to accept the law [loi] of the contract and to take advantage of the engagements imposed on themselves.

Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964). He goes on to theorize that the term contract of adhesion "may have been derived from the analogy of multilateral treaties, which are drawn up by negotiations between a few nations who sign and invite other nations to adhere to the treaty later." *Id.* at 856 n.96.

⁶⁸ The adhesion contract idea has had a long history of learned commentary, much of it of extremely high quality. See (in chronological order) Isaacs, *The Standardisation of Contracts*, 27 YALE L.J. 34 (1917) (Karl Llewellyn was an editor of 27 YALE L.J.); PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937), reviewed by Llewellyn, 52 HARV. L. REV. 700 (1939); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); Sales, *Standard Form Contracts*, 16 MODERN L. REV. 318 (1953); Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1962); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964); Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172 (1965).

⁶⁹ See, e.g., 24 Stat. 384 (1887), as amended, 49 U.S.C. § 15 (1964) (railroad rates); MO. ANN. STAT. § 392.240 (1952) (telephone rates).

⁷⁰ I am not sure whether the word "adhesion" has similar connotations in the original French, but it should not be overlooked that in English, perhaps because of the ubiquitous "adhesive tape," the word has strong connotations of agglutination and stickiness. This leads, I think, to an often subliminal impulse on the part of English-speaking commentators to speak of adhesion contracts as if they are not only quasi-monopolistic, but as if they are the kind that always contain a great many provisions stuck closely together. See, e.g., 1 CORBIN, *CONTRACTS* § 128, at 552 (1963) ("long printed standardized contracts").

⁷¹ It is of course a truism that there are geographic "relevant markets" within which a relatively small operator may function as a monopolist. But it should also be noted that the "market" sometimes is subjectively more narrow than that. For instance, consumers who are ignorant may think their local furniture stores are their only market, and this may give effective adhesion-contract power to the stores which they do not in fact have. Cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), discussed at text accompanying notes 267-99 *infra*.

⁷² Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

comes about is less important than the fact that it exists; the hallmark of the adhesion contract, and its alleged evil, is that the purveyor of such a contract is in the position for one reason or another to refuse to bargain, to put the other party to a take-it-or-leave-it option.

The dramatic situation which typically frames the contract of adhesion, therefore, is the merchant-consumer retail sale. But while it is very hard to imagine many adhesion contracts which are not at the same time form contracts, it is very simple to imagine form contracts which are not contracts of adhesion. In fact, there is one species of contract, one which most likely accounts for the bulk of commercial contracting in the nation, which is ordinarily a form contract but not an adhesion contract—the merchant-to-merchant form-pad contract, the subject matter of the “battle of the forms.”⁷³ These form-pad deals may on occasion be adhesion deals too, but they certainly need not be. Indeed, there is often a sharp gulf between the typical contract of adhesion and the typical businessmen’s battle of the forms. In a very large number of cases businessmen dealing with each other are not forced to take or leave each other’s forms. They do not have so limited a market (or knowledge) that they cannot deal elsewhere, and they can, if they wish, argue about even the minutiae of the transaction.⁷⁴ As a general rule, however, they do not so wish. They prefer instead to maneuver like Renaissance condottieri for the cheap and bloodless positional victory that comes with the “making” of the contract on their own form. They acquiesce if they lose (if indeed they notice losing as such at all), seemingly because they just don’t care. Admittedly a man does not make a contract expecting to get nothing. But he may very well enter a contract by which he assumes the *risk* of getting nothing. Professor Llewellyn with his customary insight noted that businessmen don’t read contracts because they always expect to get the “something” they were dealing for. But he also stated as a fact that businessmen also expect to have subsidiary terms which are “fair,” or at least “not manifestly unfair.”⁷⁵ Let me submit an alternative possibility: most businessmen, insofar as they think about the question at all, expect that the other party’s form will be the same

⁷³ See LLEWELLYN, *THE COMMON LAW TRADITION* 362-71 (1960). It may be seen in operation in *Application of Doughboy Indus., Inc.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962).

⁷⁴ This is not to suggest that businessmen cannot be put into the position of adherers given proper leverage on the part of another businessman, as for instance may have occurred between automobile manufacturers and their dealers. See Kessler, *supra* note 62; Macaulay, *supra* note 62.

⁷⁵ See, e.g., Mimeo 1941 DRAFT § 1-C(1)(d) and comment A(3); LLEWELLYN, *op. cit. supra* note 73, at 370 (1960) (“any not unreasonable or indecent terms”); Llewellyn, *Common Law Reform of Consideration: Are There Measures*, 41 COLUM. L. REV. 863, 871 (1941) (“too far unbalanced”); 21 AMERICAN LAW INSTITUTE PROCEEDINGS 114 (1944) (“a cake sliced 99-1”).

kind of form which they had their lawyers draft for them, that is, a form which attempts to take everything for the owner of the pad. Does a man's own form have a warranty disclaimer? Yes. Does he expect to find one in the forms of his suppliers? You bet your life. Does he expect, therefore, that he will not receive the goods he ordered, of roughly the quality ordered? Absolutely not. He expects his supplier to deliver as per the order, just as he would expect to do to his customers, *but* he also expects that his supplier will have so drafted his form that it will be almost impossible to get legal recompense⁷⁶ if the buyer and seller disagree over the quality.

Professor Llewellyn may merely have known nicer businessmen than I. Perhaps his position is right as a matter of descriptive psychology. I suspect, however, that his "description" is really the prescription: businessmen *ought* not to try to take everything. That may well be true, but the evil is taking everything, not doing so by the presentation of a preprinted form contract. Insofar as anyone's justification for the utilization of a judicial-rewriting provision like 2-302 rests on the "evil" of the bargaining process, it is shattered if that evil consists only in prefabrication of the form itself; after all, the complaining party *could* have read it and if he had read it he *could* have argued about it. He didn't. It is at least arguable without a blush that such situations are to be treated in a fashion different from the treatment accorded true adhesion contracts⁷⁷ or even the standard quasi-monopolist consumer transaction.

But no distinction was made in 2-302 between merchant-to-merchant and merchant-to-consumer cases⁷⁸ (though the "merchant" definition was already made⁷⁹). In addition, at least some of the commentary about various versions indicated that indeed the businessman's form pad was the target of the section, and it has certainly been a common assumption that none of the additional elements which

⁷⁶ Most of all, the businessman expects to settle things out of court and out of a law context. See Jones, *Merchants, the Law Merchant, and Recent Missouri Sales Cases: Some Reflections*, 1956 WASH. U.L.Q. 397, 411-18.

⁷⁷ For instance, (1) promulgating standard contract terms, see N.Y. INS. LAW § 155 (life insurance); Sales, *Standard Form Contracts*, 16 MODERN L. REV. 318, 340-42 (1953); Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 MICH. L. REV. 39 (1946), and (2) setting up special tribunals to pass on form contracts in advance. See Gottschalk, *The Israeli Law of Standard Contracts, 1964*, 81 L.Q. REV. 31 (1965); Note, 66 COLUM. L. REV. 1340 (1966).

⁷⁸ It is interesting to remember that once upon a time there was a special rule for merchants' negotiations written into what was to become § 2-302. In 1943 DRAFT § 24 it was provided that if a merchant had an opportunity to read a contract, he was bound, even if he had not read it (the rule being otherwise for non-merchants). That provision was eliminated in MAY 1944 DRAFT § 23, never to reappear.

⁷⁹ See UCC § 2-104(1).

transmute a form contract into the somewhat more objectionable adhesion contract are prerequisite to the use of 2-302.⁸⁰ Thus, the use of the adhesion-contract learning is useful only insofar as it permits one to take the cachet and tone of the consumer-oppression cases and transfer it wholesale to 2-302. This enables one to feel that by using the section he is punishing naughty contracting conduct, without having to focus sharply on the fact that the level of conduct actually subject to 2-302 is hardly more than printing up one's contracts in advance.

Let us assume, however, that despite the references to the businessman's form-pad deal, the procedural unconscionability component of section 2-302 is at the adhesion-contract level rather than at the mere form-contract level; that is, that something more than mere preprinting must be shown before the resultant contract becomes subject to meddling under 2-302. It is exceedingly important to note that the only thing such a determination does is to set the level of contract-*insulating* conduct. One may now argue that a contract which has a sufficient number of indicia of compulsion to be fairly described as a contract of adhesion is not something upon which a party can rely to protect the provisions therein from the Code's unconscionability section. In other words, the adhesion contract becomes an exception to the usual rule that one is bound to that which he signs.⁸¹ But that cannot mean that all contracts of adhesion are void, or that all clauses contained in contracts of adhesion are going to be stricken under 2-302. The presentation of an adhesion contract to a person is not, like the presentation of a pistol to his head, sufficient, if proven, to prevent the enforcement of the contract no matter how "fair" its terms.⁸² The provisions of the telephone company tariffs and of the common carrier's tickets are ordinarily binding; one cannot get out from under a provision of that sort by showing only that one could not have bargained about it. Thus, once it is decided that a certain contract is vulnerable to scrutiny under 2-302 because its bargaining was not sufficiently angelic to insulate it from the section, the problem of the unconscionability provision of the Code still remains unsolved: granted that the contract is now open to 2-302, when is it, or a portion of it, "unconscionable"?

⁸⁰ See, e.g., LLEWELLYN, *op. cit. supra* note 73, at 362-71; Llewellyn, *supra* note 75, at 869-70; Project, 10 U.C.L.A.L. REV. 1087, 1132 (1963); Note, 18 U. CHI. L. REV. 146, 146-47 (1950).

⁸¹ RESTATEMENT, CONTRACTS § 70 (1932). RESTATEMENT (SECOND), CONTRACTS (Tentative Draft No. 1, 1964) seems not to change this "usual rule." Where old § 70 ought to be there is instead a reference to §§ 20-23. Of these, § 21(3) seems the most relevant, providing in effect that an only apparent assent may still be an assent, but that the resulting contract may be voidable because of "fraud, duress, mistake or other invalidating cause."

⁸² See RESTATEMENT, CONTRACTS §§ 494-95 (1932). The same is true of fraud. See *id.* §§ 475-77.

SUBSTANTIVE UNCONSCIONABILITY

Drafting History

That the clause "or a portion of it" is necessary in the last sentence is particularly important for understanding the root failure of 2-302. For at least as originally conceived, substantive unconscionability meant something like "gross overall imbalance" of an entire contract. The section was viewed as governing unconscionable *contracts*, or at least large bloc segments of contracts drafted in gross. The determination invited by the section seems to have been almost quantitative. In the 1941 version of 2-302 and its extraordinarily extensive explanatory materials,⁸³ the metaphors of weighing and balancing abounded. The section described the act of which it was a part⁸⁴ as representing "a fair and balanced allocation of rights and liabilities between parties to sales and contracts to sell."⁸⁵ While "policy in general requires the parties' particular bargain to control," said the section,⁸⁶ and while "speed and convenience in transacting business may require . . . extensive departures [from the act's provisions] to be incorporated" ⁸⁷

on the other hand, . . . where a group or bloc of provisions are not studied and bargained about in detail by both parties, then actual assent . . . is not in fact to be assumed where the group or bloc of provisions, taken as a whole, allocates rights and obligations in an unreasonably unfair and unbalanced fashion.⁸⁸

The policy of the legislature is also to avoid any unseemingly portion of a bargain . . . under which one party seeks to displace the rules of this Act . . . in favor of a set of provisions which lack reasonable balance and fairness in their allocation of rights and obligations.⁸⁹

When a number of matters are purportedly covered *en bloc* "as by a form contract,"⁹⁰ the court may examine the bloc of provisions to see if it works a modification of the act's provisions "in an unfair and unbalanced fashion."⁹¹ If, however, "the bloc as a whole is shown

⁸³ Mimeo 1941 DRAFT § 1-C. See note 13 *supra* for a description of the peculiarly discursive form of this original provision.

⁸⁴ At that time, the "Revised Uniform Sales Act." See Mimeo 1941 DRAFT title page.

⁸⁵ Mimeo 1941 DRAFT § 1-C(1) (a).

⁸⁶ Mimeo 1941 DRAFT § 1-C(1) (b).

⁸⁷ Mimeo 1941 DRAFT § 1-C(1) (c).

⁸⁸ Mimeo 1941 DRAFT § 1-C(1) (d).

⁸⁹ Mimeo 1941 DRAFT § 1-C(1) (e).

⁹⁰ Mimeo 1941 DRAFT § 1-C(2) (a).

⁹¹ Mimeo 1941 DRAFT § 1-C(2) (a) (i).

affirmatively to work a fair and balanced allocation" it is not to be modified or stricken.⁹² In addition, in "weighing fair balance" the court is directed "properly [to] consider the circumstances of preparation of any contract form . . . and, in particular . . . (ii) whether the displacement of the provisions of this Act sought by the form . . . as a whole runs disproportionately in favor of one party as against the other."⁹³

This weighing-balancing, quasi-quantified outlook suggested by both the denotation and the metaphorical content of the statute is made even more explicit in the accompanying commentary:

The true principle is clear enough: the expression of a body of fair and balanced usage is a great convenience, a gain in clarity and certainty, an overcoming of the difficulty faced by the law in regulating the multitude of different trades; on the other hand, the substitution of private rule-making by one party, in his own interest, for the balance provided by the law, is not to be recognized without strong reason shown.⁹⁴

Or again:

Question for the court. The total estimate of the effect of a body of provisions, in terms of balance, is a job for which a court is peculiarly fitted. The question of whether the provisions fit the circumstances of a particular trade is one which a special merchants' jury can best judge But the merchant runs some risk of accepting a provision merely as it is written because it is so written; and he has little training in sizing up a transaction from both ends at once, to reach a view of balance. As against this stands the fact that the *issue* to be tried is the issue of balance; and given that focus of attention, the merchant's jury would seem an adequate tribunal.⁹⁵

Finally, the philosophical background of this decision to make the focus of the section the "imbalance" of the contract, was spelled out in the "Report" which accompanied the draft.⁹⁶ Under the heading, "The Problem of a Semi-Permanent Code of a Whole Field," the Report suggested that a Code could provide two kinds of statutory frameworks. The first kind (the example given was the Statute of Frauds) is "iron and unyielding; the parties must adapt themselves to it whether they will or no." But

⁹² MIMÉO 1941 DRAFT § 1-C(2) (a) (ii).

⁹³ MIMÉO 1941 DRAFT § 1-C(2) (c).

⁹⁴ MIMÉO 1941 DRAFT § 1-C, comment A(5), at 19.

⁹⁵ MIMÉO 1941 DRAFT § 1-C, comment B(2). (Emphasis in original.) MIMÉO 1941 DRAFT § 51-C made provision for the empanelling of a merchant's jury.

⁹⁶ See note 13 *supra*.

the second kind of framework is a sort of standardized contract, serving wherever the parties have not particularized their bargain. It fills in and it fills out. Its office is to provide not only reasonable and fair solutions for particular matters, but, no less, a whole background of solutions for *any* matter, which as a whole is sufficiently reasonable and fair not to *need* to be bargained about.⁹⁷

But, the Report goes on, variations from this "fair and balanced" background must be permitted if the admitted utility of form contracting is to be available at all under the statute. What then? Well, what the Report says about this balancing act so exposes the kernel of the problem that it bears full quotation:

Balance in any background sought to be substituted.

The Draft proceeds upon the assumption-in-policy that buyers and sellers ought (within the limits of such rules as those on legality) to be free to bargain as they choose. It proceeds upon the assumption-in-fact that choosing to bargain means resorting to deliberate and intentional dicker about particular terms, producing the kind of transaction known in law as an effective contract. Deliberate and intentional dickering is not shown in fact by a series of printed, unread clauses. When such a series appears, the position of the Draft is that the reasonableness of assuming *both* parties to have chosen and agreed to incorporate such a set of clauses, in silence and without dickering, depends upon whether the series of clauses presents the kind of balanced background which parties can fairly, or indeed accurately, be thought to incorporate by silence.⁹⁸

This is developed in the comment to the withdrawn section 1-C. This passage is not only important for a study of this draft's position on procedural unconscionability, but it serves also to clarify the picture of the substantively unconscionable as viewed by the draftsman. "Imbalance," it seems clear, was not viewed only as evidence that some validating bargaining standard had not been met, but was also in itself that which was offensive ("unconscionable") in the resulting contract. Put another way, overall imbalance in the 1941 draft was not only evidence (perhaps proof) of procedural unconscionability; at the same time it was substantive unconscionability.

The 1941 draft, then, its comments and accompanying "Report," with their complete focus upon overall imbalance, must have contem-

⁹⁷ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROPOSED REPORT ON AND DRAFT OF A REVISED UNIFORM SALES ACT 22-23 (1941). (Emphasis in original.)

⁹⁸ *Id.* at 24. (Emphasis in original.)

plated as the field of operation of 2-302 the entire contract, or at least a major group of provisions within the contract.⁹⁹ "Imbalance" is, to put things mildly, a singularly inartistic way to refer to what might be objectionable about a single contractual provision.¹⁰⁰ And indeed, after this first version of the unconscionability section was withdrawn from consideration as "unworkable,"¹⁰¹ the provision which replaced it made even more explicit that the unconscionability decision was to be made with respect to the whole contract. The new section read as follows:

SECTION 24. FORM CLAUSES, CONSCIONABLE AND UNCONSCIONABLE.

(1) A party who signs or accepts a writing evidencing a contract for sale which contains or incorporates one or more form clauses presented by the other party is bound by them unless the writing *when read in its entirety* including the form clauses is an unconscionable contract¹⁰²

The accompanying comment¹⁰³ made it even more abundantly clear that the vice still being attacked was lack of overall contractual balance. Referring to form-pad transactions, the comment stated that "such forms when drawn with *elaborate lopsidedness* can become what are in essence instruments of trickery."¹⁰⁴ And with regard to what the final official comment should say, the unofficial comment suggested:

The Comment should show that since the rules of the Act are drawn with a careful balance of the rights and needs of buyer and seller, a form which cumulates too many departures from those rules in material particulars, and in favor of one side only, begins to take on the aspect of the unconscionable.¹⁰⁵

⁹⁹ While I think that the truth of this conclusion is established beyond cavil, it should be pointed out that the heading to §1-C read, "Declaration of Policy and Procedure with Regard to Displacement of Single Provisions or Groups of Provisions by Agreement."

¹⁰⁰ It is of course possible that in some circumstances a single provision of an entire contract might be so outrageous as to render the whole radically unbalanced. For instance, if *no* duties are given one of the parties, even at common law this absolute imbalance prevented enforcement under the rubric "illusory contract." See 1 CORBIN, CONTRACTS §145 (1963). A too enthusiastic limitation-of-remedy clause might have a similar effect under the Code. Cf. UCC §2-719(2).

¹⁰¹ See note 21 *supra*.

¹⁰² 1943 DRAFT §24. (Emphasis added.)

¹⁰³ [Llewellyn,] Informal Appendix To Revised Uniform Sales Act, Third Draft, 1943, Tentative Sketch of Material for Comments (1943).

¹⁰⁴ *Id.* at 11. (Emphasis added.)

¹⁰⁵ *Id.* at 12.

This idea, that "unconscionability" meant something like overall contractual imbalance, was maintained all the way up to the 1948 version of section 2-302.¹⁰⁶ At that point came a change of immense significance. The 1948 version read in its entirety as follows:

SECTION 23. UNCONSCIONABLE CONTRACT OR CLAUSE.

(1) If the court finds the contract to be unconscionable, it may refuse to enforce the contract or strike any unconscionable clauses and enforce the rest of the contract or substitute for the stricken clause such provision as would be implied under this Act if the stricken clause had never existed.

(2) A contract not unconscionable in its entirety but containing an unconscionable clause, whether a form clause or not, may be enforced with any such clause stricken.

This draft says bluntly that a court may excise from a not unconscionable contract any single "unconscionable" clause, and the comment accompanying the 1949 version (in which version the text of the section itself is not changed from the 1948 draft) says it just as bluntly:

Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement.¹⁰⁷

From this point on in the drafting history of section 2-302 the concept of single-clause unconscionability was fixed; no substantial changes were made in this regard in the text of the statute or its accompanying comments.¹⁰⁸ The current comment 2¹⁰⁹ was present in essentially its final form as early as the 1950 draft.¹¹⁰

This progression through the drafts of the idea of substantive unconscionability, from overall imbalance to one-clause naughtiness, is the most important single transformation disclosed by a study of the drafting history. Determining which contracts are substantively unconscionable is a difficult enough job even if one's conception of substantive unconscionability is something like "gross imbalance" or

¹⁰⁶ 1948 DRAFT § 23.

¹⁰⁷ 1949 DRAFT § 2-302, comment 1. There were no comments accompanying 1948 DRAFT.

¹⁰⁸ See note 39 *supra*.

¹⁰⁹ 2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

UCC § 2-302, comment 2.

¹¹⁰ Compare 1950 DRAFT § 2-302, comment 2.

"lopsidedness." After all, even a lopsided contract might in some cases be hard to identify; what if X got seven risks and Y got five—or four to three—or two to one? The spuriousness of the quantification lurking in the idea of a contract suffering from "overall imbalance" is a potential plague for close cases. Compared, however, with the difficulties of dealing with a concept of one-clause unconscionability, it is pure vanilla. It is not a rare rule in the law that he who bites off much more than he should will be judicially choked. The treatment of over-enthusiastic no-competition clauses¹¹¹ and trade-secret protection provisions¹¹² are common examples. Quantification, while falsifying if it gives the impression of numerical precision, at least carries with it a metaphorical framework which is an aid to the decision of all but the closest cases. A real scale is admittedly useless for the measurement of anything but physical weight, but a scale as a metaphor at least lets one know that he is looking for too much of something. Admittedly, the precision of the result depends upon what is being "weighed." If it is something like potatoes which arbitrarily have a "weight," then the measure of weight *in those terms* is exact, but if it is a quality not attracted by gravity which is "weighed," then the weighing and balancing are not going to be more than metaphorically precise. Risks, for instance, do not have calibratable weight. Once it is established, however, that one is looking for a comparison of risks, if what is involved is a contract which gives no risks at all to one of the parties, or almost none, the decision under the metaphor is easy. And it was this sort of contract which seems to have been the intended target of the original draftsman's original draft.¹¹³ For that "almost-all" kind of contract

¹¹¹ See, e.g., *Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245 (1963), for a recent decision, the four-to-three nature of which is eloquent on how hard these determinations can be. See also *Vaughan v. Kizer*, 400 S.W.2d 586, 589 (Tex. Civ. App. 1966) (reasonableness of restrictions as "questions of law for determination by the court"); *Brown v. Devine*, — Ark. —, 402 S.W.2d 669 (1966) (must strike whole contract; "modifying" not within court's power).

¹¹² See Note, *Protection of Inventive Ideas Through Postemployment Assignment Covenants*, 1965 WASH. U.L.Q. 335, 359.

¹¹³ See text accompanying notes 83-98 *supra*.

Of course, nothing as difficult as this question is ever that easy for a draftsman like Llewellyn. In 1944 he told the American Law Institute:

I think that everybody who signs up on such a form knows perfectly well that he is signing a contract drawn to some extent in favor of the other party and against him, and he is perfectly willing to take a cake sliced 60-40 or perhaps even 75-25. But when it gets to be a cake sliced 99-1, he doesn't find that that is what he was agreeing to tacitly.

21 AMERICAN LAW INSTITUTE PROCEEDINGS 114 (1944). Ten years later (and, it should be noted, *after* the central concept of the section had switched to one-clause unconscionability), his metaphor was still going strong (with only slight gustatory variation); it was then "80% of the pie." NEW YORK LAW REVISION COMM'N, STUDY OF THE UNIFORM COMMERCIAL CODE 113 (Legis. Doc. No. 65(B), 1954). On the other hand he was also sometimes plagued by a feeling that certain *individual* clauses were just no good, no matter how well bargained, e.g., no-oral-waiver clauses (other than between merchants). Llewellyn, *Common-Law Reform of Consideration: Are*

ordinarily involved in a form contract, and a fortiori in an unregulated contract of adhesion, this rough quantitative approach seems to have been roughly sufficient.

The overall-imbalance formulation, however, cannot settle all of the heart stirrings which may be caused by harsh results. If all of the risks of a particular contract are put upon A, except for one which is put upon B, and it is the risk which B was to bear which in fact occurs, B loses. Under the overall-imbalance rubric how does one deal, for instance, with an ordinary old contract with no radical clauses of any kind, which, nevertheless, contains a clause clearly disclaiming any warranty? The problem may be stated quite simply: with respect to the effect of any particular contract upon any actual party thereto, *most of the contract is irrelevant*. Ordinarily only one shifted risk comes home to roost, and if there were fifty others shifted, their potential is never actualized. That means that a refusal to enforce a contract in any particular case would not be a response to what happened in that case (which would have happened anyway had only the one risk which came true been shifted), but would be instead a response to general naughtiness on the part of the party who procured such a tough contract.¹¹⁴

On the other hand, if one decides to police contracts on a clause-by-clause basis, he finds that he has merely substituted the highly abstract word "unconscionable" for the possibility of more concrete and particularized thinking about particular problems of social policy. Should warranty disclaimers be permitted? If so, should they be with respect to consumer goods?¹¹⁵ Should parties be allowed to agree about what law will govern their contract?¹¹⁶ To what extent, if any, should a party be permitted to limit his liability under a contract? All of these questions need decision.¹¹⁷ *But not one of them is helped*

There Measures?, 41 COLUM. L. REV. 863, 869 (1941). And even his latest writings show that the existence of an important one-clause-whole-contract distinction was not totally appreciated. See LLEWELLYN, *THE COMMON LAW TRADITION* 371 (1960) (contract terms should be unfair "neither in the particular nor in the net").

¹¹⁴ An instance of this peculiar type of decision is *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), where the defendant willfully broke an unfavorable contract but the plaintiff was denied specific performance because of the alleged nastiness of certain provisions in the form contract he drafted, even though they had nothing to do with the defendant's breach or impending loss.

¹¹⁵ See Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, 1019 (1966), for just such more concretized thinking.

¹¹⁶ See the exchange between Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 350-52 (1952), and Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364, 373-74 (1952).

¹¹⁷ And they all do get some kind of particularized decision in the Code. UCC § 2-316 is on exclusion of warranty, § 1-105 is on choice of law and § 2-719 is on limitation of remedy. It is in fact hard to imagine which kinds of clauses reasonably expectable in a commercial contract might be unconscionable but have not been regulated by more specific portions of the Code.

toward solution by being subsumed in a section as a species of "unconscionability." The word "unconscionable," as finally used in the Code, describes neither the dramatic situation of two persons bargaining nor the "imbalance" or "lopsidedness" or other quality of the resulting contract, but rather describes the emotional state of the trier which will justify his use of the section. In other words, the attitudes relevant under section 2-302 are not those of the parties but those of the judges. The pictures to be sought in the facts are not of the varieties of oppressive or surprising negotiations, nor of oppressive or surprising contracts, but rather of oppressed or surprised judges. But what may permissibly make the judges' pulses race or their cheeks redden, so as to justify the destruction of a particular provision, is, one would suppose, what the judge ought to have been told by the statute. In short, once the movement was made to a conception of one-clause unconscionability, and the "overall-imbalance" rubric was abandoned as insufficient, the statute and its commentary had been stripped of any power to guide the decision of what the "bad" single provisions might be like. And the enormous significance of this failure may be illustrated by a careful consideration of the ten cases described as disclosing the "underlying basis" of the section,¹¹⁸ and the interesting way they failed to fill the gap.

The Official-Comment Cases

The ten cases do illustrate the one-clause-unconscionability theory, each really involving only one offensive "unconscionable" clause. But there are only two types of naughty clauses represented: warranty disclaimers and remedy limitations.¹¹⁹ Given this arresting fact alone, one might be tempted to conclude that the purpose of section 2-302 was to render warranty disclaimers and remedy limitations per se unconscionable. Nor indeed would the world, even the commercial world, come to an end if parties were forbidden either to disclaim warranties or to withhold from each other any of the total panoply of remedies for breach of contract which the Code provides.¹²⁰ In other places in the Code the draftsmen have felt free flatly to forbid particular contractual provisions, agreement between the parties or not.¹²¹

¹¹⁸ UCC § 2-302, comment 1.

¹¹⁹ The cases appear to be divided about half and half. See HONNOLD, *CASES ON SALES AND SALES FINANCING* 27 (2d ed. 1962). In several cases it is hard to tell if the clause at issue is better classified as a disclaimer of warranty or as a limitation of remedy should a warranty be found to be breached. *E.g.*, *Robert A. Munro & Co. v. Meyer*, [1930] 2 K.B. 312, 314 ("the goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration").

¹²⁰ See UCC §§ 2-702-17.

¹²¹ For instance, reducing the limitation period to less than one year is forbidden by UCC § 2-725(1).

Unfortunately for the solution of the problem now before us, that road was not the one taken. It is perfectly clear that under the Code warranties may be disclaimed, and remedies for breach may be modified and limited; neither are per se unconscionable. Section 2-316 of the Code is devoted to describing the procedure to be used in disclaiming warranties, and section 2-719 is devoted to doing the same job for remedy limitations. If, therefore, the substantive provisions of the contracts involved in the ten official-comment cases are to have any bearing upon the definition of substantive unconscionability, one must discover if and to what extent those two types of clauses might comply with their own particularized sections and yet fall afoul of section 2-302, or find some analogical model which will make the two provisions descriptive of the *kind* of provisions being aimed at.

The simpler case of the two is presented by the remedy-limitation problem. Section 2-719 of the Code provides as follows:

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
- (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
 - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.¹²²

Its first official comment reads:

Purposes:

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this

¹²² UCC §§ 2-719(1), (2).

Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.¹²³

Now, what is most striking is the extent to which the "evil" with which this section and its comment are to deal is *not* left in terms of high-level abstraction. First, the question of procedural conscionability is not ambiguously left hanging. The section makes clear that even if it were proved by the proverbial twenty eavesdropping bishops that a particular remedy limitation had been haggled over between the parties, the limitation would have to go if "circumstances" deprived a party of "the substantial value" of his bargain. No matter what actual bargaining had led to the remedy-limitation, "at least minimum adequate remedies" must be provided in the contract.

Thus, the Code reflects a substantive decision on this point. It did not say that remedies for breach could not be limited to less than those provided in the Code, but it did provide that remedy for breach could not be *eliminated* by agreement. Certainly, section 2-719 did not settle all of the problems, most particularly what a "minimum adequate remedy" might be.¹²⁴ But it did settle the question to the extent of providing that no remedy at all was in fact below that requisite minimum. In other words, the "unchangeable background" view which animated much of earlier drafts of the Code¹²⁵ and Karl Llewellyn's thinking from a period even before the drafting began,¹²⁶ is to some small extent preserved in section 2-719's attack. Put still another way, section 2-719 represents a drafting decision that at least one form of gross overall imbalance will not be permitted. This approach accords

¹²³ UCC § 2-719, comment 1.

¹²⁴ See Note, *Limitations on Freedom To Modify Contract Remedies*, 72 YALE L.J. 723 (1963), for a recent discussion of the general problem.

¹²⁵ 1950 DRAFT § 1-107 provided: "The rules enunciated in this Act which are not qualified by the words 'unless otherwise agreed' or similar language are mandatory and may not be waived or modified by agreement." By the 1952 DRAFT that provision had disappeared and in the current version of the Code the power to modify by agreement has been made explicit. See UCC §§ 1-102(3), (4).

¹²⁶ See, e.g., Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 403-04 (1937).

with the Code's section dealing with liquidated damages clauses,¹²⁷ which provides in an orthodox way¹²⁸ that too much in the way of damages for breach is a voidable "penalty." Its comment then added that, "An unreasonably small amount . . . might be stricken under the section on unconscionable contracts or clauses."¹²⁹ Section 2-719 merely moves the argument one reasonable step further: if one cannot provide too little in the way of liquidated damages, one cannot provide too little in the way of modes of recourse either.

The standard provided by section 2-719, therefore, is also a quasi (or spuriously) quantitative one: is there *some* remedy provided; if so, is the remedy "enough"? This is hardly a universal solvent for all of the problems that might arise in this area. But it is hard to think of any factual situation in which asking oneself whether a provision were "unconscionable" would clarify the decision to a problem left unsolved after asking oneself the much more particularized questions suggested in section 2-719. As benchmarks for determining the permissibility of a remedy limitation, 2-302's "oppression and unfair surprise" can't hold a candle to 2-719's "fail of its essential purpose," "minimum adequate remedy," and "fair quantum of remedy." Obviously the 2-719 catchwords don't make close cases easy, but they certainly do a better job than the single word "unconscionability." It is as if a single statute contained two provisions, one which forbids the charging of "excessive" interest and another forbidding "lender naughtiness." Neither of these sections would be much help in settling what to do with a 7½% interest charge. But if the interest rate were, say, 78%, one could handle the problem pretty easily with the excessiveness section; it is hard to see what the naughtiness section would add. In brief, when two sections deal with the same conduct, and one deals particularistically with reasonably clear standards, and the other deals with the problem only in terms of emotional coloration, the latter provision is unlikely to be of any help in solving a problem of specific application.¹³⁰

¹²⁷ UCC § 2-718(1).

¹²⁸ See 5 CORBIN, CONTRACTS §§ 1054-75 (1964); RESTATEMENT, CONTRACTS § 339 (1932).

¹²⁹ UCC § 2-718, comment 1.

¹³⁰ This is put into relief, I think, by what happened to § 2-719 itself when it ceased to be particularistic. Section 2-719(3) reads as follows:

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.

The official comment directed to this subsection contains three sentences, one tautological, one truistic and one mysterious, as follows:

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an

The mysterious last sentence in the third comment to section 2-719¹³¹ says that the "seller *in all cases* is free to disclaim warranties in the manner provided in Section 2-316."¹³² If that in fact means what it seems to, that so long as the procedure set forth in section 2-316 is followed any warranty may be disclaimed, then the significance of the official-comment cases to an understanding of what might be substantively unconscionable is even more shadowy. Since the official-comment cases which do not deal with liability limitations deal instead with warranty disclaimers, if section 2-302 is inapplicable to warranty disclaimers too it is hard to see that the contract clauses involved in the official-comment cases could have much bearing on a definition of substantive unconscionability.

As I suggested earlier, it would not have been inconceivable for the draftsmen simply to have declared that some or all of the traditional implied warranties surrounding sales would be nondisclaimable.¹³³ They did not do so. The section of the Code explicitly devoted to the problem of warranty disclaimer is much more a blueprint of disclaiming technique than an extended form of interdiction. Section 2-316 of the Code provides (in its relevant portions) as follows:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions

unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

The central difficulty in this provision is that *all* consequential-damage exclusions operate in the *same* manner, and that is a very harsh manner indeed, *viz.*, he who has suffered a consequential loss does not get compensated for it. Since § 2-719 applies to substantively offensive clauses whether bargained about or not, the question cannot turn on procedural unconscionability considerations. What then does it mean that something is "prima facie" unconscionable? Is that a statement about the burden of going forward at a trial, or the burden of persuasion, or both? Or is it just a quiet way of saying that it is in all cases unconscionable? The awkwardness, I suspect, is the result of trying to give content to the shibboleth "unconscionable," instead of saying flat out what was meant.

¹³¹ See note 130 *supra*.

¹³² UCC § 2-719, comment 3. (Emphasis added.)

¹³³ Perhaps some provision would have had to have been made for those rare as-is sales, for instance, jalopies to teenagers, but that could easily have been handled by a more explicit version of present § 2-316(3) (a).

like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

- (b) [as to patent defects] when the buyer before entering into the contract has examined the goods . . . as fully as he desired or has refused to examine the goods . . . and
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.¹⁸⁴

In case anyone could still doubt the disclaimability of warranties, the comments accompanying 2-316 provide, *inter alia* as follows:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

. . . .

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.¹⁸⁵

Section 2-316, then, not only says that warranties may be disclaimed, but it says how one should go about doing so, in rather impressive detail and with surprising particularity. It is obvious that

¹⁸⁴ UCC § 2-316. Subsection (1) of § 2-316 deals with the conflicts between express warranties and disclaimers, saying that the warranty and the disclaimer "shall be construed whenever reasonable as consistent with each other" but that "negation or limitation is inoperative to the extent that such construction is unreasonable." What, if anything, that subsection might mean is, for obvious reasons, the subject of some dispute. See Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. Rev. 281, 310-311 (1961); Note, 112 U. Pa. L. Rev. 564, 581 n.145 (1964). Subsection (4) of § 2-316 is a cross-reference provision pointing to §§ 2-718 and 2-719, liquidation and limitation of damages sections, respectively. It does not do any pointing to § 2-302.

¹⁸⁵ UCC § 2-316, comments 1, 3, 4. See also UCC § 2-315, comment 6 (which deals with the implied warranty of fitness for a particular purpose): "The specific reference forward in the present section . . . is to call attention to the possibility of eliminating the warranty in any given case."

the vice is "surprise," and thus even the word "conspicuous" at the very heart of the provision is not left to speculation. Section 1-201(10) of the Code, which defines "conspicuous" generally as "so written that a reasonable person against whom it is to operate ought to have noticed it," goes on thereafter to simplify matters by incorporating a short typographic manual for conspicuousness: "A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."¹³⁶

With these standards before us, let us now test a case under the Code's disclaimer-of-warranty provision. To make it a fair test, let us make one of the personae a consumer,¹³⁷ and, in fact, choose a dramatic situation suggested by the Code itself.¹³⁸ Sir Edmund Pillory, an eminent mountain climber, enters Abercrombie & Fitch in New York to buy some shoes. The salesman, recognizing Sir Edmund immediately, rushes over to serve him. Sir Edmund orders "some good sturdy shoes" and the salesman, knowing that they are wanted for Sir Edmund's highly advertised impending climb up K-3, brings out a pair which, while fine for walking upon ordinary ground, is hardly sufficient for mountain climbing. Sir Edmund purchases the shoes, and thereafter makes it only to roughly K-2½. His death is at least arguably attributable to the inappropriate shoes. His executor sues Abercrombie & Fitch for breach of warranty of fitness for a particular purpose. The store defends on the ground that on the sales form handed to Sir Edmund at the time he purchased the shoes there was the following form statement in red (a contrasting color): "There are no warranties which extend beyond the description on the face hereof." That is, the disclaimer was put in the exact language specified in section 2-316(2) as being an incantation sufficient for this particular purpose, and it is in a form defined by the Code as "conspicuous." In fact, Sir Edmund never read the disclaimer, and had he done so, being a man of action rather than words, he would not have understood it. It would appear, nevertheless, that on these facts, the requirements of the Code for the successful disclaimer of a warranty having been expressly met, Messrs. Abercrombie & Fitch would be home free under 2-316, and that this would be true even though Sir Edmund's claim is

¹³⁶ UCC § 1-201(10). The same provision makes conspicuousness seem even less a matter of degree in the draftsmen's eyes by making it a question for the court rather than the jury.

¹³⁷ Cf. UCC § 2-719(3) (prima facie unconscionability of consumer-goods remedy limitation).

¹³⁸ See UCC § 2-315, comment 2, an attempt to flesh out the exact meaning of "particular purpose": "For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."

for "injury to the person in the case of consumer goods," the limitation of damages with respect to which would have been "prima facie unconscionable" under 2-719(3). Does the matter end there, however, or may 2-302 nevertheless be applied to this state of facts to eliminate the effect of the disclaimer as "unconscionable"? In other words, given a careful meeting of the requirements of section 2-316 (the Code section particularly devoted to warranty disclaimers), may the more generally protective and loosely defined section devoted to general naughtiness be invoked to avoid the harsh result?

Almost everyone seems to think so. It appears to be a matter of common assumption that section 2-302 is applicable to warranty disclaimers.¹³⁹ I find this, frankly, incredible. Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problem at hand. It contains no reference of any kind to section 2-302, although nine other sections of article 2 contain such references.¹⁴⁰ In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as "unconscionable" under 2-302 seems explainable, if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness.¹⁴¹

Of course, the emotional pressure to reach a no-disclaimer result via the unconscionability route if it cannot be done otherwise is understandable. One need only point out that if in the *Henningsen* case¹⁴² the auto manufacturers had gotten together to agree upon a form of disclaimer clause which accorded with the requirements of section 2-316, under my view, Mrs. Henningsen's serious personal injuries would have to go uncompensated. This would be so even though the auto manu-

¹³⁹ Just to list some of the clearest cases, CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, SUMMARY OF THE UNIFORM COMMERCIAL CODE FOR ILLINOIS 8 (1961) ("will perhaps find its most frequent use"); Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 128-29 (1963); Duesenberg, *The Manufacturer's Last Stand: The Disclaimer*, 20 BUS. LAW. 159, 162 (1964); Lauer, *Sales Warranties Under the Uniform Commercial Code*, 30 MO. L. REV. 259, 283 (1965) ("would apply, of course"); Weeks, *The Illinois Uniform Commercial Code: Article 2—Sales*, 50 ILL. B.J. 494, 516 (1962); Note, 45 IOWA L. REV. 843, 857 (1960) ("All contractual provisions are subject"); Note, 109 U. PA. L. REV. 401, 420 (1961). See also Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 282 (1963), recognizing the need for "a sufficiently motivated court." A case taking the position clearly (but in dictum) is *Willman v. American Motor Sales Co.*, 44 ERIC LEG. J. 51, 57 n.3 (Erie County Ct. Pa. 1961). *But cf.* Franklin, *supra* note 115, at 994-95, 1013-14, for a more skeptical position.

¹⁴⁰ UCC §§ 2-202, 2-204, 2-205, 2-207, 2-303, 2-508, 2-615, 2-718, 2-719.

¹⁴¹ In this last category see Note, 43 B.U.L. REV. 396, 403-04 (1963), a disingenuous (or ingenious) attempt to suggest that if the comments to the section indicate that the section would not apply, the comments, since not "part of" the statute, ought to be disregarded.

¹⁴² *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

facturers had the oligopolistic power to make the terms of their contracts unbargainable. Any court might find it intolerable to allow a rich auto manufacturer to avoid making restitution for injuries suffered through the breakdown of a dangerous instrument it manufactured merely because it had made verbal compliance with a talismanic form of words which may not have been read or understood by the purchaser,¹⁴³ and about which he could have done nothing even if he had read, understood and objected. Such a decision would be an exceedingly painful one to announce. But that is what the statute says. There is nothing to prevent a legislature from regulating certain particular contractual provisions out of existence, as they have done on innumerable occasions in the past.¹⁴⁴ Certainly there is not much force remaining in simplistic freedom-of-contract arguments that legislatures may not determine, as a matter of policy, that some things in contracts just won't go.¹⁴⁵ The Code itself goes that route in other places¹⁴⁶ and there would have been nothing offensive in doing so with respect to warranty disclaimers, especially with respect to consumer goods. What is offensive is the seeming attempt on the part of some commentators to nullify the legislative determination that warranty disclaimers, for the time being at least, may continue.¹⁴⁷ Even legislatures, one would think, are entitled to some protection from oppression and unfair surprise.

¹⁴³ The court in *Henningsen* might and may have relied upon the "hidden-provision" argument alone to reach its result. See 74 HARV. L. REV. 630, 631 (1961).

¹⁴⁴ For instance, for a whole list of such statutory prescriptions applicable specifically to the consumer-contract field, see CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 311-22 (1965).

¹⁴⁵ That government has such power is today accepted almost as a postulate, see, e.g., GOODHART, ENGLISH LAW AND THE MORAL LAW 109 (1953); RADCLIFFE, THE LAW AND ITS COMPASS 65-66 (1960), the powerful and successful attacks on overenthusiastic interpretations of "freedom of contract" having come a long time ago. See, e.g., *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting); Hamilton, *Freedom of Contract*, 3 ENCY. SOC. SCI. 450 (1931). That does not mean that the attractions of that "freedom" are wholly gone. Compare Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909), with Pound, *Law in the Service State: Freedom Versus Equality*, 36 A.B.A.J. 977, 1050-53 (1950).

The feeling that there once was a time when men's promises were more trustworthy is not a new one. See Chaucer, *Lak of Stedfastness* (ca. 1385), in ROBINSON, THE COMPLETE WORKS OF GEOFFREY CHAUCER 632 (1933):

Somtyme the world was so stedfast and stable
That mannes word was obligacioun.

¹⁴⁶ See, e.g., UCC §§ 2-725(1) (short statutes of limitation); 9-318(4) (prohibition of account assignments not permitted). Indeed the exclusion of the buyer's family from his warranty protection has simply been forbidden by § 2-318.

¹⁴⁷ Compare the Code's express ducking of any express position in the developing area of privity of warranty (beyond protecting household members), UCC § 2-318, comment 3. It is not as if this warranty area is one without political sensitivity or strong feelings. See, e.g., Condon, *The Practical Impact of the Proposed Uniform Commercial Code on Food Poisoning Cases*, 5 FOOD DRUG COSM. L.J. 213 (1950); Dierson, *Report on the Proposed Uniform Commercial Code*, 6 FOOD DRUG COSM. L.J. 943 (1951); Duesenberg, *The Manufacturer's Last Stand: The Disclaimer*, 20 BUS. LAW. 159 (1964).

If one concludes, however, as I do, that if there is one sales-contract provision to which 2-302 does not apply it is the warranty disclaimer, then both kinds of clauses dealt with in the official-comment cases are totally regulated by sections of the Code other than 2-302. But may one not reason by analogy from the warranty-disclaimer and remedy-limitation clauses at issue in the official comment cases to clauses which are "like" them but do not have any specific applicable section of the Code?¹⁴⁸ The answer, I think, is no. First let us recall that we are not talking here of procedural unconscionability. Assuming that a certain level of bargaining nastiness is reached, any harsh clause may be strikable; but we are talking, remember, of form contracts, or at most of contracts of adhesion, contracts whose provisions cannot be handled in any per se simplified manner. Thus we are speaking of what is "like" a warranty disclaimer as a substantive provision. What is that? Basically, it is a provision which shifts a risk from party A to party B when party A is, arguably, better able to appreciate, avoid and stand that risk.¹⁴⁹ Put briefly, can we assume that a provision is unconscionable and voidable if (a) it is in a form contract or a contract of adhesion and (b) it makes the poorer party stand a substantial loss which the richer party could stand better? Moreover, it must be recalled that the Code most specifically did not declare warranty disclaimers and remedy limitations void. Instead it regulated them in detail. Is one to assume that while the paradigms are to be regulated the clauses "like" them are to be voided instead? What analogy suggests here is not similarity of treatment, but unspecified variation instead.

The official-comment cases do illustrate, if nothing else, the responses of judges in the throes of one of the dilemmas of the judicial process, and that, if nothing else, is what they were designed to illustrate. In the first draft of 2-302,¹⁵⁰ there was no mention of illustrative cases, though Professor Llewellyn showed himself aware of what judges do when they face an apparent duty to reach harsh results in a particular case.¹⁵¹ The very next time comments to a draft were prepared, however, they closed with the following paragraph:

¹⁴⁸ Cf. Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 204 (1966):

Perhaps these more specific provisions [§§ 1-102, 2-309, 2-616, 2-718, 2-719] help give content to the word unconscionable. Perhaps it can be held to contracts and clauses which have similar vices.

But he continues with some skepticism: "Certainly it is not a warrant for judicial price control. But people worry and you can see why."

¹⁴⁹ See Franklin, *supra* note 115, for an excellent particularized summary of what might be wrong with warranty disclaimers.

¹⁵⁰ MIMEO 1941 DRAFT § 1-C.

¹⁵¹ MIMEO 1941 DRAFT § 1-C, comment A(7).

Illustrations are needed, and they should indicate also the degree to which the courts have gone in avoiding the effect of forms which had been signed but which were felt by the courts to be unconscionable in the circumstances.¹⁵²

Whatever else was then intended, therefore (and the "also" does imply a nonunitary purpose), illustration of the judges' pre-Code harshness-evading techniques was, from the beginning, one of the reasons for the projected cases' inclusion. Thus it was not surprising that while the very next version of the comments did not mention the point,¹⁵³ when they were violently revised the following year they began as follows:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. . . . The underlying basis of this section is illustrated by results in cases such as the following.¹⁵⁴

There then followed the citation of ten cases, each accompanied by its own individual brief descriptive tag—indeed *the* ten cases and tags, which, still pristinely unchanged, grace the present first comment to section 2-302.¹⁵⁵

Assuming, therefore, that the ten cases are to illustrate what judges do when faced with appealing fact situations and unhelpful legal doc-

¹⁵² AMERICAN LAW INSTITUTE, UNIFORM REVISED SALES ACT, Informal Appendix, at 12 (3d Draft 1943).

¹⁵³ See 1949 DRAFT § 2-302.

¹⁵⁴ 1950 DRAFT § 2-302, comment 1.

An interesting foreshadowing of this language may be found in 2 GENY, METHODE D'INTERPRETATION § 174, at 420 (2d ed. 1954). The language is not, however, quite close enough to support attributing it as the source of the comment.

¹⁵⁵ This fidelity to original reading has at least one untoward result: *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 Pac. 273 (1917), has remained misdescribed to date. Its tag says that under a clause permitting the buyer, upon the seller's default, to "extend time of delivery, cancel contract, or buy in for [seller's] account," 100 Kan. at 376-77, 164 Pac. at 274, "in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30-day postponement." In fact, the buyer never attempted to extend the contract for more than one additional period, it was a fifteen-day period in any event, and the propriety of that extension was expressly sustained by the Kansas Supreme Court which indeed reversed the trial court's contrary holding on that particular point.

In addition, one would think that even in 1950 it was not necessary to use a collection of illustrative cases the most recent of which was decided in 1937 and over half of which were decided before 1929. One suspects the mining of a secondary source, but like an archaeologist finding a large selection of Egyptian shards in a Greek pit, one can suspect a prior collector without knowing who he was.

trines, how do they do that job? First, they illustrate only "adverse construction of language," which is only one of the four evasive techniques named in the comment.¹⁵⁶ They do not exemplify "manipulation of the rules of offer and acceptance," or any findings that a clause is contrary to "the dominant purpose of the contract." Certainly none of the cases says that the clause is bad as "contrary to public policy." Thus, the cases are apparently not designed to be exhaustive on the subject of manipulative techniques. What they do illustrate, however, and quite well,¹⁵⁷ is the skewing of legal doctrine that may be caused by an emotional pressure to get a more heartwarming particular result. It cannot be denied that uncertainty of a particularly virulent kind enters the picture when the basis of a decision and its stated basis part company.¹⁵⁸ This uncertainty, coupled with the distorting effect on legal doctrine of generous manipulations to get "good" results (that is, the "pore-ole-widder-lady" syndrome¹⁵⁹) was fully appreciated by the chief draftsman before the drafting started,¹⁶⁰ was adverted to in the very first comment ever appended to foetal 2-302,¹⁶¹ and continued to be firm in his thought well after the Code was completed.¹⁶² It was this tendency which the express and open invalidating power given to the judges was designed to prevent. As Professor Llewellyn put it, "covert tools are never reliable tools."¹⁶³

If, therefore, this uncertainty and skewing of doctrine could be prevented by something like section 2-302, its inclusion in the Code, despite the difficulties involved, might be justified. How much of a gain, however, is likely when there is substituted for the court's obligation to give false reasons for its behavior, a specific power to give no reason at all? An answer may come from what the courts thus far have done with their shiny new weapon in the very few cases in

¹⁵⁶ UCC § 2-302, comment 1.

¹⁵⁷ Cases showing the manipulation of the rules of offer and acceptance might have better illustrated the point. See, e.g., *Alexander Hamilton Institute v. Jones*, 234 Ill. App. 444 (1924) (a save-the-correspondence-school-student case).

¹⁵⁸ See *Andrews Bros. v. Singer & Co.*, [1934] 1 K.B. 17 (C.A.), in which Scrutton, L.J., said of the warranty disclaimer in issue, "Clause 5 is, I take it, a sequel to *Wallis, Son & Wells v. Pratt & Haynes* [[1910] 2 K.B. 1003; [1911] A.C. 394]" and went on thereafter to say,

Those advising the present defendants . . . appear to have thought that by the inclusion of the word "conditions" [as suggested by the *Wallis, Son & Wells* case] . . . liability would be excluded. . . . [1934] 1 K.B. at 21-22. Scrutton found the advisors wrong, again by "interpretation of language."

¹⁵⁹ See, for instance, its illustration for recent law students in FULLER & BRAUCHER, *BASIC CONTRACT LAW* 792 (1964), where *Fox v. Grange*, 261 Ill. 116, 103 N.E. 576 (1913) is printed (masquerading as a cancellation-of-waiver case).

¹⁶⁰ See Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

¹⁶¹ See Mimeo 1941 DRAFT § 1-C, comment A(7).

¹⁶² See LLEWELLYN, *THE COMMON LAW TRADITION* 364-65 (1960) quoting at length from his Book Review, *supra* note 160.

¹⁶³ *Ibid.*

which it has thus far figured. But first it will be useful to consider another place in the law where judges were, arguably, given the power to decide cases on the basis of the high level abstraction, "unconscionability."

UNCONSCIONABILITY IN EQUITY

It is the most common thing in the world for a commentator on section 2-302, apparently impelled by the obvious fact that the section itself embodies no noncircular standards, to lessen his nervousness by pointing to the equity court's old and well-established unconscionability doctrine as a sufficient illumination of the Code provision.¹⁶⁴ "After all," he seems to say, "why get excited? This is nothing new."¹⁶⁵ Moreover, among the works most frequently pointing with elaborate but unelaborated calm to the equity doctrine are substantially all of the "official" state studies, undertaken generally for the guidance of legislatures.¹⁶⁶ One gets the impression, in fact, that everyone who thought of mentioning the equity doctrine mentioned it.

¹⁶⁴ A fair sampling would include 1 HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* §1.1603, at 46 (1964); Charney, *How to Make a Contract Under the U.C.C.*, 16 BROOKLYN BARRISTER 18, 27 (1964); Held & Torbert, *Comparison of Articles Two and Three of the Uniform Commercial Code With the Law of Alabama*, 7 ALA. L. REV. 271, 287 (1955); Kuenzel, *Uniform Commercial Code: Its Effect on Florida's Existing Law of Sales*, 36 FLA. B.J. 1020, 1027 (1962); Leflar, *The Commercial Code in Arkansas*, 14 ARK. L. REV. 302, 308 (1960); Lorenson, *The Uniform Commercial Code Sales Article Compared With West Virginia Law*, 64 W. VA. L. REV. 142, 143 (1962); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 202 n.10 (1963); Stockton, *Sales Under the Uniform Commercial Code: Significant Changes*, 20 ALA. LAW. 352, 359 (1959); Weeks, *supra* note 139, at 517; Note, 58 DICK. L. REV. 161 (1954); Note, 22 TENN. L. REV. 776, 793 (1953); Project, 10 U.C.L.A.L. REV. 1087, 1131 (1963).

¹⁶⁵ See, e.g., Charney, *supra* note 164, at 27 ("Actually all this section . . ."); Leflar, *supra* note 164, at 308 ("This amounts essentially to . . .").

This "nothing new" argument must be distinguished from the "nothing new" argument about the contractual manipulations of common-law judges to get just results. See, e.g., §2-302, comment 1; Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 305-07 (1962); Note, 109 U. PA. L. REV. 401, 402 (1961). This latter argument was broached in Llewellyn's first commentary on a proto-2-302, Mimeo 1941 DRAFT §1-C, comment A(7).

¹⁶⁶ E.g., *California Annotations to the Proposed Uniform Commercial Code*, in [CALIFORNIA] SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE 41-42 (1961); STARR, STUDY AND REPORT ON THE UNIFORM COMMERCIAL CODE 20, 71-72 (1959) (prepared for Connecticut Temporary Commission to Study and Report on the Uniform Commercial Code); ILLINOIS COMMISSION FOR THE UNIFORMITY OF LEGISLATION IN THE UNITED STATES, ILLINOIS ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE 49 (1960); KENTUCKY LEGISLATIVE RESEARCH COMMISSION, UNIFORM COMMERCIAL CODE, ANALYSIS OF EFFECT ON EXISTING KENTUCKY LAW 43 (Research Publication No. 49, 1957); MASSACHUSETTS ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 31 (1953) ("Prepared by a Group of Massachusetts Lawyers and Law School Professors"); STEINHEIMER, MICHIGAN SALES LAW AND THE UNIFORM COMMERCIAL CODE 36 (1963); BAR ASSOCIATION OF NEW HAMPSHIRE, NEW HAMPSHIRE ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 24 (1959); NEW JERSEY UNIFORM COMMERCIAL CODE STUDY COMMISSION, SECOND REPORT TO THE GOVERNOR, THE SENATE AND THE ASSEMBLY OF THE STATE OF NEW JERSEY 52 (1960); HOGAN & PENNY, ANNOTATIONS OF THE UNIFORM COMMERCIAL CODE TO THE STATUTORY AND DECISIONAL LAW OF NEW YORK

This near unanimity of belief in the relevance of equity unconscionability is all the more striking in that neither section 2-302 nor its accompanying commentary makes any mention of it. Once upon a time it did, very clearly and explicitly, but the reference came late in the section's drafting history and didn't last very long. The May 1949 Draft's first accompanying comment began:

This section is intended to apply to the field of Sales the equity courts' ancient policy of policing contracts for unconscionability or unreasonableness.¹⁶⁷

That sentence lasted just about a year. In the very next draft of this comment, though the remainder of the paragraph in which it appeared remained wholly unchanged, the quoted sentence was deleted in its entirety.¹⁶⁸ And that sums up the entire history of overt references to the equity unconscionability doctrine in the Code;¹⁶⁹ it never appeared again.¹⁷⁰

Well, not quite. If one looks at the current version of the Code, while there is nothing about the equity doctrine in section 2-302, and while the comments accompanying it make no such reference, and while none of the ten cases cited and described in the first official comment as "illustrating" the "underlying basis of the section" had anything to do with a request for specific performance or even came up in equity, there is one reference which may be significant. In the 1952 version of the official comments a key segment was changed from the way it had appeared in the 1950 version, as indicated below by italics:

STATE 35 (1961); OHIO LEGISLATIVE SERVICE COMMISSION, OHIO ANNOTATIONS TO THE UNIFORM COMMERCIAL CODE 17 (1960); OREGON STATE BAR COMMITTEE ON CONTINUING LEGAL EDUCATION, UNIFORM COMMERCIAL CODE HANDBOOK 35-36 (1963); PENNSYLVANIA GENERAL ASSEMBLY JOINT STATE COMMISSION, PENNSYLVANIA ANNOTATION TO THE PROPOSED UNIFORM COMMERCIAL CODE 18 (1953); FURLOW, REPORT OF THE SPECIAL COMMISSION [of the State of Rhode Island] TO STUDY AND REPORT ON THE UNIFORM COMMERCIAL CODE 22 (1960). Some state studies seemed to see no particular problem, *e.g.*, VIRGINIA CODE COMMISSION, REPORT ON UNIFORM COMMERCIAL CODE 19 (House Doc. No. 28, 1955). Others do see some definitional problem but nevertheless do not rely on the old equity practices. *E.g.*, MISSOURI GENERAL ASSEMBLY COMMITTEE ON LEGISLATIVE RESEARCH, PROPOSED UNIFORM COMMERCIAL CODE: ITS EFFECT UPON COGNATE MISSOURI STATUTES 48 (1954); TEXAS LEGISLATIVE COUNCIL, ANALYSIS OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE 55-58 (1953).

¹⁶⁷ 1949 DRAFT § 2-302, comment 1. At no time in the drafting history of § 2-302 was the equity practice adverted to in the text of the statute itself.

¹⁶⁸ See 1950 DRAFT § 2-302, comment 2. (The whole comment had dropped down to second place.)

¹⁶⁹ References to the equity practice of "reformation" did appear in earlier drafts, beginning with 1943 DRAFT § 24, and were not eliminated until 1948 DRAFT § 23. But these were not references to the equity unconscionability doctrine.

¹⁷⁰ In fact, at the May 1951 meeting an effort was made to assure the section against any misinterpretation that solely an equity application was meant. See AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE, MAY MEETING REVISIONS TO PROPOSED FINAL DRAFT No. 2, § 2-302 (1951):

The words "refuse to enforce" are to be reconsidered for rephrasing to avoid inference that it deals only with the question of specific performance.

No change came out of this reconsideration, however.

The principle is one of the prevention of *oppression and unfair surprise* (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power.¹⁷¹

This, of course, is how this segment reads today.¹⁷² Now, the *Campbell Soup* case *was* a case in equity, and in fact had precisely to do with a request for specific performance. And, moreover, in that case the Third Circuit¹⁷³ denied specific performance on the explicit ground that the contract involved in the case was "unconscionable."¹⁷⁴ "That equity does not enforce unconscionable bargains," said the court without elaborate citation,¹⁷⁵ "is too well established to require elaborate citation."¹⁷⁶

Taking the identity of the words "unconscionable" in the Code section and in the equity doctrine, together with this rather obscure reference to the *Campbell Soup* case, there is some justification for the widespread belief that section 2-302 is just tried and true equity applied to the field of Sales. It does seem to me that if the draftsmen had meant to signal the importation into the statute of such a vast body of decisions and learned commentary as the equity doctrine involves¹⁷⁷ they might have chosen a reference less coy than a "cf." citation¹⁷⁸ to a single equity case. But let us assume that the doctrine was meant to be applicable.

Now, as a rough guess I would say that there are as many cases dealing with denials of specific performance as stars in the heavens or sand by the sea. The divers reasons given for such refusals are almost as

¹⁷¹ Compare 1952 DRAFT § 2-302, comment 1, with 1950 DRAFT § 2-302, comment 1.

¹⁷² See UCC § 2-302, comment 1.

¹⁷³ In an opinion by Judge Goodrich, at that time Chairman of the Editorial Board and Director of the American Law Institute. See 1949 DRAFT, Foreword at v.

¹⁷⁴ The lower court had rested its decision upon the ground that the carrots involved in the case were not "unique" enough to justify specific performance. The Court of Appeals specifically rejected that ground for dismissing the bill, choosing instead to rely on the unconscionability doctrine. See *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 82 (3d Cir. 1948).

¹⁷⁵ The citation (172 F.2d at 83 n.12) is limited to two treatises: 4 POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. Symons 1941), and 5 WILLISTON, CONTRACTS § 1425 (rev. ed. 1937).

¹⁷⁶ 172 F.2d at 83.

¹⁷⁷ Treatments of various degrees of completeness, often accompanied by massive case citations, are found in 2 CHAFEE & STIMPSON, CASES ON EQUITY 1173-93, 1345-88 (1934); CLARK, EQUITY §§ 168-70 (1919); DE FUNIAK, MODERN EQUITY §§ 94, 95 (2d ed. 1956); FRY, SPECIFIC PERFORMANCE §§ 387-459 (6th ed. Northcote 1921); McCLINTOCK, THE PRINCIPLES OF EQUITY §§ 69-72 (2d ed. 1948); 3 POMEROY, EQUITY JURISPRUDENCE §§ 926-28 (5th ed. Symons 1941); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS §§ 40, 46, 175-97 (3d ed. 1926); SNELL, PRINCIPLES OF EQUITY 501-06, 551-52 (25th ed. Megarry & Baker 1960); WALSH, EQUITY § 104 (1930); Annot., 65 A.L.R. 7 (1930).

¹⁷⁸ Which means, I assume, as it always has, something like "this fits here, but I can't tell how." Cf. HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION § 27:2:4 (10th ed. 1958).

extensive. To be enforced specifically a contract must first be a contract, and thus the issues of capacity, consideration, agreement and formality are as relevant to equitable as to legal contract actions.¹⁷⁹ Certainly those failings in the contracting behavior of one of the parties which would prevent relief being given him at law will ordinarily prevent his procuring specific performance in equity.¹⁸⁰ But in addition to these considerations which are applicable both to legal and equitable actions are others which are recognized only in courts of equity as applicable to specific performance. Pomeroy saw these additional considerations merely as applications of "the grand and far-reaching principle that he who seeks equity must do equity,"¹⁸¹ but whatever their genesis, they are various and numerous:

the specific performance of a contract will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, by trickery, by taking undue advantage of his position, or by other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would be oppressive or harsh upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice.¹⁸²

Briefly put, when one examines any number of these equity cases¹⁸³ at all it becomes abundantly clear that over and above fraud, misrepresentation, mistake and duress there is a whole universe of *kinds of bargaining* which, while not sufficient to justify the voiding of a contract, will support a refusal specifically to enforce it, and that beyond the illegality and "against public policy" rubrics of law, are *kinds of contracts* which equity will not affirmatively aid.¹⁸⁴

Within the ambit of those factors of contract-procuring behavior which would result in a denial of specific performance, a bewildering

¹⁷⁹ See POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS §§ 51-161 (3d ed. 1926).

¹⁸⁰ See *id.* §§ 209-28 (misrepresentation), 229-66 (mistake), 267-79 (fraud), 280-87 (illegality).

¹⁸¹ *Id.* § 40.

¹⁸² *Ibid.* This, by the way, is merely a somewhat expanded version of the Pomeroy summation cited by the court in the *Campbell Soup* case. See note 175 *supra*.

¹⁸³ I have not come close to reading all of the thousands of cases dealing with unconscionability in equity. Moreover, those which I have read have not been selected according to any plan of reasoned randomness. A more extensive study of these cases might yield, therefore, further or other generalizations.

¹⁸⁴ The classic citation for this power to deny specific performance on grounds insufficient to justify cancellation of the contract is *Day v. Newman*, 2 Cox Ch. 77, 30 Eng. Rep. 36 (Ch. 1788), in which, faced with cross bills for specific performance and for cancellation, the Master of the Rolls dismissed both bills. (When the plaintiff refused to rescind the contract in exchange for an award of costs, the bills were dismissed without costs, too.) See for a more modern and equally clear example, *Kleinberg v. Ratett*, 252 N.Y. 236, 169 N.E. 289 (1929).

number of permutations work to inform the chancellor's discretion. In these cases one runs continually into the old,¹⁸⁵ the young,¹⁸⁶ the ignorant,¹⁸⁷ the necessitous,¹⁸⁸ the illiterate,¹⁸⁹ the improvident,¹⁹⁰ the drunken,¹⁹¹ the naive¹⁹² and the sick,¹⁹³ all on one side of the transaction, with the sharp and hard¹⁹⁴ on the other. Language of quasi-fraud¹⁹⁵ and quasi-duress¹⁹⁶ abounds. Certain whole classes of presumptive sillies like sailors¹⁹⁷ and heirs¹⁹⁸ and farmers¹⁹⁹ and

¹⁸⁵ *E.g.*, *Blackwilder v. Loveless*, 21 Ala. 371 (1852); *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Hemhauser v. Hemhauser*, 110 N.J. Eq. 77, 158 Atl. 762 (N.J. Ch. 1932).

¹⁸⁶ *E.g.*, *Clitherall v. Ogilvie*, 1 Desaussure Ch. 250, 261 (S.C. 1792) ("Young heirs even when at age . . .").

¹⁸⁷ *E.g.*, *Fish v. Leser*, 69 Ill. 394 (1873); *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Dysarz v. Janczarek*, 238 Mich. 529, 213 N.W. 694 (1927); *Fitzpatrick v. Dorland*, 27 Hun (34 N.Y. Sup. Ct.) 291 (1882).

¹⁸⁸ *E.g.*, *Blackwilder v. Loveless*, 21 Ala. 371, 373 (1852) ("being a poor man . . . he [entered into the contract] to save his crop"); *Fitzpatrick v. Dorland*, *supra* note 187, at 292 ("pecuniarily embarrassed").

¹⁸⁹ *E.g.*, *Dysarz v. Janczarek*, 238 Mich. 529, 213 N.W. 694 (1927); *Caton v. Wellershause*, 77 Pa. Super. 331 (1921).

¹⁹⁰ *E.g.*, *Clitherall v. Ogilvie*, 1 Desaussure Ch. 250 (S.C. 1792).

¹⁹¹ *E.g.*, *Knott v. Giles*, 27 App. D.C. 581 (1906) ("habitual drunkard"); *Moetzel & Muttera v. Koch*, 122 Iowa 196, 97 N.W. 1079 (1904); see also *Campbell v. Spencer*, 2 Binn. (11 Pa.) 129, 133 (1809) (drunkenness not proved but "bargaining . . . amidst the drinking of bitters early in the morning").

¹⁹² *E.g.*, *Bartley v. Lindabury*, 89 N.J. Eq. 8, 10, 104 Atl. 333, 334 (Ch. 1918) (farmer "unfamiliar with business methods"); *Smedes v. Wild*, 1 Livingston's Law Mag. 155 (N.Y. Sup. Ct. 1852) ("contract between a businessman and an inexperienced woman"); *Campbell v. Spencer*, *supra* note 191, at 133 ("and I do not like a contract by which a farmer is involved in the folly of buying a store of goods").

¹⁹³ *E.g.*, *Fitzpatrick v. Dorland*, 27 Hun. (34 N.Y. Sup. Ct.) 291, 292 (1882) ("invalid, very infirm").

¹⁹⁴ *E.g.*, *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908); *Kelley v. York Cliffs Improvement Co.*, 94 Me. 374, 47 Atl. 898 (1900) (even though defendant was a corporation); *Wilson v. Bergmann*, 112 Neb. 145, 198 N.W. 671 (1924); *Hemhauser v. Hemhauser*, 110 N.J. Eq. 77, 158 Atl. 762 (Ch. 1932) (stepchild of old "wider" lady); *Falcke v. Gray*, 4 Drew. 651, 62 Eng. Rep. 250 (Ch. 1859) (antique dealer, lady and valuable china). Of course, even if a court makes no special point of the plaintiff's behavior in any given case, getting a *very* good deal from the old, the sick, the drunk, etc., is itself hardly a character reference.

¹⁹⁵ *E.g.*, *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 237 (1892) ("the contract 'was an artfully contrived snare'"); *Gabrielson v. Hogan*, 298 Fed. 722, 725 (8th Cir. 1924) ("the Hogans were strangers").

¹⁹⁶ *Pindall v. Waterman*, 84 Ark. 575, 106 S.W. 964 (1907) (conveyance to attorneys with lynch mob in offing—set aside); *Blackwilder v. Loveless*, 21 Ala. 371, 373 (1852) ("to save his crop").

¹⁹⁷ *E.g.*, *How v. Weldon*, 2 Ves. Sr. 516, 518, 28 Eng. Rep. 330, 331 (Ch. 1754) ("a race of men loose and unthinking"). Compare the treatment of the same class in a different context, American maintenance-and-cure decisions, *e.g.*, *Koistinen v. American Export Lines, Inc.*, 194 Misc. 942, 83 N.Y.S.2d 297 (N.Y. City Ct. 1948) (leaping from brothel window part of normal sailor's normal duties—under the circumstances). See generally GILMORE & BLACK, ADMIRALTY § 6-8 (1957).

¹⁹⁸ *E.g.*, *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 28 Eng. Rep. 82 (Ch. 1750); *Clitherall v. Ogilvie*, 1 Desaussure Ch. 250, 261 (S.C. 1792) ("Young heirs even when at age are under the care of this court").

¹⁹⁹ *E.g.*, *Koch v. Streuter*, 232 Ill. 594, 83 N.E. 1072 (1908); *Bartley v. Lindabury*, 89 N.J. Eq. 8, 104 Atl. 333 (1918); *Campbell v. Spencer*, 2 Binn. (11 Pa.) 129 (1809).

women²⁰⁰ continually wander on and off stage. Those not certifiably crazy, but nonetheless pretty peculiar,²⁰¹ are often to be found. And in most of the cases, of course, several of these factors appear in combination.²⁰² It might be assumed, therefore, that one setting out to find a body of decisions which might give contour and limits to a word like "unconscionability," at least insofar as that word might have something to do with the insufficiency of the bargaining process, would find in these cases riches beyond the dreams of judicial avarice. There is, however, one weakness in using these cases as a guide to the meaning of unconscionability in section 2-302: they are all irrelevant—for two reasons. First, the equity cases are of interest, if at all, *only* for giving outline to the limits of procedural unconscionability; they cannot define what kind of clause might be substantively unconscionable because they all involve only one form of substantive unconscionability—overall imbalance. Second, on procedural unconscionability, the dramatic situations which have produced the contracts which have produced the equity cases are exceedingly unlikely to be reproduced in a Sales context except on the very rarest of occasions, and thus their details do not inform the sales-contract decision a bit.

Procedural Unconscionability in Equity

It is a commonplace, even in the very best of circles,²⁰³ to view with more than equanimity the application of equitable doctrines to actions at law. This is undoubtedly to some extent the natural by-product of the merger of legal and equitable procedures in modern codes,²⁰⁴ but the trend can hardly be considered merely an offshoot of adjective reform. There are arguments, occasionally quite passionate,²⁰⁵ that the importation has not gone far enough,²⁰⁶ and it is very clear that the extended use of at least some equitable doctrine is becoming more

²⁰⁰ *Smedes v. Wild*, 1 Livingston's Law Mag. 155 (N.Y. Sup. Ct. 1852); *Friend v. Lamb*, 152 Pa. 529, 536, 25 Atl. 577, 579 (1893) (married woman with only "very recent emancipation").

²⁰¹ *E.g.*, *Wilson v. Bergmann*, 112 Neb. 145, 198 N.W. 671 (1924); *Miller v. Tjexhus*, 20 S.D. 12, 104 N.W. 519 (1905). *Cf.* *Green, Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 306-07 (1944), arguing that when courts say they have found "mental incompetency" they usually mean only that they have found a peculiar deal.

²⁰² See, *e.g.*, *Banaghan v. Malaney*, 200 Mass. 46, 85 N.E. 839 (1908), involving an "aged, inexperienced and ignorant woman."

²⁰³ See, *e.g.*, FULLER & BRAUCHER, BASIC CONTRACT LAW 754 (1964).

²⁰⁴ *E.g.*, FED. R. CIV. P. 2; MO. R. CIV. P. 42.01.

²⁰⁵ *E.g.*, Newman, *The Place and Function of Pure Equity in the Structure of Law*, 16 HASTINGS L.J. 401 (1965).

²⁰⁶ See NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 115 (1961); Puig Brutau, *Juridical Evolution and Equity*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 82 (1962).

frequent.²⁰⁷ Insofar as the wisdom of this trend, or at least of its accelerated development, is questioned, it is generally on the ground that too much faith in increased judicial discretion (considered a hallmark of equity jurisprudence) as a simplified way to "justice" is dangerous, or at least over-sanguine.²⁰⁸ On the other hand, some doctrines developed in courts of equity are perfectly applicable to law actions, and their exclusion therefrom is absurd. In other words, there is nothing in an "equitable" doctrine as such that particularly makes it unfitted for importation into an action which would historically have been an action "at law."

Merely that there is no a priori reason why doctrines developed in equity might not fit equally well in law actions, does not justify the jumped conclusion that all equitable doctrines fit equally well at law. Put more concretely for present purposes, the practice of denying specific performance in equity to contracts because of their "unconscionability," does not necessarily make any sense when applied to the law of Sales. It might be sensible. In fact, it isn't.

Almost without exception, actions for specific performance were (and are) brought with respect to transactions involving real property.²⁰⁹ Article 2 of the Code governs "goods" only, and real property is not a species of "goods."²¹⁰ One well might argue that the subject

²⁰⁷ See M.M.W., *Equity in the Commercial World*, 105 L.J. 627 (1955); Van Hecke, *Changing Emphases in Specific Performance*, 40 N.C.L. REV. 1 (1961); Note, 49 IOWA L. REV. 1290 (1964).

²⁰⁸ See CARDOZO, NATURE OF THE JUDICIAL PROCESS 136 ("benevolent despotism" of Judges), 141 ("the judge . . . is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness"); EVERSHERD, ASPECTS OF ENGLISH EQUITY 16-17 (1954); LUNDSTEDT, LAW AND JUSTICE 30-39 (1952); Berolzheimer, *The Perils of Emotionalism*, in SCIENCE OF LEGAL METHOD 166, 185 (1921); Cohen, *Jerome Frank*, in COHEN, LAW AND THE SOCIAL ORDER 357, 362 (1931) ("uncontrolled discretion of judges would make modern complex life unbearable"); Wright, *Opposition of Law to Business Usages*, 26 COLUM. L. REV. 917, 917 n.1 (1926); Mann, Book Review, 80 L.Q. REV. 589, 590 (1964) ("the present unfortunate tendency towards a system of Cadi jurisprudence"). See also Cohn, *Frustration of Contract in German Law*, 28 J. COMP. LEG. & INT'L L. (3d ser.) 15, 23 (1946); Liberman, *Opportunity and Challenge to Bring Commercial Law in Step With Present Day Needs*, 62 COM. L.J. 221, 226 (1957), citing HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSEN [The Flight into the General Clauses] 1-4, 6-12, 46-52 (1933), on the temptations and dangers of broad discretionary standards in the hands of a burgeoning totalitarian state. The Hedemann book is in German only, which I can not read, so I have not read it. In this same connection, see the charming understatement in PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW 6-7 (1937): "In 1934 General Goering . . . said: 'The law and the will of the Fuehrer are one.' This maxim by itself may influence the interpretation of certain contracts."

It should not be thought that the above-cited works are necessarily simply-mindedly against judicial discretion; in fact portions cited are more often than not caveats tacked onto the explicit recognition of the need for judicial discretion, e.g., CARDOZO, *op. cit. supra* at 124, 129, 136-58.

²⁰⁹ McCLINTOCK, THE PRINCIPLES OF EQUITY § 44 (2d ed. 1948); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 10 (3d ed. 1926). *But see* Van Hecke, *supra* note 207; *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

²¹⁰ UCC §§ 2-102, 2-105.

matter of a transaction might reasonably have an effect upon the form it takes, and upon the legal rules which might develop to confine, define and delimit that form. Put into contract-teacher terminology, wigits and Blackacre are not the same, are not dealt with by parties in the same way and (at least arguably) ought not to be treated identically in law.²¹¹ In still other words, the successful struggle to unhorse Sales which the Code represents²¹² may have resulted in its unhappy implantation in alien soil.

Land transactions and chattel transactions are different because land and chattels are different. This is not to say that they are in all ways different, or that they can never reasonably be treated by the law as if they were not different, but only to suggest that the realty-personalty dichotomy is not arbitrary. To the extent that real distinctions do exist between the two subject matters, the learning surrounding the equity unconscionability doctrine, a specific performance doctrine and a land doctrine, may be inapplicable, and if applied to Sales, misleading. This depends, of course, on the extent to which the two subject matters do differ.

First, as a general rule a real estate transaction is likely to be economically significant for at least one, and often both, of the parties to it. It would be my guess that both at the time the equity doctrine was developing, and today, the largest single transaction which most people will enter into during their lives will be a real estate transaction of one sort or another. It is true that the purchase of the ubiquitous automobile is no trivial transaction today, but more is ordinarily involved in the family's home purchase. Even between professional real estate traders, each transaction is likely to involve more dollars than in most other businesses where the units of "merchandise" are smaller. Thus a disparity between "value" and price would more likely be a serious economic hardship with respect to land than elsewhere.

Second, as a general rule land transactions are more likely to be one-in-a-lifetime transactions for at least one of the parties than the commercial transactions the Code is primarily designed to govern. This would tend to limit those protections against overreaching which follow from a businessman's desire to build a following, to establish and maintain as continual and continuous a relationship as possible. In

²¹¹ This suggestion that the subject matter of a transaction determines the law which will grow up around it, and that such law may be absurd when applied to a totally different kind of transaction is, of course, hardly original. A most completely developed exploration of the insightful point that sales of wigits differ from dickers over Dobbin is to be found in Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

²¹² That business had progressed beyond Dobbin was appreciated by some rather early in that progression. See Note, 27 COLUM. L. REV. 430, 435 n.20 (1927) ("disappearance of the horse-trade manner of doing business").

other words, businessmen's accommodations, even when dealing with consumers, are lessened when the transaction, because of the nature of its subject matter, is relatively unlikely to be repeated between the same parties.²¹³

Third, in spite of the homogenization of land in the modern world, and its transformation into more and more of a commodity (like the Code's "goods"), land is not just *treated* as unique in equity,²¹⁴ it ordinarily *is* unique. That is, if the character of an object is dependent upon its surroundings, and both it and its surroundings are immovable, then no other object is the same, or can be. One can of course buy land for purposes with respect to which both its inherent character and its position is relatively irrelevant. I would be willing to guess that much Iowa corn land, as well as much Texas grazing land, is substantially interchangeable (or at least so it seems to one raised in New York) and it is very hard to see the distinction between various addresses in Levittown. But it often is the case that land is chosen for either its intrinsic character (*e.g.*, soil richness) or its relational character (*e.g.*, nearness to a particular school). Because these factors are effectively irrevocable and irreparable (*i.e.*, it is hard to turn sand to loam or move a school), transactions with respect to this type of commodity are transactions with respect to a semi-permanent personal commitment of some sort, and the legal rules that govern it would reasonably tend to be hedged with additional restrictions.²¹⁵

Most important, real property is likely to be the only thing that relatively unsophisticated people have which is worth tricking them out of. Farmers have farms and old ladies have old homesteads. The equity cases are replete with factual patterns involving the old being bilked,²¹⁶ and farmers sweet-talked into ruinous trades.²¹⁷ Courts would be most solicitous to impede land transfers by the poor sillies of the world.²¹⁸

²¹³ Cf. Jones, *Merchants, The Law Merchant, and Recent Missouri Sales Cases: Some Reflections*, 1956 WASH. U.L.Q. 397, 411-18; Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U.L.Q. 193, 218-19. See also FRIEDMAN, *CONTRACT LAW IN AMERICA* 46-48 (1965), on the effect of non-repetitiveness on the morals of Wisconsin real estate brokers.

²¹⁴ McCLINTOCK, *op. cit. supra* note 209; POMEROY, *op. cit. supra* note 209.

²¹⁵ This discussion does not take into account the exceedingly powerful sentimental-mystical aspects of land, the Tara and Mother Russia complexes of *Gone With the Wind* and *War and Peace*, for instance. These feelings, moreover, are apparently not even in any obvious relation to the objective charm of the land involved. See ROLVAAG, *GIANTS IN THE EARTH* (1927) (Dakota prairie). See also FRIEDMAN, *op. cit. supra* note 213, at 35, on the transformation of land from commodity to "differentiated space value" in Wisconsin.

²¹⁶ See, *e.g.*, cases cited note 185 *supra*.

²¹⁷ See, *e.g.*, cases cited note 199 *supra*.

²¹⁸ And it is a "commodity" which often needs a judicial imprimatur of some sort to render it resalable, whence actions to quiet title which apply only to an "estate or interest in real property, whether the same be legal or equitable." MO. ANN. STAT. § 527.150 (1953).

It is out of these special attributes of land, making up the *Gestalt* of real property (as opposed to the "goods" of the Code), that there arise those repeated dramatic vignettes with which the Chancellors were continually faced—the abused old and unsophisticated young, the slicker and the farmer, the money lender and the expectant heir.²¹⁹ This cast of characters, to a large extent determined by the nature of the commodity, led to the various forms of overreaching which, while not quite adding up to fraud or duress, formed the pictures of bargaining processes which the chancellors declared "unconscionable." But mark: *all of these are pictures of individual overreachings*. In other words, more important than the uniqueness of each piece of land (but connected with it) is *the uniqueness of each land transaction*. The dramatic situations which were presented and decided under the equity unconscionability doctrine were most particularly those kinds of overreaching which take place, and can only take place, when there is individualized bargaining. The equity criteria are fitted only to nonmass transactions.

And that is precisely what the Code in general and section 2-302 in particular is *not* designed to cover. The unconscionability section of the Code is primarily focused on the merchant-to-merchant form-pad deal, the merchant-to-consumer adhesion transaction, the modern mass-sale transaction.²²⁰ To decide whether one of these mass transactions is to be allowed to stand, the discriminations and discussions by the equity courts of various gradations of quasi-fraud and quasi-duress are about as useful as a goiter. Section 2-302 is a child of the mass transaction, and the state of health of little old ladies and the shade of rapaciousness of their favorite nephews is not going to inform one's decision. Thus, all of the jolly references to the good old equity doctrine,²²¹ if they are supposed to indicate a source for determining procedural unconscionability under the Code, are woefully misguided and misleading. Equity dealt with the pathology of bargaining. The Code deals with the pathology of nonbargaining.

Substantive Unconscionability in Equity

If, then, the references to the equity doctrine are to be other than delusive, the mass of equity cases must help to define the kinds of con-

²¹⁹ See notes 185-202 *supra*.

²²⁰ Cf. Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 19 n.78 (1951); Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MODERN L. REV. 167, 171 (1964); Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1 (1954). It is of some interest, I think, that the only thing left to a consumer these days which is anything like a dicker over Dobbin is a bicker over Blackacre.

²²¹ See note 167 *supra*.

tracts and contract clauses (as distinguished from the kinds of contracting behavior) which are unconscionable. Alas, that hope is also bootless. There is only one thing which equity recognized as substantive unconscionability: inadequate consideration (or, to put it another way, "gross overall imbalance"). It is instructive, I think, that the *Campbell Soup* case,²²² the only link (other than mere verbal similarity) between section 2-302 and equity unconscionability is itself an extraordinarily striking case of overall imbalance. In that case the contract *was* totally one-sided.²²³ But the hardship to the defendant farmer was in no way the result of any harshness in the contract, but solely the result of the fact that the market value of the commodity he had sold for future delivery had tripled by the time delivery was due. The soup company reserved the power to do all sorts of nasty things to farmer Wentz,²²⁴ but it didn't try. The term that hurt him was the price term, the only one, that is, which was presumably negotiable and fair when set.²²⁵ In other words, even though there was no causal connection between the terms of the contract and the hardship on the defendant, the court nevertheless refused enforcement because the contract itself was too one-sided. Thus *Campbell Soup* is not only typical of the equity cases in general in that the substantive vice in the contract is gross overall lopsidedness, but it is, so to speak, super-typical (one is tempted to say archetypal) in that the one-sidedness complained of was even irrelevant to the harshness complained of.²²⁶

This important fact, that all of the equity unconscionability decisions really depend upon a finding of inadequate overall consideration, has been obscured by the fact that the really live issue in this area, the subject of a controversy lasting centuries, was not whether inadequate consideration was a *necessary* cause of the denial of specific performance, but whether it was a *sufficient* cause.²²⁷ No one doubted

²²² *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

²²³ See the court's description of the allegedly objectionable contract terms. *Id.* at 83. Through the courtesy of counsel for Mr. Wentz, I was given a photostat of the entire original contract. As one would have guessed, the court picked out the "worst" provisions to quote, but the rest of the contract is hardly filled with favors to the farmer.

²²⁴ The one which seems most to have impressed (or depressed) Judge Goodrich was a provision that any time Campbell for one reason or another could not take carrots, the farmer could not, without its consent, sell them elsewhere. *Id.* at 83 n.11.

²²⁵ See *id.* at 81.

²²⁶ Of course, one could also just say that the case was silly.

²²⁷ See 1 AMES, CASES IN EQUITY JURISDICTION 264 n.2 (1904); CHAFFEE & SIMPSON, *op. cit. supra* note 177, at 1173-93; DE FUNIAK, *op. cit. supra* note 177, § 95, at 222-23; FRY, *op. cit. supra* note 177, §§ 438-59; HANBURY, MODERN EQUITY 550-51 (8th ed. 1962); McCLENTOCK, *op. cit. supra* note 177, § 71; MAITLAND, EQUITY 246-47 (1909); 3 POMEROY, EQUITY JURISPRUDENCE §§ 925-28 (5th ed. Symons 1941); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS §§ 192-97 (3d ed. 1926); SNELL, PRINCIPLES OF EQUITY 551-52 (25th ed. Megarry & Baker 1960); 1 STORY, EQUITY

that it was a necessary cause, and in the nature of the way in which the question was presented—as opposition to the specific performance of a contract—it would be rare that the unfairness of the exchange would not be at least implicitly asserted. Why else would the transaction be opposed? More important, if the assumption of the uniqueness of realty were taken seriously, the very opposition to the decree would be a testament to the defendant's decision that the transaction was unfair, and that subjective belief would, in equity as to land, be conclusive.²²⁸ Thus the only factor of substantive unconscionability which could be presented in an action for specific performance was that of disproportion of price, *i.e.*, overall imbalance.²²⁹ The Code draftsmen, however, quite specifically determined, after an early impulse to the contrary, that section 2-302 would be applicable not only to contracts which were unbalanced in an overall sense, but also to those containing single “unconscionable” clauses. Since under this approach a separate substantive determination must be made on a clause-by-clause basis, the equity doctrine's weighing technique is generally irrelevant.

To summarize, there are two separate social policies which are embodied in the equity unconscionability doctrine. The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed not against bargaining conduct (except insofar as certain results often are strong evidence of certain conduct otherwise unproved) but against results, and embodies the doctrine (also present in *laesio enormis* statutes)²³⁰ that the infliction of serious hardship demands special justification. The first of these social policies cannot be reflected in section 2-302 in any helpful way unless one takes the position that everything in a form contract or an adhesion contract is to be stricken upon the nondrafting party's request, for that is the type of transaction with which the section is designed to deal. The second policy, that harsh results not be permitted irrespective of the fairness of the bargaining process or the unfairness of the provision at the time of the drafting, is an attractive

JURISPRUDENCE §§ 244-49, 333 (13th ed. Bigelow 1886); WALSH, *op. cit. supra* note 177, § 104, at 482-89; Note, 25 VA. L. REV. 834 (1939); Annot., 65 A.L.R. 7, 80-97 (1930). One may also consult the exceedingly learned opinion of Chancellor Kent in *Seymour v. Delancey*, 6 Johns. Ch. 222 (N.Y. Ct. Ch. 1822), *rev'd*, 3 Cowen 445 (N.Y. Ct. Err. 1824), for a summary of the controversy up to that date.

²²⁸ Cf. MATTLAND, *op. cit. supra* note 227, at 238, suggesting that one may want particular realty even if the money offered in exchange, objectively considered, is adequate.

²²⁹ In fact, so strong was this imbalance element that specific performance might not be granted even if the contract were fair when made, if subsequent developments made it oppressive in operation. See, *e.g.*, *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1869) (decree granted, but with conditions); *McCarty v. Kyle*, 44 Tenn. 288 (1867).

²³⁰ See BUCKLAND, *TEXTBOOK OF ROMAN LAW* 486 (3d ed. Stein 1963).

one because of the ease of its administration; it is not at all hard to identify a harsh result when it has come about. The difficulty with adapting that doctrine to the Code provision is that substantially all of the important provisions in a normal sales contract are *potentially* exceedingly harsh. Generally they are inserted to determine who will stand a loss, perhaps a total loss, if a particular happening happens, or at least to give a huge litigation advantage to one of the parties should the question come up. Something as innocuous as a choice-of-law provision in a contract will operate harshly if the law chosen is unfavorable to one of the parties.²³¹ The same harshness is even more clearly inherent in a warranty disclaimer; if the warranty question becomes material and the disclaimer is upheld, the seller will win and the buyer will lose.²³² Thus "unconscionability" cannot be equated with "harshness" as an abstract matter. Certain particular clauses may indeed be declared impermissible as a matter of policy; that is how a usury statute operates, and consumer protection statutes embody numerous interdictions of specific contractual provisions.²³³ But the hallmark of unconscionability cannot be the harshness of the result without more, because sales clauses are designed to be harsh. Unless one says that *all* losses should be split or spread²³⁴ (as has been suggested in special contexts),²³⁵ a harsh result without more, even if the result of an adhesion or form-contract provision, cannot identify the impermissible.²³⁶

²³¹ See, e.g., *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955).

²³² A recent example is *Williams v. Chrysler Corp.*, 148 W. Va. 655, 137 S.E.2d 225 (1964).

²³³ See CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* 312-22 (1965), a chart showing the sundry provisions barred in various states from retail installment sales contracts.

²³⁴ Or at least should be if the person hurt were "poor" perhaps. With respect to the apparent political difficulties of the open avowal of such a position, note the Code's propagandists' horrified response to any suggestion that the Code represented "class legislation." See, e.g., Barney, *The Uniform Commercial Code*, 7 PORTLAND U.L. REV. 9, 10 (1961); Beers, *The New Commercial Code*, 2 BUS. LAW. 14, 17 (1947); Malcolm, *The Uniform Commercial Code*, 39 ORE. L. REV. 318, 322-23 (1960). See also note 11 *supra* on the allied "who-really-drafted-the-Code" controversy.

²³⁵ See, e.g., Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965). This area also seems to have its emotional aspects. See Calabresi, *Fault, Accident and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965).

²³⁶ This simplistic resultant-harshness test was firmly rejected by the draftsmen of the Code. In the present revision of the Code, no clause may be stricken unless it was unconscionable "at the time it was made." UCC § 2-302(1). While most likely implicit from the beginning, this was explicitly stated for the first time in 1955, very late in the drafting history. See AMERICAN LAW INSTITUTE, SUPPLEMENT NO. 1 TO THE 1952 OFFICIAL DRAFT OF TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE (1955) (containing the changes "voted by Enlarged Editorial Board [of the Institute] Oct. 29-31, Nov. 13-14, 1954"). The reason, the revisers said, was to "make it clear that . . . the court in making such a decision is not to apply hindsight but is rather to consider the question of unconscionability as of the date of formation of the contract." *Id.* at 8. Thus the doctrine of at least some of the equity cases, that subsequently occurring hardship alone might prevent a contract's specific enforce-

If the unconscionability of a clause at the time it was made cannot be determined by looking at its eventual harsh effect then the test of unconscionability to be applied to any individual clause of a commercial contract is no further clarified. When is a warranty disclaimer "unconscionable"? Not, obviously, when it succeeds in disclaiming a warranty, but when it is as a matter of social policy "bad" that the warranty be disclaimable. When is that? One can argue about the answer, but at least when the question is asked in that way, one is arguably arguing about the right sub-questions, not about the content of an *n*th level abstraction like "unconscionability." Alas, 2-302 steers the latter course.²³⁷

SECTION 2-302(2)

As we have seen, when the question is presented as a decision as to the "unconscionability" of a single contractual provision, the vacuousness of the standard is apparent. This led, eventually, to at least one attempt to modify the section to supply an internal method by which the definitional void might be filled. This, of course, was 2-302(2), and the very limited effect of this subsection helps to clarify even more, I think, the fundamental drafting misconception of section 2-302. Section 2-302(2) reads as follows:

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

Its genesis is clearer than that of just about any other element in section 2-302. It did not appear in the 1950 draft of the Code. Late in January 1951, the Enlarged Editorial Board for the Code met before the Section of Corporation, Banking and Business Law of the American

ment, was rejected. And it was rejected even though the New York Law Revision Commission specifically suggested that after-the-fact harshness be covered by § 2-302. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON THE UNIFORM COMMERCIAL CODE 27-28 (1962).

²³⁷ One other difference between the equity doctrine and § 2-302 should be mentioned here. Under the equity doctrine, the result of a refusal to enforce was, at least theoretically, not total failure of the plaintiff's cause, but only a remission to his rights "at law." Such "right" at law in fact might not exist. One empirical study (dealing, however, with only fifty-six cases) has suggested that as a general rule one who loses in equity loses for good. Frank & Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380 (1954). One suspects, however, that the Chancellors thought there was a real remedy at law, and that the litigants did too; else the actions for cancellation and the judges' agonizing over them make little sense. See, e.g., *Day v. Newman*, 2 Cox 77, 83, 30 Eng. Rep. 36, 38 (Ch. 1788).

Bar Association for hearings.²³⁸ On January 28, Walter D. Malcolm reported that the Section's Committee on the Code had just defeated a proposal to strike section 2-302 altogether, but only by a five-to-five vote.²³⁹ Professor Robert Braucher of Harvard then rose.

I have an additional suggestion . . . and was directed to present this by the Council of the Bar Association Section. That would be to add a second sentence to this provision, the purpose of which would be to try to help a court which passes on the question of whether a contract or a clause is unconscionable.

To understand the setting in which it is working, the sentence which I would propose would be the second sentence in 2-302:

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the court may afford the parties an opportunity to present evidence as to its commercial setting, purpose, and effect as used.

I think that violates Mr. Luther's principle that you should not have procedure in this Code, but if you are going to give the court a charter to inquire into whether the grey goods trade has regulated itself properly under the Worth Street Rules, or whether the form of contract used generally by the canners is unconscionable, it would be desirable to have some reminder that there are complications known in the trade, and that what appears on its face to be unfair or unconscionable may not be in the light of conditions in the trade.²⁴⁰

Professor Llewellyn's reaction to this suggestion was more than receptive; it would not be unfair to call it ecstatic:

The Drafting Staff will welcome that, will welcome such a subsection. It clarifies definitely the meaning of the Section and addresses the court's attention to vitally important stuff.²⁴¹

This reaction ought not to have been unanticipated. In his personal comments to the very first version of 2-302, Professor Llewellyn wrote:

²³⁸ A transcript of these hearings exists in mimeographed form. Proceedings of the Larger Editorial Board of the American Law Institute, January 27-28, 1951 [hereinafter cited as Proceedings]. In addition, a report on this meeting was included at 6 BUS. LAW. 164 (1951), which included some quotations from the verbatim transcript. I shall give parallel citations to both sources.

²³⁹ Proceedings at 171; 6 BUS. LAW. at 184.

²⁴⁰ Proceedings at 173-74; 6 BUS. LAW. at 185.

²⁴¹ Proceedings at 174; 6 BUS. LAW. at 185. Note particularly Professor Llewellyn's use of the exceedingly nonpictorial "stuff."

The one-sided group of clauses which are fair, but are needed to give protection against bad law.

Many groups of clauses in very frequent use in the Sales field are utterly one-sided, but are, for all that, entirely fair because they correct in a reasonable way an unfortunate condition of the law. The most frequent of these are seller's clauses protecting against various types of business impossibility, and protecting against the obligation of delivery on credit to a buyer who has become a risk.²⁴²

At any rate, the draftsmen of section 2-302(2) seem to have felt that it filled a need.²⁴³ It was no sooner proposed than integrated into the act, in almost exactly the words proposed by Professor Braucher,²⁴⁴ and thereafter it was carried forward into the present draft of the Code without substantial change.

Certainly the idea was sound enough. If judges were to be given the power to regulate the agreements within industries on an *ad hoc* basis, then, as Professor Braucher suggested, it would be useful if they were given the opportunity to learn, if only on an *ad hoc* basis, a little something about the industries they were regulating. Obviously what the sponsors of this new subsection had in mind was testimony on the technical business requirements of particular business complexes, perhaps on the order of a statistical defense on the basis of long-time experience of, let us say, the very tough seller-oriented insecurity provision provided in the Worth Street Rules mentioned by Professor Braucher.²⁴⁵ And to this extent section 2-302(2) serves an important purpose: it makes possible the resuscitation of a provision which, though to the uninitiated might appear unreasonable, has a particular, reasonable job to do in a particular industry.²⁴⁶

Does section 2-302(2), however, really give any help in defining substantive unconscionability in any case in which the question is likely

²⁴² Mimeo 1941 DRAFT § 1-C, comment A(6).

²⁴³ Professor Braucher indicates that one of the needs it filled was to lessen dissatisfaction over the result in *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), in which the unconscionability point had been decided without the help of much warning, briefing or evidence. Braucher, *Sale of Goods in the Uniform Commercial Code*, 26 LA. L. REV. 192, 203-04 (1966).

²⁴⁴ The only change was that the last two words "as used" were replaced by the phrase, "to aid the court in making the determination." See AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE, MAY MEETING REVISIONS TO PROPOSED FINAL DRAFT No. 2 (1951).

²⁴⁵ Worth Street Rules, Standard Cotton Textile Salesnote IV(2) (1941). Compare UCC § 2-609.

²⁴⁶ One is reminded of those cases, often brought up when the nature of "ambiguity" for parol-evidence-rule purposes is at issue, in which within a particular trade, white means black, and so forth. See *Mitchell v. Henry*, 15 Ch. D. 181 (1880) ("white selvage" meaning dark selvage); *Smith v. Wilson*, 3 B. & Ad. 728, 110 Eng. Rep. 266 (K.B. 1832) ("thousand" meaning 1200 in the rabbit trade).

to arise? Let us assume that a case comes up in which a man has been fast-talked into signing a contract by which he will have to pay roughly three times the "value" of some goods.²⁴⁷ Now let us imagine the scene when the plaintiff goes on the stand to "present evidence as to . . . [the contract's] commercial setting, purpose and effect."²⁴⁸ It seems to me that the scene might go something like this:

DEFENDANT'S COUNSEL: Mr. Greed, as President of plaintiff corporation you set that company's policy, don't you?

MAX GREED: Certainly. I own it all.

COUNSEL: What would you say was the purpose of the contract that you entered into with Mr. MacIver?

GREED: To make a lot of money.

COUNSEL: And what was the effect?

GREED: I made a lot of money.

COUNSEL: What would happen if you charged less?

GREED: I'd make less money.

COUNSEL: Mr. Greed, doesn't your conscience bother you?

GREED: Wha?

Or instead let us consider the case of a poor, ignorant lady, with seven children, who signed a contract (pursuant to which she bought a stereo set she couldn't afford) making all goods bought from a certain seller, *whenever* bought, security for any outstanding balance owed the seller, such that on default he could take anything back, even things really already paid for.²⁴⁹ That hearing might sound as follows:

BUYER'S COUNSEL: Mr. Walker-Thomas, what is the purpose of this so-called "add-on clause"?

SELLER: It gives us an extra hook over the buyers. Sometimes you can squeeze a little more out by repossessing some of the items bought earlier and reselling them. It makes it easier to convince the buyers that if they don't pay up they're going to get hurt bad.

²⁴⁷ Cf. *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964), discussed at length in text accompanying notes 254-66 *infra*.

²⁴⁸ UCC § 2-302(2).

²⁴⁹ Cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), remanding 198 A.2d 914 (D.C. Mun. Ct. App. 1964), discussed at length in text accompanying notes 268-91 *infra*.

- COUNSEL: What is the effect of this provision?
 SELLER: It's hard to tell, but we think it helps a little.
 COUNSEL: Helps do what?
 SELLER: Helps make more money.
 COUNSEL: What about commercial setting? Does everybody use this clause?
 SELLER: How would I know? What am I, some kind of conspiracy? I guess whoever can use it uses it.
 COUNSEL: What would happen if you didn't use such a provision in your contract?
 SELLER: I'd make less money.
 COUNSEL: What if you sold only to people who could afford it?
 SELLER: I'd make *much* less money.
 COUNSEL: Doesn't your conscience bother you?
 SELLER: Wha?

Or finally, to round things off, how about some testimony in the context of the standard automobile warranty disclaimer that figured in the *Henningsen* case.²⁵⁰ Since we had an oligopolistic industry involved there let us put on the stand in Greek-chorus fashion the chief executive officers of the major automobile manufacturers.

- PLAINTIFF'S COUNSEL: What is the purpose of the warranty disclaimer in your contracts?
 DEFENDANTS: It helps to increase profits.
 COUNSEL: Do you all have such a provision?
 DEFENDANTS: But of course.
 COUNSEL: Why?
 DEFENDANTS: We all like to increase profits.
 COUNSEL: What would happen if you were barred from that clause?
 DEFENDANTS: We'd increase profits some other way. We're an oligopoly, you know.
 COUNSEL: Don't your consciences bother you?
 DEFENDANTS: Beg your pardon?

²⁵⁰ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

The point of all this is to emphasize that the kind of technical testimony which the draftsmen apparently had in mind as being tendered pursuant to section 2-302(2) is testimony which need never be tendered by anyone defending his contract. There is no clause in a contract that is "needed" by a party; it is certainly true that no one needs an entire contract to be one-sided. It is useful for a seller to be able to refuse to ship goods any time he gets nervous about the buyer's credit.²⁵¹ It is useful for a party to protect himself against forms of increased difficulty of performance which do not rise to the level of common-law "impossibility."²⁵² It is even more obviously useful to disclaim warranties or to limit one's liability to essentially nothing. But not being able to provide for any of these things by contract would only take from a party one of the "edges" his lawyer had tried to get for him in his form contract. The removal of the edge would presumably find its way into the final price to be charged, if that were feasible.²⁵³ But how does a court decide if taking that particular edge is not to be permitted if in its "commercial setting" its "purpose and effect" is to increase a party's profits? Is the evidence to be focused on the last few years' profit picture in the industry, or of the particular party, to see if he has been making enough money to cut down on his competitive advantages? Should there also be testimony about the particular party's competitive position vis-à-vis his competitors, to see if he can stand a few new risks? Perhaps there should, but I do find it unlikely. What seems to me more likely is that section 2-302(2), as promising as it reads, and as useful as it is for showing the conscionability of clauses that didn't look it, gives little aid to one trying to find out when a clause in a commercial contract is "unconscionable." Once again, this is because a warranty disclaimer is not "like" a remedy limitation, and both of them are not "like," say, a choice-of-law provision. Any of these clauses might well be regulated, but one cannot decide any of the questions relevant to the form of that regulation so long as one is trying not to decide a question of social policy but to flesh out an incantation.

²⁵¹ See Worth Street Rules, Standard Cotton Textile Salesnote IV(2) (1941).

²⁵² Cf. MIMCO 1941 DRAFT § 1-C, comment A(6).

²⁵³ It is amusing, in a grim sort of way, that persons in a monopolistic or oligopolistic position, who are therefore most likely to use contracts of adhesion, are simultaneously in the best position to pass on to the entire market the losses and costs which they would supposedly bear if the adhesion contracts were forbidden them.

It has also been noted that who does eventually bear the costs of shifted risks is exceedingly hard to pin down. See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Morris, *Enterprise Liabilities and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Note, 70 YALE L.J. 453, 455-56 (1961).

THE CASES "USING" 2-302

As the history of 2-302, and the suggested guides to its operation have now been discussed, it is time to analyze those cases in which 2-302 has so far been actually involved. Strictly speaking, only one reported case relies upon section 2-302 of the Code even as an alternative ground of holding.²⁵⁴ In *American Home Improvement, Inc. v. MacIver*,²⁵⁵ the plaintiff was in the business of selling and installing home improvements. It agreed with the defendant to "furnish and install 14 combination windows and one door" and "flintcoat the side walls" on defendant's home, all for \$1,759.00. Since the defendant was apparently unwilling or unable to pay cash, the plaintiff undertook to arrange long-term financing, and furnished defendant with an application to a finance company (apparently in some way allied or affiliated with the plaintiff). This application was shortly "accepted," and defendant was notified in writing that his payments for the improvements would be \$42.81 per month for sixty months (a grand total of \$2,568.60) which included "principal, interest and life and disability insurance." Plaintiff commenced work, but after it had completed only a negligible portion of the job it was asked by defendant to stop and it complied, thereafter suing defendant for damages for breach of contract.²⁵⁶

On these facts, the New Hampshire court need never have reached any unconscionability question. There was in effect in the jurisdiction a "truth-in-lending" statute²⁵⁷ which applied to the transaction. The

²⁵⁴ This is not strictly true, perhaps. One Referee in Bankruptcy recently held two *security* agreements "unconscionable," purportedly relying on UCC § 2-302. *Matter of Elkins-Dell Mfg. Co.* (E.D. Pa.); *Matter of Dorset Steel Equipment Co.* (E.D. Pa.), both described at 39 REF. J. 115-16 (1965). On appeal, the District Court remanded both cases for further factual development, but declined specifically to hold § 2-302 applicable to nonsales agreements. *In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864, 873 n.4 (E.D. Pa. 1966).

²⁵⁵ 105 N.H. 435, 201 A.2d 886 (1964). The case has been interestingly commented upon. 78 HARV. L. REV. 895 (1965). The facts are presented as part of an agreed statement, 105 N.H. at 436-37, 201 A.2d at 886-87.

²⁵⁶ The plaintiff quite properly did not claim the contract price. See UCC §§ 2-708, 2-709.

²⁵⁷ N.H. REV. STAT. ANN. § 399-B:2 (Supp. 1965) forbids the extension of credit unless at the time thereof the borrower is furnished

a clear statement in writing setting forth the finance charges, expressed in dollars, rate of interest, or monthly rate of charge, or a combination thereof, to be borne by such person in connection with such extension of credit as originally scheduled.

The court concluded reasonably enough that the requirements of this statute had not been met by the plaintiffs, and that

In the circumstances of the present case . . . the purpose of the disclosure statute will be implemented by denying recovery to the plaintiff on its contract and granting the defendants' motion to dismiss.

105 N.H. at 439, 201 A.2d at 888.

court could have relied upon that statute to strike the contract, and indeed did so as an alternative ground of decision. But the court most specifically made it a point not to rest its decision solely upon the disclosure statute. It said:

There is another and independent reason why the recovery should be barred in the present case because the transaction was unconscionable. "The courts have often avoided the enforcement of unconscionable provisions in long printed standardized contracts, in part by the process of 'interpretation' against the parties using them, and in part by the method used by Lord Nelson at Copenhagen." 1 Corbin, *Contracts*, s. 128 (1963). Without using either of these methods reliance can be placed upon the Uniform Commercial Code (U.C.C. 2-302(1)) [quotation of section omitted]

Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction. See *Morrill v. Bank*, 90 N.H. 358, 365, 9 A.2d 519, 525; "It has long been the law in this state that contracts may be declared void because unconscionable and oppressive" ²⁵⁸

All right, then. As of the time of writing, the only case which has relied upon section 2-302 as a basis of decision has decided that "unconscionable" means "too expensive."²⁵⁹ And certainly there is no immutable principle displayed in fixed stars that would make that particular meaning of unconscionable inconceivable. I have earlier suggested that in fact that was the primary meaning of unconscionability in some of the early drafts of the Code, and that it was its *only* meaning as used by courts of equity. Certainly the idea that a strikingly dis-

²⁵⁸ *Id.* at 439, 201 A.2d at 888-89. The *Morrill* case cited by the Court in *MacIver*, *Morrill v. Amoskeag Sav. Bank*, 90 N.H. 358, 9 A.2d 519 (1939), cites for the proposition quoted from it (which, by the way, is dictum) five other cases, *Villa v. Rodriguez*, 79 U.S. (12 Wall.) 323 (1871); *Russell v. Southard*, 53 U.S. (12 How.) 139 (1851); *Bither v. Packard*, 115 Me. 306, 98 Atl. 129 (1916); *Smith v. Smith*, 82 N.H. 399, 135 Atl. 25 (1926); *Houghton v. Page*, 2 N.H. 42 (1819). The contract in the last-named case was not enforced because it violated a governing usury statute of the *locus contractus*. All of the other cited cases (including *Morrill*) were actions in equity except the *Bither* case, which, however, was a mortgagor-mortgagee case of which the court said "though the form or proceeding is in law, it is equitable in spirit and purpose." 115 Me. at 312, 98 Atl. at 932.

²⁵⁹ The only commentary devoted to *MacIver* seems to agree with that reading of its holding. The headnote to the discussion at 78 HARV. L. REV. 895 (1965) reads "Uniform Commercial Code—Construction—Inadequacy of Consideration is Sufficient To Establish Unconscionableness of Contract." Professor Braucher agrees. See Braucher, *supra* note 243, at 205, for a similar reading.

proportionate exchange should be voidable has not destroyed the commerce of the many jurisdictions which utilize a *laesio enormis* doctrine in one form or another.²⁶⁰ On the other hand one may certainly speculate on whether the legislatures which have flocked to embrace the Code²⁶¹ would have been willing to adopt a provision which frankly and openly declared that overcharges of some large but unspecified degree could be invalidated by courts on an *ad hoc* basis, at least as part of a *commercial* code.

Let us assume, however, that a system of jurisprudence ought to have some way to deal with transactions in which one party is giving up vastly more than he is getting, and that this purpose is at least one of those that section 2-302 is designed to serve.²⁶² Even given that assumption, one has still to ask whether the best way to inject that supervisory power into the law is to subsume it under a high-level abstraction like "unconscionability." After all, a *laesio enormis* type of statute is not very hard to draft, as either a flat-percentage or a "grossly-too-much" provision. The decision in the *MacIver* case exposes the weaknesses of abstraction so deliciously that it justifies esurient consideration. Let me quote the court's total discussion of *why* the contract was unconscionable.

In examining the exhibits and agreed facts in this case we find that to settle the principal debt of \$1,759 the defendants signed instruments obligating them to pay \$42.81 for 60 months, making a total payment of \$2,568.60, or an increase of \$809.60 over the contract price. In reliance upon the total payment the defendants were to make, the plaintiffs pay a sales commission of \$800. Counsel suggests that the goods and services to be furnished the defendants thus had a value of \$959, for which they would pay an additional \$1,609.60 computed as follows:

"Value of goods and services		\$ 959.00
Commission	800.00	
Interest and carrying charges	809.60	1,609.60
Total payment		\$2,568.60" ²⁶³

²⁶⁰ *E.g.*, CODE CIVIL art. 1134 (Fr. 58th ed. 1959) ($\frac{1}{2}$ of value); CIVIL CODE § 138 (Ger. 10th ed. Palandt 1952) ("strikingly disproportionate"), LA. CIV. CODE ANN. art. 1861(2) (West 1952) ($\frac{1}{2}$ of value). Moreover, according to an exceedingly interesting recent book, the Barotse of Northern Rhodesia also know fair-price and *laesio enormis* doctrines. See GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* 192-93 (1965). So much for you, Tom Hobbes.

²⁶¹ Forty-nine as of December, 1966. See 3 BENDER'S UNIFORM COMMERCIAL CODE SERVICE *vi* (Duesenberg & King eds.) (1966).

²⁶² It is, in fact, hypothesized in another section of the Code as one of the purposes of the whole law of warranty. See UCC § 2-313, comment 4.

²⁶³ 105 N.H. at 438-39, 201 A.2d at 888.

This is breathtaking economics. Note first of all the court's assumption that the seller's cost of distribution (his presumably-fast-talking salesman's commission) is *no* part of the "value" of the goods to the purchaser, so that it must be *totally* eliminated from any evaluation of the fairness of the exchange. On this reasoning, the salary of sales staff is not a factor fairly to be considered when deciding the fairness of a retail price. (This is not to say that a grotesquely uneconomic form of distribution enriches one who purchases from the distributor; it does, however, suggest that life is not so easy that the commission may simply be "drilled out" of the "value" in evaluating the fairness of the exchange.)

Then we come to the treatment of the "interest and carrying charges" by the court. Here it seems that it is enough for the judge that the amount certainly *looks* like a great deal. He makes absolutely no attempt to work out what the true effective yearly rate of interest is for this five-year pay out. Actually it works out to a bit over 18% per annum.²⁶⁴ This may seem high, but it is not out of line with the rates permitted under statutes which regulate installment purchases and loans, not to mention rates charged where not regulated.²⁶⁵ The important matter, however, is not whether this rate is "fair" or not; it is that the court in this case went on nothing but guesswork to reach its decision, examined none of the relevant considerations *and was encouraged by 2-302 to behave in just that way.*²⁶⁶ Had the section been in less abstract terms, perhaps an examination of the relevant factors would have taken place. It does seem that a judge who is forced to

²⁶⁴ The formula for finding the annual simple interest rate for any time period or amount when based on a monthly repayment schedule may be expressed:

$$\frac{24 C}{L (N + 1)} = R$$

where C is the cost of the loan, L is the amount of the loan, N is the number of payments to be made and R is the annual simple interest rate. See Willging, *Installment Credit: A Social Prospective*, 15 CATHOLIC U.L. REV. 45, 66 (1966) for a more generalized form of this equation. In the *MacIver* case the calculation is:

$$\frac{24 \times 810}{1759 \times 61} = 18.1\%$$

and this assumes that the "life and disability insurance" included is part of the "interest" charge. (If one gives no "value" to the salesman's commission, then the calculation yields a bit over 33%.)

²⁶⁵ See CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 69 n.558, 270-77 (1965), for the regulated rates. The first tentative draft of a Uniform Consumer Credit Code calls for a maximum rate of 18%. N.Y. Times, Aug. 5, 1966, p. 39, cols. 1 & 2. The New Hampshire statute, N.H. REV. STAT. ANN. §§ 399-B:2-3 (Supp. 1965), has no maximum charge provided. In states without rate regulation it is believed that the actual rates charged may range between 12% and 275%. See Fand, *Competition and Regulation in the Consumer Credit Markets*, 20 PERSONAL FINANCE L.Q. REP. 18, 23 (1965).

²⁶⁶ In fairness, it should be pointed out that the plaintiff-appellee filed no brief at all on appeal to the New Hampshire Supreme Court. See 105 N.H. at 437, 201 A.2d at 887.

recognize by the form of the statute upon which he is relying that he is supposed to evaluate the actual economic exchange is likely to feel called upon to see what that exchange in fact is, and how it accords with contemporary practices. When the key evaluative word, however, is a description of the judge's own state of mind rather than of the situation which might be justified in producing such a state, the likelihood that the court will even examine the relevant questions is severely lessened.²⁶⁷

As noted earlier, the *MacIver* case is the only one reported which has relied upon 2-302 as a basis of decision. One very recent case, however, which has attracted substantial attention from the commentators, clearly would have been decided on the basis of 2-302 had the statute been in effect at the time of the relevant transaction, and in fact was decided as if the section were the law of the jurisdiction. In that case, *Williams v. Walker-Thomas Furniture Co.*,²⁶⁸ the appellant, a Mrs. Williams, "a person of limited education separated from her husband,"²⁶⁹ had, during the period 1957-1962, purchased "a number of household items"²⁷⁰ from appellee furniture company on printed-form installment sale contracts (in the transparent guise of leases). One sentence in this printed contract, part of "a long paragraph in extremely fine print"²⁷¹ had the net effect of keeping

a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser²⁷²

When Mrs. Williams' outstanding balance was only \$164, she bought a \$515 stereo phonograph set.²⁷³ At the time of this purchase, the

²⁶⁷ The court's sole reference, by the way, to the procedural unconscionability problems is the following quote from Corbin:

"The courts have often avoided the enforcement of unconscionable provisions in long printed standardized contracts, in part by the process of 'interpretation' against the parties using them, and in part by the method used by Lord Nelson at Copenhagen." 105 N.H. at 439, 201 A.2d at 888.

²⁶⁸ 350 F.2d 445 (D.C. Cir. 1965), remanding 198 A.2d 914 (D.C. Mun. Ct. App. 1964). The case has occasioned extensive commentary. See, e.g., Schneider, *Unconscionable Contract Unenforceable*, 20 PERSONAL FINANCE L.Q. REP. 32 (1965); 15 CATHOLIC U.L. REV. 269 (1966); 54 GEO. L.J. 703 (1966); 79 HARV. L. REV. 1299 (1966); 12 HOW. L.J. 164 (1966); 44 TEXAS L. REV. 803 (1966).

²⁶⁹ 198 A.2d at 915.

²⁷⁰ This abstract classification is that of the Court of Appeals. 350 F.2d at 447. The lower court opinion is, interestingly enough, not as reticent, spelling out the items as "sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, a washing machine." 198 A.2d at 915.

The *Williams* case had a companion case involving a Mr. Thorne and Walker-Thomas, which was also remanded. Mr. Thorne had purchased instead of a stereo set, "an item described as a Daveno, three tables, and two lamps." 350 F.2d at 447. Mr. Thorne's marital status and number of children are not described.

²⁷¹ 198 A.2d at 915.

²⁷² 350 F.2d at 447.

²⁷³ 350 F.2d at 447 & n.1.

furniture company was perfectly aware (since the information was endorsed on the back of the installment contract) that Mrs. Williams' sole income²⁷⁴ was a government payment (apparently some species of relief) of \$218 per month. The Circuit Court opinion also indicated that the store knew that Mrs. Williams was supposed to support herself and her seven children on that amount (though that seems not to have been endorsed on the back of the contract).²⁷⁵ At any rate, the stereo set was apparently just too great a burden for the \$218 per month to bear. Mrs. Williams defaulted, the store replevied every item it could lay its hands on and won in the trial court and the intermediate appeals court. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the case was remanded to make findings on the issue of unconscionability.²⁷⁶

For those of us who have an instinctive and infallible sense of justice (and which of us does not), any other result in this case is unimaginable. But there are grounds for quibbling about the court's (and the Code's) methodology. Judge Wright found unconscionability easy to describe:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. . . . [In the footnote which supports this statement, citation is to *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), and *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) only.] In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.²⁷⁷

That is, there is immediate recognition that unconscionability has to have two foci, the negotiation which led to the contract and that contract's terms. As for the procedural aspect, while there is no finding that this was the only credit furniture store open to Mrs. Williams, or that even if it were not, they all had substantially the same contract (which was the situation in the *Henningsen* case²⁷⁸ so heavily relied

²⁷⁴ Actually, there is no finding that Mrs. Williams had no other source of income, but one assumes that if she had, one of the courts, most likely the Municipal Court of Appeals, would have mentioned it.

²⁷⁵ See 350 F.2d at 448. Presumably after fourteen contracts over a five-year period, see 12 How. L.J. 164, 168-69 (1966), Mrs. Williams' home status was the subject of common banter among the Walker-Thomas folks.

²⁷⁶ 350 F.2d at 450.

²⁷⁷ *Id.* at 449. Compare § 2-302, comment 1: "The principle [of the section] is . . . not [one] of disturbance of allocation of risks because of superior bargaining power."

²⁷⁸ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

upon by the court), one may assume that the form Mrs. Williams signed was essentially the only kind of form open to her. A person's "relevant market" may fairly be the one he can reasonably be expected to know about or dare to use. In other words, the local stores may be a local person's relevant market because of his ignorance, and if they are all as one on something, as to him they are a monopoly. And besides, in this case the court made an almost-finding of contracting procedures which went beyond the mere use of a form or even of a contract of adhesion, which reached, in fact, at least some level of quasi-fraud. Judge Wright asks:

Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? ²⁷⁹

There was apparently no problem with the answer, for after giving lip service to the "usual rule" ²⁸⁰ that one who signs an agreement is bound to all of its terms, he said:

But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms the usual rule . . . should be abandoned ²⁸¹

It is hard to fault the court's argument on the procedural unconscionability aspects of this case. While it might sometimes be difficult to decide whether a species or level of bargaining ought to protect a contract from section 2-302, it is not difficult here. If the unconscionability section is to be applicable to any contract, it must be to one "bargained" as this one was.

But there is no need to labor this point. Finding that the bargaining procedure involved will not insulate the contract from judicial scrutiny under section 2-302 is only the first and less difficult step in the process of using that section. Once one decides that the contract is vulnerable to judicial meddling, there still remains to be decided whether the provision or contract is "unconscionable." For that determination Judge Wright also articulated a test:

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered

²⁷⁹ 350 F.2d at 449.

²⁸⁰ See RESTATEMENT, CONTRACTS §70 (1932).

²⁸¹ 350 F.2d at 449. Compare § 2-302, comment 1: "The principle [of the section] is . . . not [one] of disturbance of allocation of risks because of superior bargaining power."

in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case" [citing "Comment, Uniform Commercial Code sec. 2-307," but obviously meaning 2-302]. Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." . . . We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.²⁸²

How does that test apply to the *Williams* facts? What is it about Mrs. Williams' contract which is "unconscionable"? Surprisingly, the answer is not clear, even about *what* in the contract is bad. It seems, however, that there are two possibilities. First, it may be that the provision by which each item purchased became security for all items purchased was the objectionable feature of the contract. Or it might be that the furniture company sold this expensive stereo set to this particular party which forms the unconscionability of the contract. If the vice is the add-on clause, then one encounters the now-familiar problem: such a clause is hardly such a moral outrage as by itself meets Judge Wright's standard of being "so extreme as to appear unconscionable according to the mores and business practices of the time and place." The lower court in the *Williams* case called attention,²⁸³ for instance, to a Maryland statute regulating retail installment sales²⁸⁴ under which Mrs. Williams might have been relieved, noting with regret that the statute was not in effect in the District. What was not pointed out by the lower court (and *certainly* not by the upper court) was that the State of Maryland had found nothing illegal per se about add-on provisions, in fact specifically permitting them and setting out to regulate them in some detail.²⁸⁵ Of the thirty-seven jurisdictions which have statutes regulating retail installment sales, only one has a provision making add-on clauses impermissible.²⁸⁶ In such circumstances it does seem a bit much to find "so extreme as to appear unconscionable according to the mores and business practices of the time

²⁸² 350 F.2d at 450.

²⁸³ 198 A.2d at 916.

²⁸⁴ MD. ANN. CODE art. 83, §§ 128-53 (1965).

²⁸⁵ MD. ANN. CODE art. 83, § 137 (1965).

²⁸⁶ As of 1965. See CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 312-22 (1965). A bill proposed for the District of Columbia would apparently at least regulate the use of the add-on provisions. See 12 How. L.J. 164, 172 (1966).

and place"²⁸⁷ an add-on clause in the District of Columbia which is used and statutorily permitted almost everywhere else, including contiguous Maryland. One's gorge can hardly be expected to rise with such nice geographic selectivity.

If one is not convinced that the unconscionability inheres in the add-on provision, it may be argued that it inheres in the contract as a whole, in the act of having sold this expensive item to a poor person knowing of her poverty. This is quite clearly the primary significance of the case to some of the commentators.²⁸⁸ That is the kind of action which the Maryland statute does not deal with, nor do any of the statutes like it: the unconscionability of aiding or encouraging a person to live beyond his means (without much hope of eventual success). Well, why not make that "unconscionable" for purposes of section 2-302? After all, in this case Walker-Thomas did know for a fact that Mrs. Williams was on relief; they knew her income and needs with great particularity: \$218 per month and seven children. This case does not present any of the sticky close questions of how much of what a seller would have to know (or inquire about) before being deemed to know that the buyer shouldn't buy.²⁸⁹ Moreover, what Mrs. Williams bought this time was a stereo record player. No one could argue that such an article is a "necessity" to a relief client, and thus the dissenting judge's suggestion that "what is a luxury to some may seem an outright necessity to others"²⁹⁰ hardly applies in this case. Who can doubt but that this purchase was a frill?²⁹¹ So in this case all we would have is a holding that one cannot enforce a contract pursuant to which one has sold luxuries to a poor person (or at least one on relief) with knowledge or reason to know that he will not be able to pay for them. This is just another class distinction, and distinctions among persons on the bases of the "class" to which they belong, that is, on the basis of some common supra-personal charac-

²⁸⁷ 350 F.2d at 450.

²⁸⁸ For instance, the subheading of Schneider, *Unconscionable Contract Unenforceable*, 20 PERSONAL FINANCE L.Q. REP. 32 (1965), is "Sale of Stereo to Woman on Relief." See also 44 TEXAS L. REV. 803 (1966): "a court may refuse on the ground of unconscionability to enforce a contract where there is an overextension of credit." The great interest shown in the opinion as to Mrs. Williams' financial status and the prominence given her relief status seems to express a similar feeling about the case's real significance.

²⁸⁹ For simplicity's sake we will leave Mr. Thorne out of this. See note 270 *supra*.
²⁹⁰ 350 F.2d at 450.

²⁹¹ *But see* LEWIS, FIVE FAMILIES 134-36 (1959), for the story of a Mexican slum dweller who bought a "combination radio, record player, and television set" on time, intending to rent its use to his neighbors until it was paid for and then (having left it carefully cartoned and protected) resell it as new. One is not told how the plan finally worked out.

teristics, is exceedingly common in the law²⁹² (not to mention life). Such a process immensely simplifies decision by limiting the required inquiry to the person's membership in the class. Once that determination is made, a certain legal result will flow. The classic instance is the majority-minority dichotomy. Persons under twenty-one cannot, as a general rule, make self-binding contracts. This may be considered a shorthand form of a syllogism which would go something like (a) persons lacking sufficient probity ought not to be allowed to bind themselves; (b) all persons under twenty-one lack sufficient probity; (c) persons under twenty-one cannot bind themselves. This illustrates some of the strengths and weaknesses of the class system. The rule is easy to administer because a party's age is much easier to determine than his probity. The difficulty is that the easier the classification the less likely it is to be accurate, because classes are, in fact, hardly ever wholly homogeneous. In our case, for instance, the "minor premise" is false; not all persons under twenty-one lack sufficient probity to bind themselves.²⁹³

When faced with the difficulties inherent in deciding the bargaining fairness of any given transaction, the equity courts, in working out *their* unconscionability doctrine, similarly leaned heavily on relatively gross classifications. In effect, they seem continually to have taken a kind of *sub rosa* judicial notice of the amount of power of certain classes of people to take care of themselves, often without too much inquiry into the actual individual bargaining situation. And it is arguable that sometimes they were wrong; not all old ladies or farmers are without defenses.²⁹⁴ Put briefly, the typical has a tendency to become stereotypical, with what may be unpleasant results even for the beneficiaries of the judicial benevolence. One can see it enshrined in the old English equity courts' jolly treatment of English seamen as members of a happy, fun-loving race (with, one supposes, a fine sense of rhythm), but certainly not to be trusted to take care of themselves.²⁹⁵ What effect, if any, this had upon the sailors is hidden behind the judicial chuckles

²⁹² The usefulness of these group classifications has not gone unnoticed by the draftsmen of the Code, whose innovations, after all, include the merchant-non-merchant dichotomy, § 2-104(1). See also Llewellyn, *Through Title To Contract and a Bit Beyond*, 15 N.Y.U.L. REV. 159, 160 n.2 (1938): "My own attack would be to . . . split 'retailer' still further into petty, and large (department store; chain store)."

²⁹³ For some recent speculations on infants' contracts in the modern world, see Note, 41 IND. L.J. 140 (1965).

²⁹⁴ For instance, consider farmer Wentz in *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

²⁹⁵ See *How v. Weldon*, 2 Ves. Sr. 516, 518, 28 Eng. Rep. 330, 331 (Ch. 1754) ("a race of men, loose and unthinking"); 3 POMEROY, EQUITY JURISPRUDENCE § 952 (5th ed. Symons 1941); 1 STOREY, EQUITY JURISPRUDENCE § 332 (13th ed. Bigelow 1886).

as they protected their loyal sailor boys, but one cannot help wondering how many sailors managed to get credit at any reasonable price. In other words, the benevolent have a tendency to colonize, whether geographically or legally.²⁹⁶

Far more economically significant and widespread as an example of the Chancellors' temptation toward stereotypical jurisprudence is found in the expectant-heir cases. The most important thing about expectant-heir cases is that there are expectant-heir cases, classifiable separately as such in treatises.²⁹⁷ The Chancellors did not find unfairness in the price and refuse to enforce because they had no conception of how an expectancy had to be discounted for risk; that kind of sophistication came early.²⁹⁸ They just set out to protect heirs from the full effect of their tendency to live beyond their governors' life expectancies. This was easy to do; it was rare that a judge had to enter into too long a discussion of the actual facts, or to face the real basis of his easy decision in the battle between his (there but for the grace of God) grandson and the most-likely-Jewish moneylender. After all, he had the rubric "unconscionable" with which to explain (to himself and to the public) that decision.

Thus, when one asks why a court (like the District of Columbia Court in the *Williams* case) ought not be allowed to subsume its social decisions under a high-level abstraction like "unconscionability," one may point to the equity cases so many other commentators have pointed to, but for a different reason. One may suggest that first (and less important) it tends to make the true bases of decisions more hidden to those trying to use them as the basis of future planning. But more important, it tends to permit a court to be nondisclosive about the basis of its decision even to itself; the class determination is so easy and so

²⁹⁶ See F. Cohen, *Indian Wardship: The Twilight of a Myth*, in *THE LEGAL CONSCIENCE* 328 (L. Cohen ed. 1960); cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

²⁹⁷ See FONBLANQUE, *A TREATISE OF EQUITY* 119-22 (4th Am. ed. 1835); 3 POMEROY, *EQUITY JURISPRUDENCE* §§ 953-54 (5th ed. Symons 1941); POMEROY, *SPECIFIC PERFORMANCE OF CONTRACTS* § 191 (3d ed. 1926); 1 STORY, *EQUITY JURISPRUDENCE* §§ 333-34 (13th ed. Bigelow 1886). In 1804 Lord Eldon could distinguish the "cases of reversions and interests of that sort" as a separate class of cases, *Coles v. Trecothick*, 9 Ves. Jr. 234, 246, 32 Eng. Rep. 592, 597 (Ch. 1804), and modern English treatises continue to note them separately. See HORSFIELD, *EQUITY IN A NUTSHELL* 181 (1960); SNELL, *PRINCIPLES OF EQUITY* 502-03 (25th ed. Megarry & Baker 1960). In fact, cases are still coming up, e.g., *Levin v. Roth*, [1950] 1 All E.R. 698 (C.A.), and the old expectant-heir learning is still discussed. 24 *AUSTL. L.J.* 158 (1950):

Though of somewhat rare occurrence before the Courts, the application of the equitable doctrine relating to unconscionable bargains with expectant heirs should not be forgotten.

²⁹⁸ The leading case of *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 28 Eng. Rep. 82 (Ch. 1750), for instance, contains a sophisticated judicial discussion of the economic problems involved.

tempting (and often so heart-warming). More particularly with respect to the *Williams* case concept that the poor should be discouraged from frill-buying, no legislature in America could be persuaded openly to pass such a statute, nor should any be permitted to do so sneakily. If the selling of frills to the poor is to be discouraged, if the traditional middle-class virtues of thrift and child care are to be fostered in the deserving poor by a commercial statute, if one wants to protect a class, improvident by definition, from the depredations of another class, it is at least arguable that one should just up and do so—but clearly.²⁹⁹ This is not to suggest, for a moment, anything as stupid as that some “freedom-of-contract” concept ought to prevent, for instance, the statutory interdiction of an eleven-hour day. It is only to say that when you forbid a contractual practice, you ought to have the political nerve to do so with some understanding (and some disclosure) of what you are doing.³⁰⁰

CONCLUSION

I have attempted to describe in some detail the pathology, developmental, morphological and functional, of section 2-302 of the Code and its official and unofficial commentaries. The gist of the tale is simple: it is hard to give up an emotionally satisfying incantation, and the way to keep the glow without the trouble of the meaning is continually to increase the abstraction level of the drafting and explaining language. If for one reason or another (in this case the desire to forward the passage of the whole Code) the academic community is generally friendly to the drafting effort, a single provision in a massive Code may get by even if it has, really, no reality referent, and all of its explanatory material ranges between the irrelevant and the misleading. That this happened with respect to 2-302 the few cases using it are beginning to show more and more clearly. The world is not going to come to an end. The courts will most likely adjust, encrusting the irritating aspects of the section with a smoothing nacre of more or less reasonable applications, or the legislatures may act if things get out of

²⁹⁹ See 12 How. L.J. 164, 170-72 (1966), for a brief contemplation of such overt class legislation which is notably lacking in enthusiasm. At least one observer of the consumer finance scene, however, seems willing to bar the poor from credit. See CAPLOVITZ, *THE POOR PAY MORE* 191 (1963) (“establish by law minimal credit requirements”).

³⁰⁰ In *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), continually cited in the *Williams* case (see 350 F.2d at 448 n.2, 449 nn.6 & 7, 450 n.12), it is most significant that the court did *not* have § 2-302 to work with. It was forced, therefore, to face the relevant policy questions, which it did in a many-paged opinion. In other words, in *Henningsen* the New Jersey court was forced to talk about the basis for its decision; in *Williams* and *MacIver* the courts were most particularly enabled not to.

hand. Commerce in any event is not going to grind to a halt because of the weaknesses in 2-302. But the lesson of its drafting ought nevertheless to be learned: it is easy to say nothing with words. Even if those words make one feel all warm inside, the result of sedulously preventing thought about them is likely to lead to more trouble than the draftsmen's cozy glow is worth, as a matter not only of statutory elegance but of effect in the world being regulated. Subsuming problems is not as good as solving them, and may in fact retard solutions instead. Or, once more to quote Karl Llewellyn (to whom, after all, the last word justly belongs), "Covert tools are never reliable tools."³⁰¹

³⁰¹ LLEWELLYN, *THE COMMON LAW TRADITION* 365 (1960), quoting Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700, 703 (1939).