

THESIS

UNCONSCIONABILITY IN CONTRACTS: A NEW TEST

Submitted by

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ABSTRACT

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The goal of this thesis is to answer a number of unresolved, fundamental legal and moral questions about contracts. Answering these important questions will require a broad legal, applied ethical, and normative ethical analysis of historical and contemporary case law, statutory law, and legal literature. The end result will be a unified theory of unconscionability: it will capture the intent of contemporary statutory law, provide a test that consistently yields judgments of unconscionability where it ought to do so, and include plausible, well-developed normative ethical justification for the judgments yielded by the test.

In Chapter 1 there will be a brief presentation of the legal historical context. We will have a look at unconscionability in statutory law, case law, and the legal literature of the previous era of unconscionability law and find that there has for a long time been broad, fundamental disagreement about the nature of unconscionability itself, and more recently, equally serious disagreement about how contemporary statutory legal attempts to define unconscionability should be interpreted and applied.

In Chapter 2, we will examine and critique two contemporary attempts at legal and moral analysis of extant case and statutory law. In Chapter 3, I will take a stand on the issues discussed throughout the first two chapters, proposing a general theory of unconscionability and a two-pronged test for identifying unconscionability in contracts. The theory will capture the intent of contemporary statutory unconscionability law, explain and solve the difficulties that led to broad inconsistency in the case law we saw in Chapter 2, and lead us to a plausible test. Chapter 4 will present the normative theory that undergirds and unites both prongs of the test proposed in

Chapter 3. The goal is to show how my theory of unconscionability is explained and justified within moral theory more broadly.

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Introduction

The goal of this thesis is to answer a number of unresolved, fundamental legal and moral questions about contracts: what is wrong, legally and/or morally, with contracts that are ‘unconscionable’ under the law? Can a contract be so one-sided as to be simply morally wrong to enforce? Or is it, rather, that extreme one-sidedness is sufficient evidence of such a great disparity in bargaining power between two parties that we can say there was fraud or duress? If it is not one-sidedness that is the problem, is it something else, or a combination of other things? How in the world can we justify, legally and morally, interfering with people’s free will and the free market?

Answering these (and other) important questions will require a broad legal, applied ethical, and normative ethical analysis of historical and contemporary case law, statutory law, and legal literature. The end result will be a unified theory of unconscionability: it will capture the intent of contemporary statutory law, provide a test that consistently yields judgments of unconscionability where it ought to do so, and include plausible, well-developed normative ethical justification for the judgments yielded by the test.

In Chapter 1 there will be a brief presentation of the legal historical context. We will have a look at unconscionability in statutory law, case law, and the legal literature of the previous era of unconscionability law. We will find that there has for a long time been broad, fundamental disagreement about the nature of unconscionability itself, and more recently, equally serious disagreement about how contemporary statutory legal attempts to define unconscionability should be interpreted and applied.

In Chapter 2, we will examine and critique two contemporary attempts at legal and moral analysis of extant case and statutory law. Both these analyses consider many of the same well-

known, oft-cited cases examined in Chapter 1 of this work, and both come up with different answers about what unconscionability is and what we ought to do about it while remaining consistent. We will find that both analyses have serious shortcomings.

In Chapter 3, I will take a stand on the issues discussed throughout the first two chapters, proposing a general theory of unconscionability and a two-pronged test for identifying unconscionability in contracts. The theory will capture the intent of contemporary statutory unconscionability law, explain and solve the difficulties that led to broad inconsistency in the case law we saw in Chapter 2, and lead us to a plausible test. After proposing the test, before the end of the chapter, I will briefly present and answer some practical objections.

Chapter 4 will present the normative theory that undergirds and unites both prongs of the test proposed in Chapter 3. The goal is to show how my theory of unconscionability is explained and justified within moral theory more broadly. This will include ruling out some normative approaches, re-examining the major problems raised by the legal theories of others in Chapter 2 and by my critique of those theories, presenting and addressing some objections, and ultimately, showing how my normative theory justifies the answers my test gives about the landmark cases.

Chapter 1: Unconscionability in Statutory Law, Case Law, and Pre-U.C.C.

Legal Literature

The purpose of this chapter is to explore the recent history and evolution of the concept of unconscionability in contract law. Through the examination of unconscionability in statutory law, case law, and the philosophy of law, the chapter will seek to reveal whether unconscionability is supposed to be a kind of problem in its own right, or instead is merely indicative of some other kind of problem or problems such as fraud or duress.

I. Unconscionability in Statutory Law

Prior to the advent of the Uniform Commercial Code, or U.C.C., if the courts of equity and later the common law courts wished to nullify a contract they found unconscionable, they were forced to appeal to a patchwork of statutory laws which were not consistent from state to state, unclear precedent, and judicial discretion. The result was that their opinions often ended up containing very strained legal justification: they relied on unusual construal of contractual content,¹ fine-grained analyses of the procedural details of the making of a contract in order to find reasons that the procedure was violative of some interpretation of the classic rules of offer and acceptance,² and other tricks.

¹ *See, e.g.*, *New Prague Flouring Mill Co. v. G. A. Spears*, 189 N.W. 815, 822 (1922) (construing a contract against a seller by holding that, subject to liability for damages, the right to refuse performance inheres in all executory contracts even in the teeth of express terms to the contrary, and, on these grounds, rejecting terms that allow a seller to indefinitely extend a contract at its option to a buyer's detriment once the buyer has abrogated: the seller may claim damages accrued only up to the point of the buyer's abrogation).

² *See, e.g.*, *Chapelton v. Barry*, [1940] 1 KB 532 (appeal taken from Wales) (holding that the contractual terms actually accepted by the purchaser of a ticket entitling him to the temporary use of a deck chair were those printed on the sign advertising the chair's availability for rental, rather than those printed on the back of the ticket, and so allowing one injured by a defective chair to appeal for damages despite the disclaimer of liability on the back of his ticket) *and* *Alexander Hamilton Institute v. Jones*, 234 Ill. App. 444 (1924) (denying a seller's attempt to recover the balance due on an installment contract by claiming that, since the transaction was never formally entered into as an installment contract by the seller, but rather the seller merely accepted the first payment and shipped the first order, the contract actually entered into by both parties was not an installment contract but an offer by the buyer to make

The U.C.C. is a project of the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission or ULC, which is made up of lawyers who are practicing lawyers, sitting judges, legislators, legislative staff, and law professors. The conference drafts and promotes enactment of uniform state laws “in areas of state law where uniformity is desirable and practical.”³ The U.C.C. was first published in 1952.⁴ As of June 2012, 39 U.S. states and the District of Columbia had adopted the language of Article 2, section 302 of the U.C.C. verbatim.⁵ 11 states had adopted it with minor modifications.⁶ It was adopted and took effect in most states in the early- to mid-1960s. Its first adopter was Pennsylvania,

periodic payments in consideration of a series of acts to be performed by the seller – this despite the buyer’s expression of a desire to enter into an installment contract in his letter.)

³ *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited May 25, 2012).

⁴ *Past and Present ALI Projects*, AM. LAW INST., http://www.ali.org/doc/past_present_ALIprojects.pdf (last visited June 6, 2013).

⁵ ALA. CODE § 7-2-302 (2012); ALASKA STAT. § 45-02-302 (2012); ARIZ. REV. STAT. ANN. § 47-2302 (2012); ARK. CODE ANN. § 4-2-302 (2012); CAL. CIV. CODE § 1670.5 (Deering 2012); COLO. REV. STAT. § 4-2-302 (2011); D.C. CODE § 28:2-302 (2012); IDAHO CODE ANN. § 28-2-302 (2012); 810 ILL. COMP. STAT. 5/2-302 (2012); IND. CODE ANN. § 26-1-2-302 (2012); IOWA CODE § 554-2302 (2012); KAN. STAT. ANN. § 84-2-302 (2012); KY. REV. STAT. ANN. § 355.2-302 (LexisNexis 2012); ME. REV. STAT. tit. 11, § 2-302 (2012); MD. CODE ANN., COM. LAW § 2-302 (LexisNexis 2012); MASS. ANN. LAWS ch. 106, § 2-302 (2012); MICH. COMP. LAWS § 440.2302 (2012); MISS. CODE ANN. § 75-2-302 (2011); NEB. REV. STAT. § 2-302 (2011); NEV. REV. STAT. § 104.2302 (2012); N.H. REV. STAT. ANN. § 382-A:2-302 (2012); N.J. STAT. ANN. § 12A:2-302 (2012); N.M. STAT. ANN. § 55-2-302 (2012); N.C. GEN. STAT. § 25-2-302 (2012); N.D. CENT. CODE § 41-02-19 (2012); OHIO REV. CODE ANN. § 1302.15 (LexisNexis 2012); OR. REV. STAT. § 72-3020 (2011); 13 PA. CONS. STAT. § 2302 (2012); R.I. GEN. LAWS § 6A-2-302 (2012); S.C. CODE ANN. § 36-2-302 (2011); S.D. CODIFIED LAWS § 57A-2-302 (2012); TENN. CODE ANN. § 47-2-302 (2012); TEX. BUS. & COM. CODE ANN. § 2.302 (West 2011); UTAH CODE ANN. § 70A-2-302 (LexisNexis 2012); VT. STAT. ANN. tit.9A, § 2-302 (2012); VA. CODE ANN. § 8.2-302 (2012); WASH. REV. CODE ANN. § 62A.2.302 (LexisNexis 2012); W. VA. CODE ANN. § 46-2-302 (LexisNexis 2012); WIS. STAT. § 402.302 (2012); WYO. STAT. ANN. § 34.1-2-302 (2012).

⁶ CONN. GEN. STAT § 42a-2-302 (2012); DEL. CODE ANN. tit. 6, § 2A-108; FLA. STAT. § 680.1081 (2012); GA. CODE ANN. § 11-2A-108 (2012); HAW. REV. STAT. § 490:2A-108 (2012); LA. REV. STAT. ANN. § 9:3551 (2012); MINN. STAT. § 336.2A-108 (2012); MO. REV. STAT. § 400.2A-108 (2012); MONT. CODE ANN. § 30-2A-108 (2011); N.Y. U.C.C. LAW § 2-A-108 (Consol. 2012); OKLA. STAT. tit. 12A, § 2A-108 (2012). *See also* 1A U.L.A. 1-2 (2004) (table of jurisdictions with notes on excepted articles, amendments, and revisions).

where it took effect in July of 1954. Its last adopter was Louisiana, where it took effect in January of 1975.⁷

The aim U.C.C. § 2-302, which Alan Wertheimer calls the most explicit development of the contemporary doctrine of unconscionability⁸, was to allow the courts to avoid the practices mentioned above. It reads:

“(1) If the court as a matter of law finds the contract or any term 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 term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the contract or any term 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.”⁹

By adopting this part of the U.C.C. or modifications of it, state legislatures give courts explicit permission to refuse to enforce unconscionable contracts, or to refuse to enforce terms of contracts deemed unconscionable.¹⁰

In the official committee comments on the 2004 version of the U.C.C., Comment 1 states that:

“[U.C.C. § 2-302] 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 directly on to 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 light of the general commercial background and commercial needs of the particular trade or case,

⁷ 1A U.L.A. 1-2 (2004).

⁸ Alan Wertheimer, *Unconscionability and Contracts*, 2 BUSINESS ETHICS QUARTERLY no. 4 487, 498 (October 1992).

⁹ U.C.C. § 2-302 (2004).

¹⁰ Wertheimer, *supra* at 489.

the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. 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.”¹¹

In other words, U.C.C. § 2-302 is intended to allow the courts to avoid being forced to find ways to construe ostensibly unconscionable contracts or clauses so as to avoid unconscionable result. Furthermore, the courts need not resort to fine-grained analyses of the procedural details of the making of a contract in order to find reasons that the procedure was violative of some interpretation of the classic rules of offer and acceptance.

The courts may also avoid resorting to claims about ‘public policy’, i.e., “[b]roadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is ‘contrary to public policy.’ [...]. More narrowly, the principle that a person should not be allowed to do anything that would tend to injure the public at large.”¹² They may also avoid resorting to claiming that a clause is not in accord with the contract’s main purpose.¹³ In summary, under the U.C.C. an unconscionable contract or clause no longer needs to merely contain language that can be adversely construed, have been made in some way that violates some strained interpretation of the classic rules of offer and acceptance, be contrary to public policy, or contain or be a clause that is not in accord

¹¹ UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 344-45 (2004).

¹² BLACK’S LAW DICTIONARY 1351 (9th ed. 2009). *Accord* *Murphy v. McNamara*, 416 A.2d 170, 176-77 (1979) (finding a contract unconscionable partly on ground that its unfairness violates public policy as explicitly expressed by the legislature in statutory law) *and* *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 95 (1960) (holding that disclaimers of implied warranty of merchantability and attempted elimination of all obligations other than replacement of defective parts of an automobile are violative of public policy in that habitually enforcing such terms would be “so inimical to the public good as to compel an adjudication of [the given terms’] invalidity.”).

¹³ *Cf.* *Gianni v. Gantos*, 391 N.W.2d 760, 762 (1986) (questioning whether a clause that entitles one party to cancel at any time without liability even allows for a contract to exist).

with the contract's main purpose in order to be declared unconscionable and voided for unconscionability.

Now that we have seen what features a contract or clause no longer needs to have in order to be declared unconscionable, there are four elements of U.C.C. § 2-302 that must be examined carefully in order to gain a clearer idea of just what a contract or clause does need to have. First, the code states that if the court finds a contract or term unconscionable as a matter of *law*, as opposed to a matter of *fact*, it can refuse to enforce. Ballentine's Legal Dictionary and Thesaurus defines a 'matter of law' as "[t]he application, meaning, or interpretation of the law by which a case is to be decided. Matters of law are always decided by the judge, as opposed to the jury."¹⁴ A 'matter of fact' is defined as "[w]hether something is true or real; whether an event took place; in a case involving a jury, that which is for the jury to decide based upon evidence."¹⁵ A 'question of law' is defined as "[a] question to be decided by the judge; that is, a question as to the appropriate law to be applied in a case, or its correct interpretation,"¹⁶ and a 'question of fact' is "[a] question to be decided by the jury in a trial by jury or by the judge in a bench trial; that is, a question of what is the truth when the evidence is in conflict."¹⁷

Second, the code states that the contract or term must be unconscionable *at the time the contract was made*. Third, the code states that a contract's terms are to be considered in the light of the setting in which it was made, its purpose, and its effects. Finally, a contract or clause must

¹⁴ JONATHAN S. LYNTON, *BALLENTINE'S LEGAL DICTIONARY AND THESAURUS* 407-08 (1995).

¹⁵ *Id.* at 407.

¹⁶ *Id.* at 548.

¹⁷ *Id.* at 548. *Cf.* BLACK'S LAW DICTIONARY 1366 (9th ed. 2009) (defining a question of law more broadly as a "question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion <the enforceability of an arbitration clause is a question of law>," an "issue about what the law is on a particular point; an issue which parties argue about, and the court must decide, what the true rule of law is <both parties appealed on the question of law>, or an "issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury <whether a contractual ambiguity exists is a question of law>.")

be “so one-sided as to be unconscionable,” taking the second and third of these elements into consideration. In the following two sections, I will discuss, among other things, the presence and interpretation of all these elements (including those now deemed unnecessary by the U.C.C.) in the legal literature and in case law.

II. Unconscionability in the Legal Literature: Corbin

Section 128 of Arthur Linton Corbin’s work Corbin on Contracts (a work first published in 1950,¹⁸ two years prior to the first publication of the U.C.C.) is frequently cited in discussions of unconscionability in case law.¹⁹ Corbin held a relativistic view of what ought to be considered unconscionable: he claimed that whether or not a bargain is unconscionable is to be determined by whether or not the terms are so unfair as to “appear unconscionable according to the mores and business practices of the time and place.”²⁰ This is perhaps part of what is meant in the U.C.C. when it orders that courts consider “one-sidedness” in light of “commercial setting” or “commercial background.”

As for the fourth factor, what Corbin means by ‘unfair’ is not immediately clear. He cites as examples extremely poor rates of currency exchange or high rates of loan interest.²¹ Corbin also discusses the matter in terms of “considerations.” If that which is promised by a promisor is grossly inadequate when compared to what is given in exchange by the promisee, that which is

¹⁸ Yale University, *THE YALE BIBLIOGRAPHICAL DICTIONARY OF AMERICAN LAW 128* (Roger K. Newman, ed., 2009).

¹⁹ Arthur Linton Corbin, *Corbin on Contracts* § 128 (One Vol. ed. 1952).

²⁰ *Id.* at 188.

²¹ *Id.* at § 128.

given is said to be a “grossly inadequate consideration,”²² and the terms may be shown to be unconscionable by the existence of such inadequacy.

Corbin struggles to define what counts as a consideration, let alone what counts as an *adequate* consideration and thereby makes a promise enforceable. He argues that what foils those who attempt to provide a single, precise, absolute definition is that the reasons for deeming a consideration adequate are myriad, and that the definition of ‘consideration’ should really be seen as an “evolutionary product,” i.e., a thing which is neither absolute nor eternal, but relative and changeable.²³ His approach is to set himself the task of examining cases in order to discover what factors have been held to make a promise enforceable, and what factors have been found to be insufficient for making a promise enforceable,²⁴ and it is this task in which he is still engaged when we find him discussing unconscionability much later.

Corbin claims that although judges of common law had been ambivalent toward unconscionability, a chancellor of a court of equity would have refused to enforce a contract that was unconscionable in the terms Corbin suggests, and he argues that judges in his time, since most of them were effectively both chancellors and judges, ought to apply equity doctrines in considering whether a contract is unconscionable.²⁵ Common law and equity law were merged by federal statute in 1937.²⁶ Corbin also argues that gross inadequacy of consideration may be

²² *Id.* at § 127.

²³ *Id.* at § 109.

²⁴ *Id.* at § 110.

²⁵ *Id.* at § 128.

²⁶ FED. R. CIV. P. 2.

evidence of fraud, mistake, or undue influence, but unless these are evident, inadequacy of consideration “will seldom affect the enforceability of a promise.”²⁷

This latter statement, along with his reference to “equitable doctrines,” seems to indicate that Corbin, like the courts of equity, saw unconscionability as something indicative of fraud, mistake, undue influence, or some other substantive or procedural problem resulting from unequal bargaining power, rather than as a problem in its own right. According to Arthur Leff, regarding *substantive* unconscionability, “[t]here is only one thing which [the courts of] equity recognized as substantive unconscionability: inadequate consideration (or, to put it another way, ‘gross overall imbalance’).”²⁸ In other words, for the courts of equity, ‘substantively unconscionable’ simply meant that for the wronged party, what was bargained for was too expensive: that party gave much more than it got.²⁹

Citing numerous cases, Leff writes that when examining cases the courts of equity refused to enforce on *procedural* grounds, one

“runs continually into the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naïve, and the sick, all on one side of the transaction, with the sharp and hard on the other. [...] Certain whole classes of presumptive sillies like sailors and heirs and farmers and women continually wander on and off stage. Those not certifiably crazy, but nonetheless pretty peculiar, are often to be found. And in most of the cases, of course, several of these factors appear in combination.”³⁰

In other words, the courts of equity made decisions regarding procedural unconscionability based on A’s being such that he was easily taken advantage of in some way or another by B, and where

²⁷ *Id.* at § 127

²⁸ Arthur Allen Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 538 (1967).

²⁹ *Id.* at 548.

³⁰ *Id.* at 531-33.

B's behavior amounted to, if not full-blown fraud, duress or undue influence, then something like them.³¹

However, as we have seen, in addition to his mention of the courts of equity and procedural misconduct, Corbin also stresses consideration. Apparently following the courts of equity, Corbin suggests the courts might rely on the flexibility of the concepts of fraud, duress, misrepresentation, and undue influence “to enable the courts to avoid enforcement of a bargain *that is shown to be unconscionable by gross inadequacy of consideration* accompanied by other relevant factors.”³² Corbin further suggests, as if they were good excuses, that the courts might cite the existence of a difference in economic bargaining power, or simply intentionally turn a blind eye to certain provisions.³³

With this sentence construction, Corbin implies that gross inadequacy of consideration is a necessary condition for unconscionability (though perhaps not a sufficient one, since gross inadequacy of consideration must be “accompanied by other relevant factors”). Gross inadequacy of consideration is a negative *consequence* for one of the parties. That party gets a grossly disproportionately small net benefit from the contract. In this respect, Corbin seems to be following older, pre-U.C.C. opinions that stretched the available legal concepts to find other reasons to declare contracts unconscionable when the real problem lay in that those contracts were morally repugnant in their actual *outcomes* or the outcomes they could reasonably be expected by the parties to produce. Corbin probably took this stance because he, like judges

³¹ See, e.g., *Banaghan v. Malaney*, 85 N.E. 839 (1908) (in which equity conceded that a plaintiff was most likely entitled to damages at law, but on the “sound discretion of the court,” denied his request to compel specific performance of a contract for the sale of land despite the fact that the defendant was “competent to make the contract...was not induced by any fraud or misrepresentation to sign the contract, and, at law, [was] bound thereby,” because the elderly, illiterate defendant was “aged, inexperienced, wavering,” and not “of equal mental ability” with the plaintiff, and because the plaintiff had engaged in “unfair conduct” and taken “inequitable advantage”).

³²Corbin, *supra* at § 128, my emphasis.

³³Corbin, *supra* at § 128.

writing opinions prior to the enactment of the U.C.C., was forced to do so because the necessary statutory resources to move directly to unconscionability as one-sidedness that were provided by the U.C.C. were lacking when *Contracts* was published in 1952.

Corbin is in accord with the U.C.C.'s requirement that a contract's terms be unconscionable at the time the contract was made, rather than as the result of changed conditions, when he argues that a consideration's value will not be rendered inadequate simply by changes in market conditions that occur after the contract is made. When two parties agree on an exchange, they are part of the market. The market value at a given time just is what buyers and sellers are willing to pay at that time. The free market requires that buyers and sellers be free to make contracts that fix their own values, rather than having the courts force one person to pay as much as others are willing to pay.³⁴ On the subject of whether unconscionability is a matter of fact or one of law, Corbin is silent.

III. Unconscionability in Case Law

In this section, I will attempt to distill the notion of unconscionability as it is seen by sitting judges from four oft-cited opinions on cases decided between 1960 and 1986. In Henningsen v. Bloomfield Motors, 161 A.2d 69 (N.J. 1960), the defendant dealer, Bloomfield Motors, and the defendant manufacturer, Chrysler Corporation, attempted to deny liability for an injury caused by a defective automobile because the contract contained, in very small print, a disclaimer of any implied warranty, including of merchantability. The New Jersey Supreme Court unanimously declared the contract unconscionable because the plaintiff had unequal bargaining power in forming a bargain according to a standard form contract, which, given the fact that similar terms were used by all the defendant's competitors, the plaintiff could not have hoped to truly negotiate.

³⁴ *Id.* at § 127

Judge Francis wrote:

“The task of the judiciary is to administer the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer. The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. In the matter of warranties on the sale of their products, the Automotive Manufacturers Association has enabled them to present a united front. From the standpoint of the purchaser, there can be no arms length negotiating on the subject. **Because his capacity for bargaining is so grossly unequal**, the inexorable conclusion which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker. He cannot turn to a competitor for better security.”³⁵

Judge Francis explains that, though he concedes that the law³⁶ was intended to protect the ability of buyers and sellers to agree to qualified warranties, it was not the intent of the legislature to allow sellers like the automobile manufacturers to relieve themselves of liability and impose on the ordinary buyer by exploiting their own powerful bargaining positions. Because of the gross inequality of bargaining power, the warranty terms were not fairly procured. So, Francis argues that the terms of the contract concerning the disclaimer of implied warranty of merchantability, as a matter of law, must be invalidated: given the unfair procurement of the disclaimer, the disclaimer must be ignored, and an implied warranty of merchantability must be held to have existed, making the defendant liable.³⁷

More specifically, Francis seems to think that the inequality of bargaining power resulted in the warranty agreement being unfairly procured for three reasons. First, as Francis argues in the quotation above, the manufacturers are powerful and are united in presenting poor warranties of the kind in this case, so the consumer has no recourse.

³⁵ *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 69 (emphasis added).

³⁶ Namely, the Uniform Sale of Goods Law (also referred to as the Uniform Sales Act) N.J. Rev. Stat. § 46:30-18, now codified as N.J. Stat. Ann. § 12A:2-313 (2012).

³⁷ *Henningsen, supra* at 94.

Francis's second reason is related to, but distinct from, his first. He argues that the ordinary person could not be expected to have the knowledge, capacity, or even the opportunity to make adequate inspection of "mechanical instrumentalities" in order to decide whether something like a car is reasonably fit for the intended purpose. As such, ordinary consumers have no choice but to rely on the warranties of the manufacturers. Manufacturers cannot be allowed to use their power and united efforts to relieve themselves of that burden, as Chrysler attempted to do in this case.³⁸ Third, Francis discusses at length the facts that the warranty was designed to be subtle overall, and in particular was meant to be misleading in terms of its not covering bodily injury or death as the result of defect,³⁹ and also that the warranty was never explained to the plaintiff, nor was the plaintiff's attention even drawn to the warranty by the dealer.⁴⁰

When Judge Francis was writing in May of 1960, the U.C.C. was only beginning to catch on in the U.S. In fact, it did not become law in New Jersey until almost three years later.⁴¹ Therefore, although he does briefly mention the "proposed *Uniform Commercial Code*,"⁴² it is not surprising to find him relying on the old ways of deriving a judgment of unconscionability. He draws our attention to inequality of bargaining power and procedural problems of duress, fraud (or at least misrepresentation), and perhaps mistake.

Elsewhere in the opinion, we see a strong focus on substantive unconscionability in the form of gross inadequacy of consideration: the warranty terms of the contract were said to be unfair or unconscionable in that the warranty gave very little and withdrew much from the buyer.

³⁸ *Id.* at 78.

³⁹ *Id.* at 73, 92-93.

⁴⁰ *Id.* at 97.

⁴¹ UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 344-45 (2004).

⁴² *Henningsen, supra* at 95.

Furthermore, we see an argument that the allowance of such limitations of liability on the part of automobile manufacturers would be greatly “inimical to the public good.”⁴³ Defective automobiles, after all, have a great potential to harm people, and it is in the public interest to provide manufacturers with an incentive to ensure they are not defective.⁴⁴ Somewhat more bluntly, Francis cites “an instinctively felt sense of justice” according to which the terms constitute an unjust, “sharp bargain.”⁴⁵

Given his attention to both sides, it is difficult to place Francis on one side or the other of the issue of whether unconscionability is a problem in its own right, or merely indicative of other problems, such as duress. However, from the tenor of his opinion, it seems that he is genuinely *offended* or somehow *bothered* by both the automobile manufacturers’ bargaining behavior and the unpleasant results that would come from allowing this and other such warranty agreements to stand. He complains that, although the courts have been sensitive to inequality of bargaining power, they have tried to avoid departing from “age-old tenets” by adopting “doctrines of strict construction, and notice of knowledgeable assent by the buyer.”⁴⁶

He also argues that the rule that the buyer’s failure to read a contract makes him ineligible to seek relief in the absence of fraud should not be applied on a “strict, doctrinal basis,” but rather that

“the conflicting interests of the buyer and seller must be evaluated realistically and justly, giving due weight to the social policy evinced by the Uniform Sales Act, the progressive decisions of the courts engaged in administering it, the mass production methods of manufacture and distribution to the public, and the bargaining position occupied by the

⁴³ *Id.* at 86, 94.

⁴⁴ *Id.* at 85.

⁴⁵ *Id.* at 85.

⁴⁶ *Id.* at 87-88.

ordinary consumer in such an economy. [...] In such cases, the need for justice has [typically been allowed to stimulate] the necessary qualifications or adjustments.”⁴⁷

So, as we saw in *Corbin*, it seems Francis is looking for reasons to protect the plaintiff from a contract that offends Francis morally in its consequences and in its formation. It seems safe to say, then, that Francis thinks unconscionability should be seen as a substantive problem, or group of problems, in its own right, viz. ‘inimical’, grossly unjust or unfair results, *combined with* quasi-coercive bargaining practices, and that such unfairness must be remedied and, if possible, legally prohibited from ever being deployed to begin with.

As for the factors mentioned in the above discussion of the U.C.C., all are in play. First, the unconscionable term was invalidated as a matter of law: although the particular reason given was a departure from what is considered necessary by the U.C.C., the court relied on a liberal interpretation of the existing law which demanded that the parties have bargaining power that was at least not grossly unequal. Second, the contract was unconscionable due to conditions extant at the time the contract was made. It is not as if, for example, some unexpected or unduly considered possible market condition caused the plaintiff injury after the contract was made. Finally, the court considers the business mores and practices extant in its evaluation of the contract (though it rejects them), the defendants’ purposes, and the negative effects of the contract, and exploited what Francis, citing *Corbin*, refers to as the flexibility in the concept of duress.

In another well-known case, *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965), the District of Columbia Court of Appeals court decided that the contracts between Ora Lee Williams and William Throne, buyers, and the Walker-Thomas Furniture Company, seller, may have been unconscionable, and remanded the case back to trial court for

⁴⁷ *Id.* at 84.

further consideration. The contracts provided that the buyers make monthly installment payments on purchased items, and that the title for each item would remain Walker-Thomas's until all of the monthly payments were made equaling the stated value of each item. If the buyer defaulted on any monthly payment, Walker-Thomas could repossess the item. Furthermore, each payment was considered *pro rata* on all of a customer's outstanding accounts: a small balance was due on every item, regardless of when it was purchased or how much had been paid until all items were paid off, and Walker-Thomas could repossess them all as the result of a default.⁴⁸

Williams, for example, had been making various purchases since 1957. Her payments over the years totaled \$1,400 for \$1,800 in merchandise. When she defaulted on the payments for a stereo worth \$514.95, Walker-Thomas sought to replevy everything she had bought since 1957 despite the \$1,400 she had paid.

Judge J. Skelly Wright, writing for the majority, claims that there is evidence of intrinsic fraud⁴⁹ in the contract; in other words, the contract can be presumed to have been fraudulent merely by the presence of terms so grossly unfair that no sensible and nondelusional person would agree to them were they known and understood. This is said to be, once again, a case of unequal bargaining power being exploited by one party against the other.⁵⁰ Wright cites Williams' "obvious...lack of" education, the fact the terms in question were subtle and hidden "in a maze of fine print"⁵¹, and the fact that Walker-Thomas knew that Williams had to support both herself and 7 children on a \$218 per month stipend from the government and sold her a

⁴⁸ Williams v. Walker-Thomas Furniture Company, 350 F.2d 445, 445-48.

⁴⁹ 'Intrinsic fraud' is a concept borrowed from British law: Wright cites Earl of Chesterfield v. Janssen, (1751) 28 Eng. Rep. 82, 100.

⁵⁰ Williams v. Walker-Thomas Furniture Company, 350 F.2d 445, 449 n.7.

⁵¹ *Id.* at 449.

\$515 stereo set anyway,⁵² where attention to this fact seems to imply that Wright views Walker-Thomas as having hoped that some buyers would default.

Citing *Henningsen* and Campbell Soup Co. v. Wentz, 172 F.2d 80 (2d Cir. 1948), Wright defines unconscionability as “an absence of meaningful choice of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁵³ He argues that when someone like Williams, with little bargaining power and therefore little real choice, signs an unreasonable contract with little or no understanding of its terms, most likely her consent cannot be taken to have been given, and that the enforceability of the contract is therefore questionable.⁵⁴ That is, a contract may be unenforceable when its terms are unreasonable, since those terms most likely cannot be taken to have been consented to by someone who understood them. So, for Wright, bargaining power is seen, in large part, as a function of a party’s capability to understand the terms. If B has hidden the important unfair terms “in a maze of fine print” or “[minimized them] by deceptive sales practices,” and then takes advantage of A’s failure to really understand them, B has used superior intelligence, acumen, experience, or something of that sort to create a situation in which A does not have an opportunity to make a meaningful choice.⁵⁵

On the other hand, it seems that, for Wright, substantive problems are also necessary for unenforceability on grounds of unconscionability. In order to be unenforceable, in addition to being misunderstood by A, terms must be unreasonable in that they are *grossly unfair* to A. It is not the case that the substantive unfairness that results from the terms is nothing more than an

⁵² *Id.* at 448.

⁵³ *Id.* at 449.

⁵⁴ *Id.*

⁵⁵ *Id.*

indicator that consent cannot be taken to have been given. Rather, after it has been established that the terms are unfair enough so that they could not be taken to have been assented to with a full understanding of them, *then* the court should abandon the usual rule that the terms of an agreement should not be questioned, “and...should consider whether the terms of the contract are *so* unfair that enforcement should be withheld.”⁵⁶ Only when it is found that the terms are *grossly* unfair can the label ‘intrinsically fraudulent’ be applied, and enforcement refused.

Wright also argues that the trial court did in fact have the authority to declare the contract unconscionable and refuse to enforce it, that court’s finding that it could not declare such contracts contrary to public policy due to lack of the necessary statutory framework notwithstanding. Wright holds that, as a matter of law, unconscionable contracts were unenforceable, citing, among other things, decisions in other jurisdictions such as *Henningsen*, and the relevant text of the Uniform Commercial Code, which the District of Columbia had adopted in 28 D.C. CODE § 2-302 (Supp. IV 1965).⁵⁷

For example, the contract was unconscionable under conditions extant at the time it was made, which made it unconscionable under the U.C.C.⁵⁸ Furthermore, as we have seen, Wright considers the circumstances under which the contract was made, its purpose, and its effects. As a result of these findings, the appellate court remanded Thorne’s and Williams’s cases for further consideration by the trial court.

In another well-known case, Murphy v. McNamara, 416 A.2d 170 (Conn. Super. Ct. 1979), plaintiff Carolyn Murphy entered into a rent-to-own contract with defendant Brian

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Id.* at 448.

⁵⁸ *Id.* at 449.

McNamara which she did not realize required her to pay \$1268 for a television set that retailed for \$499. Though the contract stipulated that the defendant would make 78 weekly payments of \$16 (plus a \$20 delivery charge), the defendant never advised Murphy of the total sale price under the agreement.⁵⁹ When she learned that the price was exorbitant after reading a newspaper article criticizing the defendant's lease plan, she ceased making payments and contacted a lawyer, and the defendant harassed the plaintiff and attempted to repossess the television. Murphy had already made payments totaling \$436.⁶⁰

Judge J. Berdon declared the bargain unconscionable specifically because Murphy was required to "pay over two and one-half times the regular retail sales price of the television set for the extension of credit," and that "[c]learly, the plaintiff did not have equal bargaining power with the defendant; the plaintiff was at a disadvantage because her economic circumstances required an extension of credit in order to make the purchase."⁶¹ Murphy is described as a mother of 4 children who was a recipient of welfare, and who was "lured" by the defendant's offer because of his representations that no credit was necessary.⁶²

Though some of the actions of the defendant were deemed unlawful for other reasons, the contract was deemed unconscionable as a matter of law on the authority of the U.C.C.'s unconscionability clause, which was codified in the Connecticut General Statutes at Conn. Gen. Stat § 42a-2-302. Citing part of Comment 1 of the official committee comments on U.C.C. § 2-302, Berdon argues that "excessive price charged a consumer with unequal bargaining power can

⁵⁹ Murphy v. McNamara, 416 A.2d 170, 172-73.

⁶⁰ *Id.* at 173.

⁶¹ *Id.* at 175.

⁶² *Id.*

constitute a violation of [Conn.] General Statutes § 42a-2-302.”⁶³ Interestingly, Berdon ignores the part of Comment 1 which states that “The principle is one of the prevention of oppression and unfair surprise...*and not of disturbance of allocation of risks because of superior bargaining power*” (emphasis added.) This language was inserted in 1950, well prior to Berdon’s writing in 1979.⁶⁴ It is still in place today.⁶⁵

However, since Berdon would be able to rely on the other means in order to cite the element of unequal bargaining power as contributing to the terms’ unconscionability as a matter of law, this is perhaps immaterial. In fact, Berdon does argue that the excessive price coupled with the plaintiff’s unequal bargaining power meant that the terms violated the public policy of the state, and so they constituted unfair trade practices under the Connecticut Unfair Trade Practices Act or CUTPA.⁶⁶ Judge Berdon wrote that “Through the CUTPA, protection must be given to those who do not have the economic sophistication or the awareness possessed by others who may be less concerned about credit; the act must be applied to protect the unthinking, the unsuspecting and the credulous as well as the sophisticated.”⁶⁷ Williams is evidently taken to

⁶³ *Id.* at 176.

⁶⁴ Leff, *Supra* at 497.

⁶⁵ U.C.C., *Supra*.

⁶⁶ *Murphy v. McNamara*, 416 A.2d 170, 176. Berdon’s explanation here is poor. He did not cite the statute which is the part of the CUTPA to which he referred when he claimed certain violations of the public policy of the state constitute unfair trade practices, but he apparently meant to refer to what is currently Conn. Gen. Stat. § 42-110b (2012), which has not been fundamentally revised since its first enactment as 1973 Conn. Pub. Acts 73-615, which compels the courts to defer to the Federal Trade Commission and the federal courts’ interpretations of unfair or deceptive trade acts or practices. At 29 Fed. Reg. 8355 (1964), where the F.T.C.’s criteria for determining unfair trade practices are laid out, we find that they are: “(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).” At 175, Berdon did cite *Federal Trade Commission v. Sperry Hutchinson Co.*, 405 U.S. 233, 244-45 n.5, which cites the text at 29 Fed. Reg. 8355 (1964) just quoted, without explaining why he did so.

⁶⁷ *Id.* at 175.

have been just such an unthinking, unsuspecting, or credulous buyer in need of protection from the sharp practices of the defendant, and the court refused to enforce the contract, allowing that the defendant should be allowed to litigate in order to recover the difference between the amount paid and the television's reasonable value, but barring him from attempting to repossess it through self-help, harassing the plaintiff further, or pursuing a criminal complaint.⁶⁸

So, Berdon, in his interpretation and application of the law, could fairly be said to have been guilty of ignoring the express intention of U.C.C. § 2-302 with regard to bargaining power and public policy. However, Berdon's analysis covered and the terms met the other two requirements for unconscionability in the U.C.C. as codified in the Connecticut General Statutes: the contract was unconscionable at the time it was made, and Judge Berdon considered the contract's setting, purpose, and effects in his decision.

Once again, we see emphasis on both procedural and substantive issues. Berdon claims that "[i]n evaluating the claim that the bargain was unconscionable, the impact upon the plaintiff must be considered,"⁶⁹ and is clearly appalled that the contract set such an exorbitant price for the goods received. On the other hand (apparently ignoring Comment 1) he repeatedly stresses that the plaintiff did not have equal bargaining power. And, although he relies heavily on CUTPA, he also declares both kinds of things problematic under U.C.C. § 2-302.

The decision in Gianni v. Gantos, 391 N.W.2d 760 (Mich. Ct. App. 1986), takes a slightly different tack from the others discussed so far. In the case in question, Gantos, Inc. cancelled a special holiday clothing order from a small, independent manufacturer, Gianni Sport, Ltd. The order comprised 20-22% of Gianni's sales for the year, and the clothing could most

⁶⁸ *Id.* at 179, 180.

⁶⁹ *Id.* at 175.

likely not be sold to anyone else. The contract contained a clause that allowed the buyer to cancel the order anytime it pleased.

The court was convinced by the testimony of a Mr. Steinberg, Gantos' buyer, who claimed that such clauses were standard in contracts between large buyers and small sellers in the garment industry. The fact that this sort of clause puts the seller in an untenable position, viz. that of either absorbing a loss or negotiating with the buyer for a reduced price in the event of a last-minute cancellation, was found to be unconscionable by the trial court that had considered the case originally.⁷⁰ In a *per curiam* opinion, the appellate court's Judges D.F. Walsh, H. Hood, and K.N. Hansen affirmed the trial court's finding.⁷¹

The appellate court did focus on the three criteria we have been considering. However, its opinion differs from those considered above in that it places less emphasis on unequal bargaining power making the terms unconscionable as a matter of law at the time the contract was made, or even the circumstances, purpose, or effects. It instead placed great emphasis on whether the terms were 'substantively unreasonable'. It found that the trial court had made no clear error in considering this case in light of two questions borrowed from another opinion, viz. Allen v. Michigan Bell Telephone Co., 171 NW2d 689 (Mich. Ct. App. 1969): "(1) What is the relative bargaining power of the parties, their relative economic strength, [and what are] the alternative sources of supply? (2) Is the challenged term substantively reasonable?"⁷²

The *Allen* court held that even if there was a disparity in bargaining power, and even if the parties had other options in terms of suppliers or buyers, the terms should be upheld so long

⁷⁰ Gianni v. Gantos, 391 N.W.2d 760, 761-63.

⁷¹ *Id.* at 763.

⁷² *Id.* at 762.

as they were not substantively unreasonable.⁷³ The trial court in the *Gianni* case adopted this criterion, as did the appellate court. So, for the *Gianni* appellate court, (in accordance with Comment 1) unequal bargaining power was neither necessary nor sufficient for unconscionability. It focuses on the termination clause: “[i]f a termination clause appears reasonable to this Court,” the opinion reads, “disparity in bargaining power between the parties will not make the clause unenforceable.”⁷⁴

In declaring this clause unconscionable, the court relied on official Comment 1’s test, viz. “whether, in the light of the general commercial background and commercial needs of the particular trade, the clauses involved are so one-sided as to be unconscionable under the circumstances existing...”⁷⁵ and interpreted it to be a test of whether the terms of a contract are substantively unreasonable. The cancellation clause was held to be unreasonable in that it was thought to be questionable whether a clause that entitles one party to cancel whenever it pleases even allows a contract to exist. Furthermore, and perhaps more importantly, the cancellation clause was found to be unreasonable in that, given “the fast-changing nature of the women’s fashion industry,” the seller cannot merely replace the goods on the shelf and await another order; rather “[a] last-minute cancellation places the seller in the untenable position of absorbing a loss or negotiating with the buyer to accept the goods at a reduced price.”⁷⁶ Therefore, the trial court found, and the appellate court affirmed, that on *these* grounds, the term was unconscionable.⁷⁷

⁷³ Allen v. Michigan Bell Telephone, 171 N.W.2d 689, 692.

⁷⁴ Gianni v. Gantos, 391 N.W.2d 760, 762.

⁷⁵ *Id.* at 761; UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 344-45 (2004).

⁷⁶ Gianni v. Gantos, 391 N.W.2d 760, 762.

⁷⁷ *Id.*

Even after careful consideration of these opinions, though there are certainly common threads, it is difficult to say just what constitutes unconscionability from the standpoint of case law. Twice, in *Henningsen*, 191 A.2d 69 (N.J. 1960) at 94, and in *Murphy*, 416 A.2d 170 (Conn. Super. Ct. 1979) at 174, the ‘spirit of the law’ or the obvious, but unwritten intent of the legislature is cited in determining that terms are unconscionable as a matter of law. In *Murphy*, 416 A.2d 170 (Conn. Super. Ct. 1979) at 175, Berdon even goes so far as to say that “conduct which is legally proper may be prohibited if it is unfair to the public.” In *Henningsen*, 191 A.2d 69 (N.J. 1960) at 85, Francis refers to “[a]n instinctively felt sense of justice.” Also, two of these opinions explicitly discuss the business mores and practices of the time as Corbin recommends; however, rather than deferring to those mores and practices, both reject them. *See Henningsen*, 191 A.2d 69 (N.J. 1960) at 85 and *Gianni*, 391 N.W.2d 760 (Mich. Ct. App. 1986) at 762.

The strongest common thread in these cases seems to be inequality of bargaining power (contrary to the intentions expressed in Comment 1.) Each of these cases discusses, and all but one place strong emphasis on, inequality of bargaining power. This is a concept that will require further analysis. For a foundation for this analysis, we will turn to Wertheimer.

Chapter 2: Contemporary Legal Analysis of Unconscionability

In this chapter, I will summarize and then critique the theories of unconscionability of Alan Wertheimer and Asifa Quraishi. Many themes and distinctions crucial to a plausible analysis of unconscionability will be introduced, including objective vs. subjective measurement of contractual gains, pre-contractual baseline, threat advantage, and paternalism. The critical analysis at the end of each section will reveal that neither of these theories does a satisfactory job of explaining these themes and distinctions or solving the problems associated with them.

I. Unconscionability in the Legal Literature: Wertheimer

In his discussion of bargaining power, Alan Wertheimer distinguishes between bargaining *ability*, i.e., things like available information and one's personal characteristics, such as toughness, patience, and perceptiveness; and bargaining *potential*, which is a function of one's external resources or circumstances. To put it another way, bargaining ability is how well one plays one's cards, while bargaining potential has to do with the strength of the cards one has been dealt. Where 'inequality of bargaining power' refers to defects in ability, such as irrationality or lack of relevant information, it is relatively straightforward: it is a problem of voluntariness, at least in cases where one party caused the other's disadvantages or knowingly exploited them.⁷⁸

However, in cases like *Henningsen* and *Gianni*, where the one-sidedness of the contracts was allegedly a result of inequality of bargaining potential, Wertheimer argues that things are more complicated. He thinks that there does not seem to be any reason to doubt anyone's competence or rationality in such cases. He considers and rejects the relative sizes of the parties and the necessity of a good to one party as what constitutes inequality in bargaining potential: in

⁷⁸ Wertheimer, *supra* at 493-4. (See also Wertheimer, *supra* note 39, at 498).

the former case, though it seems to have figured in some decisions, Wertheimer argues that the contemporary automobile buyer, unlike the Henningsens, is not at a disadvantage. Size is irrelevant in a competitive environment where the larger party ‘needs’ the smaller party more than vice-versa. In the latter case, necessity is irrelevant in that the party that possesses a good has no special power over the party that needs it in a competitive environment.⁷⁹

So, in both these cases, it is not the bargaining potential intrinsic to the parties themselves that is the salient factor. It is rather the existence of competition and one party’s resulting ‘threat advantage’: one party will be willing to walk away from a potential contract if his proposal is rejected. Wertheimer argues that this will be, in large part, a function of a party’s potential for utilitarian gain over the pre-contractual baseline (or roughly, a party’s potential for gaining something that is good for it that the party did not have prior to entering the contract.) As it turns out, the reason the stronger party is often able to bargain for an objectively greater share of resources (that is, a share of resources that is greater than the share of resources the other party receives as measured, e.g., strictly numerically in terms of something like dollars) is that she will get less utility relative to her baseline than the weaker party, so she can walk away more easily. This gives the stronger party a threat advantage.

Given this inequality of potential gain, it seems that with any normative approach that depends on a principle that distributes the surplus resulting from the parties’ cooperation in proportion to their contributions, difficult questions are raised regarding how to measure this contribution: should it be gain provided relative to the parties’ pre-contractual baseline, or measured objectively?⁸⁰ In a situation where a rich person and a poor person must agree to share

⁷⁹ Wertheimer, *supra* at 494.

⁸⁰ *Id.*

\$200, the rich person will argue for at \$150-\$50 split in her favor, since it would grieve the poor person more to lose \$50 than it would grieve the rich person to lose \$150.

Measuring ‘objectively’, or strictly numerically in terms of dollars and without considering how good \$X would be for either party, the bargain the rich person is arguing for is lopsided: the rich person gets \$150 and the poor person gets \$50, and \$150 is more than \$50. At first glance, this seems unfair. However, Wertheimer concedes that if we are to measure the parties’ gains in terms of relative utility gain, the rich person’s argument is “extremely persuasive.”⁸¹ This is because, relative to the rich person’s pre-contractual baseline, \$150 is, at most, *as good for* the rich person as \$50 is *for* the poor person.

Wertheimer claims that a principle requiring equal utility gain, where both parties are benefitted to the same extent as measured objectively, will be difficult to defend. Suppose our objective measure is whether or not one party’s price is supracompetitive. This would not have yielded unconscionability in *Henningsen* or *Gianni*. Wertheimer thinks that neither case involved prices above what was sustainable in a competitive market. Likewise, in *Murphy* and *Williams* he thinks there is no reason to think that the contracts were exorbitantly profitable.⁸² Poor customers like *Murphy* and *Williams* were likely to default, and the furniture in question was likely to depreciate quickly. In *Williams*’ case, Wertheimer argues that repossession of just a single item (rather than all the items previously purchased) would result in a loss for Walker-Thomas. The extension of credit to her, therefore, required the harsh terms.⁸³ Likewise, had *Murphy* returned

⁸¹ *Id.* at 492.

⁸² Wertheimer, *supra* at 492.

⁸³ *Id.*

the television after a short period, it would have greatly depreciated in value, resulting in a loss for McNamara.⁸⁴

Wertheimer further argues that it is not clear that, when a bargain does result in an unjust distribution, we should prevent such injustice. It is one thing to prohibit contracts in which the strong “push the weak to the wall.”⁸⁵ However, he thinks it is another thing to disallow contracts, no matter how one-sided, in which the strong find the weak “at the wall,”⁸⁶ and where the contract will give the weak a little distance from it. Furthermore, even if both parties adhere to some reasonable principle of fair division, and do not cause or knowingly exploit one another’s disadvantages, the resulting contract might still be unjust if the background conditions, such as a person’s endowed position in the world, are unjust.⁸⁷

However, Wertheimer concedes that, after careful analysis, there may still be cases we find unconscionable. He divides these cases into 4 types based on 2 criteria. The criteria are (1) whether the contract benefits the weaker party relative to the pre-contractual baseline, and (2) whether the contract is extremely profitable for the stronger party. The 4 types, then, are (a) harmful/high-profit, (b) harmful/low-profit, (c) beneficial/high-profit, and (d) beneficial/low-profit.⁸⁸

Contracts of types (a) and (b) occur when the weaker party simply fails to understand or lacks the capacity to understand the contract’s terms or the values of the goods bargained for, or when the weaker party is placed under stress and cannot resist entering into a bargain that is

⁸⁴ *Id.* at 495.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

harmful to him. In these cases, justifying protecting people from unconscionable bargains is a straightforward matter of paternalism, where we do so because we have reason to doubt the voluntariness of their decisions. And, as we have seen, there is no reason to assume that harmful contracts will always be of type (a). *Murphy*, for example, was likely not a case in which the stronger party profited greatly. In cases like *Murphy*, perhaps we feel the terms are unconscionable because we would prefer that *no one* dealt with a consumer or class of consumers on terms that are likely to be harmful to those consumers.⁸⁹

Type (c) cases will typically occur when there is some kind of market imperfection. The law is supposed to protect freedom of contract and the free market, and the courts generally try to avoid interfering with it.⁹⁰ However, given the choice between contracting on extortionate terms and not contracting at all, the weaker party will prefer to be prevented from entering into an extortionate agreement if the stronger party would, in that case, enter into a bargain on better terms. This is not paternalism, but *strategy*. We do not act to protect the weaker party from its own shortcomings, but rather we artificially limit the weaker party's bargaining options *post hoc* because it is in a difficult position, and it is in the party's interest to have its options limited: limiting her options actually puts her in a better, more fair position to bargain. In such cases, then, the doctrine of unconscionability will try to replicate the likely results of a better market; i.e., it forces the price the weaker party would have paid had there been a competitive market.⁹¹

⁸⁹ Wertheimer, *supra* at 495.

⁹⁰ See, e.g., Wertheimer, *supra* at 487 (claiming that contract law is justified, in part, by its facilitation of autonomy in forming binding relationships with others) and Corbin, *supra* at § 127 (claiming that we have a 'free market' under our law and, that for that reason, "the courts have left it free") and *Henningsen v. Bloomfield Motors*, 161 A.2d 69 at 86 (claiming that, traditionally, contracts are seen as the result of "free bargaining of parties who are brought together by the play of the market").

⁹¹ Wertheimer, *supra* at 496.

The example Wertheimer provides of a type (c) case is The Port Caledonia and the Anna, (1903) 1 P 184 (Prob., Div. & Adm. Div.) (U.K.). In the case in question, the Port Caledonia, a four-masted barque of 2426 tons sheltering in Holyhead Harbour in a gale, had begun to drag her anchors and was in danger of fouling the Anna, another four-masted barque of 2663 tons. The Sarah Jolliffe, a screw tug of 299 tons, observed the other two vessels' distress and the Port Caledonia's signal for a tug and pilot and approached. The master of the tug demanded £1000 to move the Port Caledonia safely away from the Anna, rejecting his offer of £100 or to let the Port Caledonia's owners make a deal later. The terms were "£1000 or no rope." The Port Caledonia's master consented and the tug towed her to safety.⁹²

The court nullified the agreement, calling it "inequitable, extortionate, and unreasonable," but did award the Sarah Jolliffe's owners £200 plus court costs.⁹³ Wertheimer writes that the Port Caledonia's master would of course prefer, if possible, to be prevented from entering into an extortionate agreement if the tug would then rescue the Port Caledonia on better terms; i.e., limiting its options would put it in a better bargaining condition in such cases.⁹⁴ In awarding £200 to the Sarah Jolliffe's owners, the court was trying to create the outcome that likely would have occurred had the market for being towed been better than it was – say, if some competition had existed or if the Port Caledonia had not been under duress.

Wertheimer subdivides type (d) cases into two classes: those like *Henningsen*, in which there is a problem of information and/or collective consumer action, but which could ultimately be worked out on *Pareto superior* terms (i.e., terms under which an exchange can be made that

⁹² *The Port Caledonia and the Anna*, 1 P 184 at 184.

⁹³ *Id.* at 187.

⁹⁴ Wertheimer, *supra* at 496.

benefits someone and injures no one⁹⁵), and those like *Murphy*, in which no such moves are available. In *Henningsen*, perhaps the manufacturer would have been willing to offer a high price/soft terms warranty so long as it did not put it at a competitive disadvantage, rather than the low price/harsh terms warranty it did in fact offer. If we declare low price/harsh terms contracts unconscionable, then most buyers will be better off and the manufacturers would not be any worse off. By this reasoning, it is sensible to interfere in the market. However, this has little to do with inequality of bargaining power or exploitation, in which terms the courts have couched it.⁹⁶

In cases like *Murphy*, if we assume the stronger party's terms seem to accurately and fairly reflect the risks of dealing with poor consumers, there is no clear way to ensure that the weaker party will be better off without harming the stronger party unfairly. Furthermore, Wertheimer argues that such cases are the results of poverty, not ignorance: we might assume *Murphy* did not underestimate the cost to her or the value of the television. She knew she probably could not afford it, but bought it anyway. In such cases, Wertheimer does not think we ought to declare terms unconscionable only to protect the exploited party.⁹⁷ Some such cases will be cases of finding the weaker party at the wall, and giving her the opportunity to gain a bit of distance from it. In other cases, it may be that the weaker party has contracted for something he does not need; e.g., *Murphy* did not *need* the television.

Wertheimer briefly mentions 3 classes of arguments that might be tried in order to justify declaring the second subclass of type (d) arguments unconscionable. The first he calls 'welfarist', and this class of arguments is based on the alleged 'psychic disutility' or discomfort

⁹⁵ BLACK'S LAW DICTIONARY 1225 (9th ed. 2009).

⁹⁶ Wertheimer, *supra* at 496.

⁹⁷ *Id.*

of members of a society who learn of such bargains. The second is based on apparent incongruencies between what consumers actually do and what would constitute rational maximization. People will often refuse to pay what they feel are exorbitant prices even when it would be rational to do so. These arguments hold that the doctrine of unconscionability is one of society's ways of demonstrating its commitment to fair division of goods.⁹⁸

The third and final class of arguments Wertheimer refers to as 'perfectionist'. These arguments attempt to establish that it would be wrong to allow people to enter into certain contracts even when they prefer to do so, and it would improve their welfare. One subclass of these holds that people are *morally* harmed or degraded when they enter into unjust contracts. The second subclass holds that unconscionable agreements are wrong even if they are bad for no one: unconscionability is some sort of "free-floating evil," like the good which occurs according to retributivists when wrongdoers are punished, even if such punishment benefits no one. Wertheimer concedes that he does not know whether any of these 3 types of arguments can be sustained, but he thinks one of them must be in order to justify prohibiting unconscionable contracts like those of type (d).⁹⁹

On the whole, Wertheimer's analysis is subtle and his suggestions for justifying nullification of unconscionable contracts are interesting. However, his work contains nothing more than analysis and suggestions. He does not strongly endorse or extensively defend any one solution to the vexing problems he discusses. Furthermore, there are a number of serious problems with both his analysis and his suggestions. Though I will not mention them all just now, it is worth briefly pointing out some of the most serious of them.

In cases involving contracts of type (a) and type (b), Wertheimer claims that

⁹⁸ *Id.* at 497.

⁹⁹ *Id.*

“unconscionability is a relatively unproblematic form of paternalism, where we seek to protect [a party] from harming himself because we have reason to doubt the full voluntariness of his decision.”

The first problem here is that while it is true that we might find paternalistic intervention in cases like this *relatively* unproblematic, that is of course not to say it is unproblematic. There are many people with strong and reasonable anxiety about paternalistic intervention of any kind. Any approach to unconscionability that endorses paternalistic intervention must consider and attempt to mitigate the dangers of paternalism. My approach does this, while Wertheimer makes no serious attempt at it.

The second problem is that relying on a surmise that full voluntariness was lacking because one party may not understand or may lack the capacity to understand the contract in order to justify nullification of a contract, as many pre-U.C.C. opinions in case law did, is not consistent with the spirit of the U.C.C. Recall that in our earlier analysis of Corbin and equity legal doctrine, we learned that prior to the advent of the U.C.C., unconscionability was taken to be indicative of other substantive or procedural problems resulting from unequal bargaining power rather than a problem in itself. When parties who were old, young, ignorant, poor, etc. failed to understand the terms of contracts and ended up with unconscionable terms which were harmful to them, this fell under the category of procedural problems stemming from the main procedural problem: unequal bargaining power.

As we also saw, placing such mistakes in the category of problems resulting from unequal bargaining power continued in early-post-U.C.C. case law; e.g., in *Williams* Judge Wright claimed that the fact that Williams was poor and uneducated indicated that she had less bargaining power than Walker-Thomas, and he condemned Walker-Thomas for exploiting its superior bargaining power in his justification of the court’s refusal to enforce the contract.

However, as we also saw, U.C.C. § 2-302 is not intended to be a principle of “disturbance of allocation of risks because of superior bargaining power.”¹⁰⁰ In other words, U.C.C. § 2-302 is not intended to be used to justify rescission on grounds of parties taking on risks as a result of their unequal bargaining power. Thus it is clear that unconscionability is not a principle about the voluntariness of the decisions of fools. Wertheimer has got this wrong. Though my analysis has not yet made clear just what unconscionability is supposed to be under the U.C.C., it soon will.

Though he offers two suggestions, Wertheimer fails to follow through and provide a satisfactory normative justification for the way the courts have handled type (c) cases. Recall that in type (c) cases the courts have tried to replicate the results of a “more perfect” market. However, type (c) cases are often cases in which the bargain is unconscionable even if the party which appears to be profiting disproportionately is actually profiting *less* than the party that appears to be the victim of the ostensibly unfair price. For example, the Port Caledonia seems to have profited more through its rescue than the tugmaster profited from his allegedly exorbitant £1000.¹⁰¹ In these cases, i.e., in cases in which a close examination reveals that the alleged victim, in a sense, made out quite well, what is so bad about the contract and how do we justify interfering? This is puzzling.

As Wertheimer points out, before we can say how the profits of a contract ought to be divided between the parties, we need a principle of fair division. One of the principles he considers attractive is one requiring equal utility gain. “It is frequently said,” he claims, “that a contract is just when it benefits both parties to the same extent.” However, he says that “[u]nfortunately, and as we have already seen, equal utility may well prescribe exactly the sorts

¹⁰⁰ UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 344-45 (2004).

¹⁰¹ Wertheimer, *supra* at 492.

of distributions that motivated the concern with inequality of bargaining power.”¹⁰² In other words, depending on how we measure utility gain, either objectively or relative to pre-contractual baseline, demanding that the parties gain equal utility from the bargain may result in the parties receiving objectively different, but relatively identical utilitarian gains, as in the rich person/poor person case. It may also result in one party receiving an objectively exorbitant but relatively small utility gain, as in *The Port Caledonia*. In cases like this, “[i]t is precisely because the stronger party gets *less* utility from a proposed bargain [relative to pre-contractual baseline],” Wertheimer claims, “that he is able to get a greater share of objective resources.” However, he does not come down on one side or the other of this issue.

This failed attempt of Wertheimer’s to come up with a principle of fair division leaves us in a difficult spot. What kind of normative justification can we give for interfering in cases like *The Port Caledonia*? Must we concede that the bargain in that case was not unconscionable? Does the rich person deserve \$150 of the \$200? The answer to the latter two questions is no. The answer to the former question is that although it will not require precisely equal utility gain, and despite the problems raised by Wertheimer, we can plausibly employ a utilitarian principle of fair division.

The result of Wertheimer’s rushing through his discussion of the three classes of arguments he suggests could be used to justify refusing enforcement of type (d) contracts is that he fails to see that they have much more potential than he gives them credit for. His welfarist suggestion concerning psychic disutility fails to consider the full moral significance of “psychic disutility” (it is not merely a matter of third parties being uncomfortable.) He also fails to appreciate the relevance of the inadequacy of the rational utility maximization model in

¹⁰² *Id.* at 494.

economics to the issue of paternalism (if people are not the perfectly rational utility maximizers this model assumes, a reasonable case can be made for limited paternalistic intervention.)

Finally, his discussion of perfectionist views comes out looking uncharitable and leaves many avenues unexplored. His endorsement of them, with its vague and tentative suggestions that “we could argue that a person is *morally* harmed...in *some* sense” and his putting of the term ‘free-floating evil’ in scare quotes, is lukewarm at best. At the end of the paper we are left hanging, with the “something like” perfectionist theories Wertheimer thinks may need to be defended left unexplained and unexplored (it turns out that a theory in the same family as perfectionist theories does a very fine job of capturing our intuitions about unconscionability and rendering them consistent.) I will discuss all of these issues at length below, and we will find that these three of Wertheimer’s suggestions, when fully developed, are good ones.

II. Unconscionability in the Legal Literature: Quraishi

Asifa Quraishi’s From a Gasp to a Gamble: A Proposed Test for Unconscionability¹⁰³ begins with a brief history of unconscionability in Western equity and common law. He notes that efforts to define unconscionability prior to the advent of the U.C.C., such as in Earl of Chesterfield v. Janssen¹⁰⁴ in equity law and Campbell Soup Co. v. Wentz¹⁰⁵ in common law failed to produce clear definitions.¹⁰⁶ One such test, proposed in Stiefler v. McCullough, proposed that unconscionable terms, when presented to a reasonable person, would produce “an

¹⁰³ Asifa Quraishi, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. no. 1 187 (Fall 1991).

¹⁰⁴ *Earl of Chesterfield v. Janssen*, (1751) 28 Eng. Rep. 82.

¹⁰⁵ *Campbell Soup Co. v. Wentz*, 172 F.2d 80.

¹⁰⁶ Quraishi, *supra* at 191-95.

exclamation at the inequality of it,”¹⁰⁷ but this ‘gasp test’ proved too subjective to be useful, since, as Quraishi points out, “[a]fter all, different people gasp at different things.”¹⁰⁸

Quraishi also points out that, although the advent of U.C.C. § 2-302 eliminated the need for courts to “resort to artificial, formalistic devices to strike down unfair contracts,” and made the unconscionability as a legal concept “more readily available” to courts of law,¹⁰⁹ it too failed to provide a clear, useful definition or test. The test it provides, viz. “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing...”¹¹⁰ only defines unconscionability in terms of itself; i.e., it provides merely that that is unconscionable is that which is unconscionable.¹¹¹ A defender of this definition might point out that at least one-sidedness is provided as a criterion, but then to the question “how one-sided is one-sided enough to be unconscionable?” it can only be replied “unconscionably one-sided.”

Quraishi explains that courts and commentators have generally interpreted U.C.C. § 2-302’s stated goals of preventing “oppression and unfair surprise”¹¹² to be the prevention of substantive unconscionability, associated with oppression, and procedural unconscionability, associated with unfair surprise. However, there is disagreement in case law as to whether one, the other, or both are necessary for invalidating a contract.¹¹³ For example, the first attempt in case law to apply the U.C.C. unconscionability doctrine was in American Home Improvement,

¹⁰⁷ Stiefler v. McCullough, 174 N.E. 823, 826.

¹⁰⁸ Quraishi, *supra* at 195.

¹⁰⁹ *Id.* at 196.

¹¹⁰ UNIF. COMMERCIAL CODE § 2-302, 1A U.L.A. 344-45 (2004).

¹¹¹ Quraishi, *supra* at 197.

¹¹² UNIF. COMMERCIAL CODE, *supra*.

¹¹³ Quraishi, *supra* at 198-99.

Inc. v. MacIver,¹¹⁴ in which, on Quraishi's reading, it was held that disparity between value and price, a substantive problem, was the main indicator of unconscionability.¹¹⁵ On the other hand, Williams v. Walker-Thomas Furniture Co.,¹¹⁶ on Quraishi's reading, held that "unconscionability is one party's lack of meaningful choice combined with 'contract terms which are unreasonably favorable to the other party,' i.e., both procedural and substantive problems were what constituted unconscionability."¹¹⁷

In the second section of his paper, Quraishi discusses the doctrine of unconscionability in Islamic law.¹¹⁸ In the third section, he proposes a two-pronged test for unconscionability that combines part of the unconscionability doctrine of Islamic law in the first prong with part of American common law doctrine in the second. If a party uses a contract for undeserved gain, e.g., through excessive profit¹¹⁹, excessive speculation¹²⁰ on unpredictable future events, or even merely being in a position to demand and receive more value than she gives up, the first prong is met.¹²¹ Excessive profit is profit derived from oppression or unjust enrichment, i.e., enrichment gained through one party manipulating the circumstances to his advantage and to the other

¹¹⁴ American Home Improvement, Inc. v. MacIver, 201 A.2d 886.

¹¹⁵ *Id.* at 887; Quraishi, *supra* at 200.

¹¹⁶ Williams v. Walker-Thomas Furniture Company, 350 F.2d 445.

¹¹⁷ Quraishi, *supra* at 201.

¹¹⁸ *Id.* at 205-15.

¹¹⁹ *Id.* at 211.

¹²⁰ *Id.* at 211-12.

¹²¹ *Id.* at 216-17.

party's detriment in a manner that is oppressive according to social customs or market norms.¹²² Excessive speculation is speculation that exceeds market norms.¹²³

The prohibition against excessive profit and receiving more than one gives stem from Quranic injunctions against oppressive and unfair bargains.¹²⁴ In general, the Quran admonishes us not to “devour one another’s possessions wrongfully – not even by way of trade based on mutual agreement – and [not to] destroy one another.”¹²⁵ Furthermore, due to the Quranic prohibition of gambling,¹²⁶ when it seems to the court that all the other conditions exist for unconscionability, the addition of excessive speculation makes a contract *especially* unconscionable. That is, it is *especially* unconscionable for one to enrich oneself unjustly through taking advantage of excessive risks and thereby gaining “unearned profit,” and the court *must* declare unconscionable a contract which, combined with the other relevant factors, also allows one to do this.¹²⁷

The second prong requires that an oppressive relationship exist at the time the contract is made.¹²⁸ Borrowing from American unconscionability doctrine, Quraishi includes

“(1) unequal bargaining power; (2) limited time in which to read and understand the contract; (3) use of fine print; (4) absence of meaningful choice; (5) excessively one-sided terms; (6) a monopolistic market; (7) an adhesion-type contract; (8) the level of education and experience in the marketplace; and (9) whether an unexpected risk is shifted to a party who does not usually assume it.”¹²⁹

¹²² *Id.* at 207.

¹²³ *Id.* at 217.

¹²⁴ *Id.* at 206.

¹²⁵ *Id.* at 187.

¹²⁶ *Id.* at 212.

¹²⁷ *Id.* at 218.

¹²⁸ *Id.*

¹²⁹ *Id.* at 219.

Since these factors are incorporated into a definition of oppression, they “become part of a larger test rather than ends in themselves.”¹³⁰ That is, unconscionability becomes a thing in itself of which these things are, in part – the first prong must also be met – indicative, improving on its present condition as a disputed, poorly-understood notion that may or may not be independent of them.

Both prongs are necessary: without the first, weaker parties would be allowed to escape from contractual obligations regardless of stronger parties’ actions, and without the second, oppressive contracts could be struck down even if neither party benefitted undeservedly.¹³¹ Other means exist to remunerate parties who suffer any emotional harm that might come of such bargains as the latter kind,¹³² viz. in the law of duress and tort.¹³³ Quraishi argues that “[t]his test incorporates existing common law interpretations of oppressive contracts, yet avoids some of the problems of the common law doctrine [e.g., unfettered judicial discretion, ambiguity, and inconsistent results¹³⁴] by requiring an additional finding of unjust enrichment.”

There are numerous serious problems with Quraishi’s test. Once again, I will briefly mention only the most serious problems here. As we have seen, one of the conditions that the second prong of Quraishi’s test claims constitutes an oppressive relationship, viz. unequal bargaining power, is explicitly ruled out as constitutive of unconscionability by the committee comments on U.C.C. § 2-302. Furthermore, many of the test’s prohibitions are unreasonable.

¹³⁰ *Id.* at 218.

¹³¹ *Id.* at 219.

¹³² *Id.* at 219-20.

¹³³ *Id.* at 219 n 215.

¹³⁴ *Id.* at 227 n 262.

This is often the case even when two or more of the test's necessary conditions are met so that both prongs are met.

For example, the fact that one party's being in a position to demand and receive more value than she gives up results in the first prong being met is particularly absurd, and it is not just that this criterion is not clearly distinguishable from Quraishi's second prong's unequal bargaining power criterion. Quraishi's stated reasoning behind this criterion is that "[t]hese situations often exist when one party has a monopolistic hold on a given market, or where every alternative in a given market is identical, so that parties wishing to transact business are faced with little or no meaningful choice."¹³⁵ True as that may be, attempting to protect weaker parties in such circumstances by claiming that one party's merely being in a position to demand and receive more value than she gives up constitutes part of unconscionability is ham-fisted. By that standard, nearly all or perhaps all contracts would meet the first prong. As we shall see, there are more reasonable, more subtle ways of understanding and mitigating the effects of power differentials in contractual negotiations that do not run afoul of the U.C.C. by emphasizing the leveraging of power differentials as unconscionable in itself.

Quraishi's prohibition of "unjust enrichment" is also problematic. Quraishi himself recognizes that "[t]he free market system central to both American and Islamic law recognizes that the law cannot arbitrarily limit a person's profit in the marketplace." Hence he concedes that unjust enrichment alone is insufficient to warrant legal intervention. He then argues that including unjust enrichment as a criterion for unconscionability is nonetheless justifiable because "[w]hen a party makes a 'killing' by oppressing another party...the transaction violates society's notions of a free market to such an extent that a court will deem the contract unconscionable....

¹³⁵ *Id* at 217 n 194.

Thus, both prongs, unjust enrichment and oppression, are necessary to a complete, equitable definition of unconscionability.”¹³⁶

However, this too is a clumsy approach. It is not clear that even when a party is in a position to demand and receive more value than she gives up and uses this position to make a ‘killing’, or a large amount of money, the transaction was necessarily unconscionable. What if the weaker party is not harmed by the bargain? What if, for example, the stronger party finds the weaker party at the wall and the bargain gives the latter a little distance from it? It seems that for a bargain to be unconscionable, someone must suffer some net harm as a result of it. At least, one party’s stronger position and apparently disproportionate profit do not seem to be, in themselves, constitutive of unconscionability.

It appears we must be more careful than Quraishi in our analysis of what constitutes a disproportionate profit. For example, in *The Port Caledonia*, given the value of what was at stake, the Port Caledonia (the supposed victim) actually seems to have profited far more through its rescue than the tugmaster did from his allegedly exorbitant £1000. Thus despite the tugmaster’s exploitation of his stronger position and the ‘killing’ it at first appeared he had made, his profit was not disproportionately large. In that case, are bargains Wertheimer classified as type (c), like the one in *The Port Caledonia*, not unconscionable? Was the tugmaster in fact the victim? Like Wertheimer’s, Quraishi’s insufficiently sophisticated evaluation offers no solution to this important puzzle.

¹³⁶ *Id* at 220.

Chapter 3: The Nature of Unconscionability and a New Test

Before moving forward and proposing a test, I must lay out my own views on the questions raised at the beginning of Chapter 1. That is, I must take a stand on what unconscionability is, and whether unconscionability is a kind of problem in its own right, or instead is merely indicative of some other kind of problem or problems such as fraud or duress. If unconscionability turns out to be a problem in its own right, two further questions arise: first, whether unconscionability is a problem of negative consequences or something else, and second, whether it is a sufficient or merely a necessary condition for the nullification of a contract or clause. The goals of this chapter are to answer these questions in a way that captures our intuitions about unconscionability with a test that is as clear, simple and broadly useful as possible.

I. The Nature of Unconscionability and a New Test

The answer of the legal community to the question of whether unconscionability is a problem in its own right is clearly implied in both case and statutory law. In case law, we reviewed numerous pre- and early-post-U.C.C. opinions in Chapter 1 in both equity and common law in which the writers produced strained justifications for refusing enforcement based on questionable construal of contractual language and strained applications of traditional procedural rules. It seems clear that the writers believed there was something wrong with the contracts or terms in question other than what they explicitly claimed was wrong with them, but most nonetheless would not say just what it was.

The best explanation for this is simply that they either lacked the necessary statutory resources or case law precedent, or were uncomfortable with what they saw as insufficient establishment or clarity of one or both of the former, in order to discuss unconscionability as a

problem in its own right, even though some notion of unconscionability was the, or at least the most significant, problem they saw. In that case, it is no wonder they felt compelled to find ways to refuse enforcement. Any person with a reasonable grasp of fairness can intuitively see that the contracts in the cases in question were unconscionable. However, as Quraishi pointed out, something along the lines of a ‘gasp test’ that relies on vague intuitions about fairness is far from a satisfactory response to the problem. If unconscionability is supposed to be a problem in its own right, it needs to be clearly defined.

This is where U.C.C. § 2-302 was supposed to have come in. Since the states adopted U.C.C. § 2-302, it has been clearly implied in the statutory law of the states that unconscionability is a problem in its own right. As mentioned above, official Comment 1 explicitly states that “[U.C.C. § 2-302] is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable” without resorting to “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,” and that U.C.C. § 2-302 “is intended to allow the court to pass directly on to the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.”

In other words, the courts are meant to be given the power to police against *unconscionability* where they find it and to be able to call it what it is, rather than being forced to find things like fraud or duress, or rely on contrivances like quasi-fraud or quasi-duress, and so on. However, as we have also seen, U.C.C. § 2-302 does a poor job of defining just what it is the courts are given authority to police against, and neither the courts nor philosophers of law, or at least those writers of the well-known opinions and papers we have examined, seem to have been

able to reach an agreement upon it. For these reasons, I will propose a test for unconscionability and discuss how it ought to bear upon the enforceability or non-enforceability of contracts or terms.

My approach here will be consequentialist. In other words, I will assume the truth of a theory according to which what is right is whatever ultimately results in the production of the best consequences. My goal in this work is not a broad and detailed explication or defense of consequentialism, and I shall not present those. Rather, the goal here is to present a solution that does the best possible job of capturing our intuitions about what ought to be considered unconscionable, what is intended by the relevant statutory law, and what has in fact been applied, albeit without a unified approach and hence clumsily and inconsistently, in case law. In other words, the goal is to discover and apply principles that can satisfy, or at least account for, all three of these together.

I believe I have shown that the assumption that unconscionability is a problem in its own right and is a sufficient condition for refusal to enforce a contract or certain terms of a contract is clearly supported by extant statutory law; that part of the legal analysis is complete. To begin the *moral* analysis that will lead us to the new test, it will be helpful to use the procedural/substantive distinction as a springboard. This distinction is useful as a starting point because although the approach to judging cases of substantive unconscionability is comparatively straightforward – we either decide that one party has suffered some sort of unacceptable outcome or that it has not – the issue of procedural unconscionability is somewhat trickier.

That is, it seems as though some procedural conditions are important at least to the *prima facie* unacceptability of certain contracts, but since it turns out that things like “quasi-duress” and

“quasi-fraud” are not part of the problem of ‘unconscionability proper’ at all, this obviously affects how a case is to be judged with respect to their contribution to a contract’s either being unenforceable on grounds of procedural unconscionability or not so. In order to show that they are not part of the problem of unconscionability, it would have to be clearly shown why they have been used in some decisions to contribute to a judgment of unconscionability when they need not have been – that is, when the contract could have been shown to be unconscionable on other moral grounds.

The most widely cited example of procedural unconscionability in case law involves some version of ‘unequal bargaining power.’ In pursuit of a way of clarifying the problem of unequal bargaining power, let us re-examine Murphy v. McNamara. Berdon declared the contract unconscionable both because the price of the television was far above the typical retail price and because Murphy did not have equal bargaining power in the agreement. However, as Wertheimer pointed out, there is little reason to think that McNamara made an extraordinary profit from such deals. Extending credit on things that would quickly depreciate in value to poor customers like Murphy was risky, and no doubt they often defaulted and forced McNamara to take losses. This would make it difficult to call the bargain inherently substantively unconscionable from a pre-contractual standpoint. Things did turn out such that Murphy was the loser, but both sides stood to lose much *at the time the contract was made*.

Wertheimer’s passing suggestion that perhaps “we would prefer that *no one* deal with consumers on terms that are likely to be harmful to them” suddenly seems very salient. I contend that what made the contract between Murphy and McNamara unconscionable was just that. Even if in reality most of McNamara’s relevantly similar customers did not happen to default, McNamara *knew* Murphy was very poor, and it would be reasonable to think her likely to

default. Refusing to enforce bargains like those between Murphy and McNamara on these grounds would set a precedent prohibiting anyone making deals with anyone else that can be reasonably expected to result in significant net harm to either party.

Now, I agree with Wertheimer that this was not an issue of unequal bargaining power in either sense. Recall that according to Wertheimer, the problem was not of ignorance, but of poverty. Murphy most likely did not underestimate the cost to her or vastly underestimate the value of the television and probably bought it despite the fact that she knew she probably could not afford it. However, when it comes to cases of this kind, Wertheimer seems to have forgotten his own good suggestion. In such cases, Wertheimer does not think we ought to declare terms unconscionable “if the only justification of unconscionability is to protect the exploited party.”

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Though Wertheimer does not explicitly say why he holds this view, it seems to be because he thinks we can assume that although Murphy did not know precisely how expensive the television was in terms of the going rate, she nonetheless did knowingly and freely enter into a bargain that was likely to be harmful to her: she knew or at least could have easily ascertained the price of the television and she knew her own income, and so she knew or could be reasonably expected to have known the cost of the television *to her*. Wertheimer thinks that therefore she is not entitled to be protected from exploitation. Her ignorance of these facts was not the primary factor; rather, she was poor and made an unwise decision.

But that is exactly why it is preferable that no one deal with consumers on terms likely to be harmful to those consumers: to deter those dealers from entering into exploitative relationships with consumers who happen to make apparently informed and free but very unwise decisions that will result in serious negative net consequences. It is important to respect freedom

¹³⁷ Wertheimer, *supra* at 496.

of contract, but human beings are fallible, and it is substantively unconscionable to take advantage of their mistakes when mistakes are being made that can be reasonably expected to result in serious net harm to them. Though in this particular case McNamara may have stood to gain little by exploiting Murphy, even if he had stood to gain a large profit, this would not make the bargain any less unconscionable. If either party can be reasonably expected to experience a significant net loss, regardless of the benefits to the other party, the bargain is unconscionable. We will call this criterion “Prong 1.”

There are difficulties that accompany this approach. One arises from Wertheimer’s problem concerning unconscionability that allegedly stems from measuring disproportionate gain in terms of utility. This is supposed to be problematic because we may encounter cases in which a bargain seems to be unconscionable even if the party which appears to be gaining disproportionately is actually gaining *less* utility than the party that appears to be the victim of the ostensibly unfair price. For example, the Port Caledonia gained greater objective utility through its rescue than the tugmaster gained from his allegedly exorbitant £1000. So, Wertheimer’s problem is that we must either declare that the contract was not unconscionable, or we must find an objective way of measuring utility gain that can handle what we tend to feel are unfair gains for one party.¹³⁸

The natural answer, and the one Wertheimer proposes and rejects, is that we should measure utility gain in terms of market norms: the tugmaster’s gains were supracompetitive, and this is what made his price exorbitant and unconscionable. Wertheimer rejects this answer because there is no evidence that the profits in for the defendants in *Henningsen, Gianni, Murphy*, or *Williams* were supracompetitive, so making our standard supracompetitive profits would force us to concede that the contracts in those cases were not unconscionable.

¹³⁸ *Id.* at 492.

However, I would contend that what is problematic is significant net utility loss for either party, not one party's supracompetitive or disproportionate profit. As we shall see, the unconscionability of *Henningsen*, *Gianni*, *Murphy*, and *Williams* can be accounted for wholly in those terms. That said, Wertheimer's analysis reveals that I seem to be in an awkward position when it comes to cases involving what we might call disproportionate gains made by one party, but in which *both* parties nonetheless experience net gain, such as in *The Port Caledonia*. That is, since my criterion (viz. the reasonable expectation of significant net utility loss for either party) relies upon the 'objective' market value of the *Port Caledonia* and her cargo and the market value of the £1000 in order to measure net utility gain or loss, and both parties apparently experienced a net gain by this measure, then unless further refined my criterion suffers the inverse of the problem we saw in the supracompetitive or disproportionate profit criterion: it apparently fails to yield unconscionability in cases like *The Port Caledonia*.

However, there are good reasons to refine the criterion further so that we end up with a further, secondary test. To begin, I point out that 'market value' cannot be fully expressed by a single value, even if it is a value like a mean. In truth, market value will always be most clearly expressed as a *range* of values. The possibility and preferability of expressing it in terms of a range are useful; for, when considering whether a given price is potentially problematic, rather than arbitrarily choosing a value that is too high or low above the 'market value' expressed as a mean or even a median, we may consider the price potentially problematic if it can be considered an *outlier* from this *range*.

Furthermore, under extraordinary conditions, any number of strange things can happen. The extraordinary conditions component of the second test stage is a safety precaution that protects both parties regardless of their mistakes or bargaining position. The importance of this

component will become clearer when it is applied to some examples below. In general, it can be associated with Comment 1's targeting of "oppression and unfair surprise."

So, I propose that if it is the case that neither party experiences a net loss, *and* it is the case that the gain experienced by one party is unequal as a result of the consideration it receives being interpretable as an outlier from the market value of that consideration, *and* it is the case that the bargain takes place under extraordinary conditions, then the bargain is unconscionable. We will call this criterion "Prong 2."

Both the latter conditions must be met in order to make the test the least likely as is possible to interfere in the 'free market' to what might be considered an inappropriate extent. If Party A charges Party B a price that is far above the market value range, but the conditions were not extraordinary (and the market is healthy, e.g., there is no monopoly or inappropriate collusion among those in positions relevantly similar to that of Party A,) and the parties are not in an extraordinary situation, as was the case in *The Port Caledonia*, then it is almost certainly the case that Party B simply made the bargain without bothering to explore her available options. Given that she did not suffer a net loss, she ought not be rescued from it by the courts. On the other hand, if the conditions are extraordinary, but neither party gains anything outside the range of market values, then neither party has grounds on which to complain. Each experienced a net gain, and the bargain was 'fair': neither party gained anything above what is usual in a well-functioning market.

Now, an opponent might reasonably ask what 'market value' means, and how we are supposed to determine what constitutes an outlier from it. There are good answers to these questions. There is considerable precedent for judicial determination of the values of things based on 'market value'. For example, the Fifth Amendment to the United States Constitution

states that private property cannot be taken for public use without “just compensation.”¹³⁹ This has given rise to a large body of case law opinion on market value since in eminent domain cases what constitutes ‘just compensation’ is generally attempted to be determined based on the “fair market value” of a property.¹⁴⁰ Justice Roberts, in the opinion for United States v. Miller, writes that market value is usually taken to be “what a willing buyer would pay in cash to a willing seller,” and that this can be determined, where possible, by looking at recent sales of the property in question or like properties in the vicinity.¹⁴¹

For normally distributed data, any value that falls more than three standard deviations from the mean is typically considered an outlier. Standard deviation is an excellent way of dividing up a range of data and isolating outliers because it inherently accounts for the level of variability in a particular data set. Thanks to this, theoretically, 99.7% of all values in any normally distributed data set will fall within three standard deviations of the mean. So, using this measure provides us with an objective way of determining outliers. From a practical perspective, the further beyond the third standard deviation the price is from the mean, the less likely it is that it falls within the normal distribution, and hence the more important it is to be suspicious of a price and the more likely it is that we will and ought to see it as unreasonable.

Justice Roberts cautions that “even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true market value with nicety....”¹⁴² Viewing the market value as a range and using statistical analysis, as I suggest, can help courts mitigate the dangers of such assumptions: they can use the range of

¹³⁹ U.S. Const. amend. V.

¹⁴⁰ 26 AM. JUR. 2D *EMINENT DOMAIN* § 275 (2012).

¹⁴¹ *United States v. Miller*, 317 U.S. 369, 374.

¹⁴² *Id.*

prices of relevantly similar things to test the assumptions involved in their determination of the market value of a particular thing. The further an assumption pushes the court's estimate of a value from the estimated mean, the less likely it is the assumption is a good one and the more carefully it must be examined. Based on the distribution and the proposed price, this probability can be calculated objectively with reasonable confidence.

A precedent of the use of my test would cause parties to think carefully before charging any price outside the boundaries of the specified range, for should the other party claim the price was unconscionable, the first party must be prepared to explain to a judge why its price just happened to be higher than that of all but 0.3% of other relevantly similar parties. If the first party appeals to risk, it must be able to show that the other party could at the time reasonably have been expected to experience a net gain, *and also* that the first party ran an unreasonable risk of experiencing a significant net loss if the price had been any lower.

Note also that uniform application of this view would serve not only to deter substantively unconscionable bargains, but also so-called procedurally unconscionable ones: since both parties must be reasonably expected to experience some net gain, any procedural advantages become far less useful and more difficult to exploit in terms of the final outcome of a contract. In fact, given that, procedural advantage becomes moot for all practical purposes, and the procedural/substantive unconscionability distinction can be discarded. That is, in cases like those we have examined thus far, there is little or no reason to pay attention to procedural advantage in itself because there is no way for contracting parties to exploit it to the point of unconscionability without creating a substantively unconscionable contract.

The intentions behind U.C.C. § 2-302 are also respected. Unequal bargaining power is removed as the primary consideration: as we saw in the previous paragraph, bargains involving

unconscionable oppression and unfair surprise would be unconscionable by extension. Furthermore, what is central to this view is reasonable expectation regarding the outcomes for both parties *at the time the contract is made*, just as U.C.C. § 2-302 and Comment 1 demand.

Finally, a very reasonable interpretation of what is meant in Comment 1 by “one-sidedness,” especially in light of its statement regarding unequal bargaining power, is inequality of net outcome. The kind of inequality of outcome in which one party takes a significant net loss is precisely what the first prong of my view aims to prohibit. As Wertheimer points out, in *Henningsen* and *Gianni* there is no reason to doubt anyone’s competence or rationality. In these cases, the courts appear to have been claiming that there were asymmetries between the parties in bargaining potential, and these led to an unjust *result*.¹⁴³ I argue that in these cases it was the *result* that ultimately mattered, and perhaps we needn’t necessarily get tangled up in issues of bargaining power. Mine is a simpler solution that provides clear guidelines and also is in line with the letter and spirit of U.C.C. § 2-302.

II. Applying the Test

At this point, it will perhaps be most instructive to continue by applying the test to some of the cases to which we have not already applied it in detail. *The Port Caledonia* and *Murphy* have already been briefly discussed, and given the similarity of *Williams* to *Murphy*, we can lay *Williams* aside. We will consider *The Port Caledonia* a little further in the course of considering *Banaghan*,¹⁴⁴ and we will also consider *Henningsen* and *Gianni*.

Note that the second prong of the test is also able to yield unconscionability in cases in which both parties experience a net gain, but one receives what we would be inclined to think too *low* a price for its goods or services. In *Banaghan*, all the criteria were met. The conditions were

¹⁴³ Wertheimer, *supra* at 494.

¹⁴⁴ *See supra* note 29.

extraordinary: the railroad company's buying up of properties in the path of the planned track was suddenly driving prices to unusual levels. Whether Malaney could reasonably have been expected to experience a net gain is difficult to say; she did receive from Banaghan what would have been a very fair price under normal conditions, but no further data about prices under the unusual conditions extant is available. Let us assume for the sake of argument that Malaney did experience a net gain, despite how poor the price was under the unusual conditions. If the consideration she received was more than three standard deviations *below* the mean in value (again, given the unusual conditions), then it was an outlier from the range, and Banaghan would have to show that he risked a significant net loss if he had given any more. Given that he faced almost no risk and clearly stood to get a much higher price than he paid by re-selling the property to the railroad, his price would be difficult to justify.

However, as with *The Port Caledonia*, the price data is unavailable. We must therefore either assume that the price Malaney got was greater than three standard deviations below the mean and thus the correct judgment was made, or, if it was not greater than three standard deviations below the mean, the bargain was not unconscionable. If the latter was the case, then according to my test, though the bargain was a poor one for Malaney, the price was within the range of prices typically got for relevantly similar properties, i.e., properties in the path of the proposed tracks at that time, and the price was therefore not unconscionable. Given how shocked the court and others were by the price, we can probably safely assume that the price was that low. If not, I would be willing to 'bite the bullet,' so to speak, and concede that the bargain was not unconscionable.

Now, though all the conditions of both stages of the test were met, was *Banaghan* still simply a case of a fool who made a raw deal without exploring her options, and for whom we

should not feel sympathy? If we assume Malaney experienced a net gain, we cannot appeal to Banaghan's having taken advantage of her significant net loss, as we can cases like in *Williams* and *Murphy*. In that case, must we appeal to her age, illiteracy, or some other disadvantage, and grope for quasi-fraud or quasi-duress, or some other such thing?

I do not think so. When this second stage of testing is reached, whether or not Malaney could have been expected to explore her options is irrelevant: this part of the test is blind to mistake. As mentioned above, under extraordinary conditions, any number of strange things can happen, and the extraordinary conditions criterion of the second test stage is a 'blanket' or 'catch-all' safety precaution that protects parties regardless of their mistakes or bargaining position. Either the price, adjusted for risk and resulting in net gain for both parties and negotiated under extraordinary conditions, was too high or low, or it was not, period.

Note that an approach like the one the court actually employed in *The Port Caledonia* would not have worked for *Banaghan*. That is, a principle that prohibits charging high prices when the buyer is under some level or shade of duress would not have applied. Malaney was not under any pressure other than that of Banaghan's persuasiveness, which is a far cry from the position of a ship drifting uncontrollably toward another ship in a storm with only *one* tug in the vicinity to haul it to safety. On the other hand, if we appeal to Banaghan's deceptiveness, we must add yet another principle to our test that prohibits the enforcement of contracts negotiated involving quasi-fraud: though Banaghan's deception was clearly a factor in the decision to refuse to compel specific performance, Judge Wait explicitly conceded that the bargain "was not obtained by such fraud or misrepresentation as would give the defendant a right to void it."¹⁴⁵

Even applying the more general principle that the courts ought to declare unconscionable any contract in which a party receives unreasonable consideration due to market imperfection

¹⁴⁵ *Banaghan, supra* at 839.

would not have worked since the core of the problem was not that Banaghan and Malaney were part of an imperfect market, but rather that Malaney was unaware of the unusual market conditions and Banaghan deliberately exploited this. The market itself was not dysfunctional, and Banaghan's price was not even inappropriate relative to the market conditions of properties relevantly similar to Malaney's except for their not being in the railroad's path: Judge Wait conceded that

“I am convinced that, in the absence of the action by [the railroad representative that informed Malaney she had been bamboozled] and knowledge of the railroad company's intentions, the defendant and her advisors would have made the conveyance to the plaintiff and have been properly satisfied with the price agreed upon.”¹⁴⁶

The fact that my test clearly yields unconscionability (or, given the necessary data, would be able to clearly yield unconscionability) in both cases despite their unique difficulties is evidence of its superiority, in terms of clarity, simplicity, and applicability over the two separate approaches actually employed in *The Port Caledonia* and *Banaghan*.

Gianni is a comparatively easy case. Any clause that allows one party to refuse at any time to purchase goods that will be unlikely to be purchased by anyone else can reasonably be expected to result in a significant net loss for the party that has invested in creating those goods. At the very least, there is an unreasonable risk of this happening, and this risk was particularly unreasonable in *Gianni* due to the volatility of the industry. Therefore, the clause was unconscionable.

An opponent might appeal to what the *Gianni* court pointed out, viz. that the seller could choose to negotiate with the buyer to accept the goods at a lower price, and that so long as that price did not result in a significant net loss for either party, my initial test would fail to yield unconscionability. Nonetheless, the existence of this sort of tacit agreement in the contract still

¹⁴⁶ *Id.*

strikes one as unconscionable: it would effectively give Gantos the power to change its mind about the selling price at any time. The *Gianni* court called that position “untenable” for the seller.¹⁴⁷ So, perhaps I must either disagree with the court and concede that the clause was not necessarily unconscionable or find a way for the secondary test to yield unconscionability.

In reply, I point out that the tacit agreement regarding negotiation for reduced price was just that: tacit. The clause that gave rise to the possibility of such negotiation was unconscionable according to my test, and therefore that clause was unenforceable. In that case, *Gianni* did not have the option of cancelling and forcing Gantos to bargain for a lower price. If *Gianni* cancelled, the court could force *Gianni* to pay Gantos the price originally agreed upon.

Henningsen can also be handled by the primary portion of the test. The manufacturer denied any responsibility for injury or death caused by its failure to control the quality of a potentially very dangerous machine. The machine in question was dangerous in that operating it put the *Henningsens* at risk of loss in terms of life, limb, and property. It was necessarily part of the bargain that when they bought and operated it, they therefore assumed that risk. In that case, any gain they experienced from the ownership and use of the machine must be balanced not only against the price paid, but against risk of significant net loss as a result of death, injury, and destruction of property.

What the *Henningsens* would have needed to receive in order to counterbalance the risk of significant net loss arising from operating such a machine, and thus to make the bargain reasonably likely to result in a net gain for them, was a guarantee from the manufacturer that it would compensate them for any failure on the manufacturer’s part to ensure safety by controlling the quality of parts. Warranty terms denying any responsibility for loss caused by defective parts,

¹⁴⁷ *Gianni*, *supra* at 762.

on the whole, put the Henningsens at unreasonable risk of significant net loss. The terms were therefore unconscionable.

Though Wertheimer seems to have noticed the importance of weighing such risk, he failed to follow through with considering it to be part of the bargain in *Henningsen*. He writes that

“it is possible that automobile buyers have, in effect, been compensated (without their asking to be compensated in *this way*) in advance – that, in principle, Chrysler would have been willing to allow Henningsen to purchase a far more inclusive warranty, one which included insurance for injuries, for an added premium. If so, we would need to ask why consumers do not get to choose high price/easy terms over low price/harsh terms, but the fact remains that Henningsen received a price discount for accepting harsh terms.”¹⁴⁸

So, Wertheimer seems to be aware that it would have been better had Chrysler offered a more inclusive warranty and that it should be considered whether there is any reason Chrysler ought not have, but his focus shifts immediately to the Henningsens’ apparent consent. He does not bother to weigh the “price discount” against the risk of harm from Chrysler’s negligence or consider how this might affect the fairness of the bargain. Interestingly, he also somehow manages to overlook the fact that the whole point in this case, as in *Gianni*, was that there was not a competitive market; all of Chrysler’s competitors used the same unfair warranty terms, and all of Gantos’s competitors used the same unfair cancellation terms.

III. Some Further Objections and Replies

An opponent might object that it will be very difficult in many cases to define or circumscribe ‘the market’ in anything like an objective manner when trying to determine market value, and this means market value determinations and hence unconscionability determinations made using either portion of my test will be less objective and provide less clear precedent than I would like to claim. I concede that defining ‘the market’ will be difficult in at least some cases,

¹⁴⁸ Wertheimer, *supra* at 492.

and that any definition will be, to some extent, subjective. However, this is not a problem unique to my philosophical view, nor is it anything like new in case law in general.

Once again, it will be useful to refer to the law of eminent domain. American Jurisprudence states that, in fact, using “fair market value” of a property is considered a “relatively objective working rule” for determining just compensation, and it is to be used unless unusual circumstances prevent it from being useful.¹⁴⁹ Concerning the determination of market value for purposes of determining just compensation in eminent domain cases, it concedes that

“[j]udicial determinations as to what constitutes ‘just compensation’ in a given set of circumstances...are not made according to rigid principles. Only a few principles exist which may be deemed to rise to the category of general rules, and even these may yield to exceptional circumstances; an owner’s compensation depends so much on the facts of the case that no rigid formula is appropriate. Accordingly, the process for the determination of the value of a property in eminent domain proceedings cannot be reduced to inexorable rules.”¹⁵⁰

Some of the facts of a case on which just compensation depends are obviously what constitutes a market, and which market is to be used for reference. This difficulty is clearly appreciated by Justice Clark in the opinion on United States v. Toronto, Hamilton & Buffalo Navigation Co., where he writes that

“[w]e take it that in the valuation of readily salable articles, price at the market nearest the taking is, at least in the usual case, a practical rule of thumb, and one that is most likely to place the claimant in the pecuniary position he occupied before the taking. [...] Thus, in *Grand Tower Co. v. Phillips*, 23 Wall. 471 (1874), the plaintiff had planned to sell the defendant's coal at the best available market on the Mississippi between Cairo and New Orleans. Yet the defendant's breach of contract to sell to plaintiff brought a ‘more direct’ measurement of damages: the nearest available market. [...] But we do not think a similar rule practical or fair in the requisition of property which most owners would, if possible, sell without geographic restriction. We doubt, for example, that owners of ocean liners would, under ordinary circumstances, fail to negotiate beyond the port in which the vessels lay.... Were market conditions normal, we could hardly call an

¹⁴⁹ 26 AM. JUR. 2D *EMINENT DOMAIN* § 275 (2012).

¹⁵⁰ *Id.*

award ‘just compensation’ unless relevant foreign sales, in available markets, were considered.”¹⁵¹

In sum, even given its shortcomings, using fair market value is generally considered a good approach, i.e., one which is relatively objective and functions well at least as a rule of thumb. We can see that any view applied to any case which tries to take market value into consideration must wrestle with this difficulty.

¹⁵¹ United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 404-05.

Chapter 4: The Normative Basis

The two prongs of my test for unconscionability as they currently stand are as follows:

Prong 1

If set of terms X, at the time the contract was made, could have reasonably been expected to cause significant net harm to one or both parties, then set of terms X is unconscionable.

Prong 2

If set of terms Y is not unconscionable via Prong 1, *and*
the price under set of terms Y is an outlier from market value range, *and*
set of terms Y was agreed upon under extraordinary conditions,
then set of terms Y is unconscionable.

The goal of this chapter is to determine what sort of normative theory undergirds and unites both of these prongs. We will begin with Prong 2. A consequentialist approach will be defended. Parsimony is often best; however, simple direct consequentialist approaches like total consequentialism are not up to the philosophical challenges faced by Prong 2. Even basic indirect consequentialist approaches are inadequate.

I. Consequentialism and Prong 2

Prong 2 is intended to cover many kinds of cases. Let us begin with cases like *The Port Caledonia*, in which the specific problem is one closely resembling duress: Party A has something Party B needs, and because of some unusual condition, this thing cannot be gotten elsewhere, so Party A charges a price far above the price normally charged in order to benefit himself as much as possible. That is, Party A demands a price far above the price that would be

charged in a market with the usual level of supply in order to achieve greater profit. This kind of practice is often colloquially referred to as ‘price gouging’, and many of us are inclined to feel there is something wrong with it.

The criteria provided by Prong 2 and employed against price gouging in decisions in cases like *The Port Caledonia* do not initially appear well-suited for consequentialist justification at all. Indeed, as we shall see, many simpler forms of consequentialism will not be able to justify employment of Prong 2.

II. Price Gouging and Total Consequentialism

If we take the view Walter Sinnott-Armstrong calls “total consequentialism,” i.e., as long as we regard the net gains or losses experienced by both parties taken together as what is morally relevant in determining which good consequences are to be maximized, as opposed to the average net gains per party,¹⁵² it appears the consequentialist will be unable to see any problem with the agreed-upon terms in most price gouging cases. This is because even if one party experiences a significant net loss, that party’s loss will typically be balanced out by the other’s gain.

The Port Caledonia seems to be such a case. The £1000 price offered by the Sarah Jolliffe for a tow was far less than the monetary market value of the Port Caledonia, the Anna, and their cargo, all of which were endangered. The value of the Port Caledonia was set at £41,132 and that of the Anna at £41,906,¹⁵³ thus the total value at stake was £83,038. (For the time being, we shall ignore any additional potential gains or losses we might feel are morally

¹⁵² Walter Sinnott-Armstrong, *Consequentialism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2012).

¹⁵³ *The Port Caledonia*, *supra* at 184.

relevant, e.g. of lives and limbs, in the interest of adhering to legal tradition.¹⁵⁴) Though the £1000 price for a tow appears exorbitant relative to the normal market range of a tow, had the Port Caledonia's captain refused, he would certainly have lost more than he did by accepting, especially given that he would also have been responsible for the losses to the Anna had the Port Caledonia fouled her.¹⁵⁵

At the £1,000 price, the net gain to the Port Caledonia would have been £82,038 and the net gain to the Sarah Jolliffe £1,000 minus its expenses (fuel, paying the crew, and so on), let us say £20. So, the total net gain to the Sarah Jolliffe would have been £83,018. Had the Sarah Jolliffe asked only the standard £200 for a tow, the net gain to the Port Caledonia would have been £82,838 and the net gain to the Sarah Jolliffe £180, for a total net gain of £83,018. In both cases the total net gain is the same. One party's loss is the other's gain. So, it seems the total consequentialist would be forced to concede that it was no more wrong to charge the £1,000 price was that it would have been to charge the standard £200 price.

In fact, total consequentialism could have no qualms with *any* price for the tow — even those that would have caused the Port Caledonia to take a huge net loss. For example, had the Sarah Jolliffe demanded an extremely exorbitant £83,058 for the tow, the net gain would be the same as it was at the £200 and £1,000 prices: at £83,058 the Port Caledonia would lose £20 and

¹⁵⁴Due to an idiosyncrasy of U.S. maritime law, human lives are not to be included in the calculation of salvage value and life salvors are only entitled to a share of monetary awards arising from salvage of property. To even be entitled to a share of the property salvage award, life salvors must have participated in the salvage of property in addition to life salvage. *See* 46 U.S.C.S. § 80107 (providing that life salvors are only entitled to a share of monetary awards arising from salvage of property) *and* 67B AM. JUR. 2D *Salvage* § 20 (2012) (stating that in case law, it has traditionally been held that, and 46 U.S.C.S. § 80107 and its predecessors have been interpreted in case law such that, “an independent life salvor, disassociated from the act of salvaging property was not entitled to salvage compensation,” that “life salvage is not an additional award, but rather a fair share of the traditional award,” and that, in order to be entitled to a portion of salvage compensation, “the [life salvor] claimant, in addition to saving lives, must have taken part in the services rendered on the occasion of the accident giving rise to traditional salvage....”). This seems problematic from a moral standpoint, and has been recognized as such. *See* Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 Yale L.J. 779 (1954).

¹⁵⁵ *The Port Caledonia*, *supra* at 184.

the Sarah Jolliffe would gain £83,038 after expenses for a total net gain of £83,018. At £83,068 the Port Caledonia would lose £30 and the Sarah Jolliffe would gain £83,048 for a total net gain of £83,018, and so on. Had the Sarah Jolliffe demanded £1,000,000 for the tow, the Port Caledonia would have lost £916,962 and the Sarah Jolliffe would have gained £999,980, for a total net gain of £83,018. Even if the Sarah Jolliffe *paid the Port Caledonia* for the privilege of towing her, the total net gain would be the same.

III. Price Gouging, Maximizing Consequentialism, and Satisficing Consequentialism

Combining total consequentialism with the view Sinnott-Armstrong calls “maximizing consequentialism,” according to which something’s being morally right depends only on its bringing about the best possible consequences,¹⁵⁶ will not help us avoid this absurdity. Under maximizing consequentialism, if the gains experienced by both parties taken together are somewhat less than they would be under other terms, the maximizing consequentialist must declare them wrongful or unconscionable. For instance, in *The Port Caledonia*, the maximizing consequentialist would find the £200, £1,000, £83,058 and £1,000,000 prices for the tow equally acceptable, since they all result in the total net gain that is optimal given the values of the Port Caledonia and the Anna and the expenses of the Sarah Jolliffe, viz. £83,018.

Maximizing consequentialism is implausible as a standard for unconscionability no matter what method of measuring outcomes we adopt, be it total consequentialism or something else, because maximizing consequentialism would require us to declare unconscionable, or at least wrongful, any contract that did not bring about the best possible consequences. Nearly all contracts can be said to be imperfect in this way, and it is doubtful that most of us would be willing to claim that nearly all contracts are unconscionable or even wrongful.

¹⁵⁶ Sinnott-Armstrong, *supra*.

Instead of maximizing consequentialism, we might try combining total consequentialism with what Michael Slote calls “satisficing consequentialism,” according to which it is often morally acceptable to accept the less-than-optimal, even if the optimal is available.¹⁵⁷ Presented with contractual terms the outcome of which was less-than-optimal, the satisficing consequentialist would not reject them out of hand as the maximizing consequentialist would, but rather would say that the terms were acceptable even if not perfect. The terms would have to produce consequences that were far from optimal for the consequences to fall below Slote’s loose standard of ‘good enough’¹⁵⁸ in order for the satisficing consequentialist to reject the terms as unconscionable or even wrongful.

So, satisficing consequentialism seems promising, at least if we can come up with a clear notion of how far from optimal counts as ‘good enough’. However, as long as it is coupled with total consequentialism, satisficing consequentialism’s threshold of ‘far from optimal in terms of the best consequences overall’ does not seem to capture what we see as the problem with price gouging. It is not that the net gains of both parties taken together are not as great as they could be, or that they are not quite good enough. What bothers us is that one party takes advantage of the position of the other to charge more than ought to be charged relative to some market norm.

Setting aside for the moment the ‘taking advantage of the other party’s position’ component, the consequentialist might attempt to capture the other component of what bothers us about price gouging by replacing the total consequentialist principle with an average consequentialist principle, such as what Derek Parfit calls the “Wide Average Principle,”

¹⁵⁷ Michael Slote and Philip Pettit, *Satisficing Consequentialism*, 58 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 150 (1984).

¹⁵⁸ *Id.* at 140.

according to which “the best outcome is the one that gives to people the greatest average net sum of benefits per person.”¹⁵⁹

An average consequentialist would argue that what we provisionally held to be morally relevant before, viz. the gains or losses of both parties taken together, are not what is morally relevant. What is morally relevant is whether Parties A and B gain as much, on average, as possible. If we combine this with satisficing consequentialism (as opposed to maximizing consequentialism, which we found to be less plausible when it comes to contracts), we get a theory that demands that individuals, on average, experience gains that are at least good enough. Average consequentialism is thus at least *prima facie* a more plausible approach than total consequentialism since it holds individual outcomes to be relevant, even if only indirectly.

For instance, if the best possible outcome Z for the parties to a contract would make the average gain experienced per party 11, and if under outcome X the average gain experienced would be 5 and under outcome Y the average gain experienced would be 10, then assuming 5 is not good enough, we ought to prefer the contractual terms that bring about outcome Y or Z. The parties ought to eschew terms that bring about outcome X as wrongful, or perhaps even unconscionable. On the other hand, it is acceptable for them to accept the terms that would bring about outcome Y even if, through harder bargaining, they could reach agreement that would bring about the better outcome Z, since it is morally acceptable to take what is ‘good enough’ even if optimization is possible. In other words, while it would be wrong for them to accept X, it would not be wrong for them to accept either Y or Z even if Z were available.

We appear to be getting closer to a plausible theory. Unfortunately, average consequentialism (with or without satisficing consequentialism) runs into a problem similar to

¹⁵⁹ Derek Parfit, *Reasons and Persons* 397 (1984). The reason it is ‘wide’ as opposed to ‘narrow’ is not important for our purposes, but see 394-95 and 396-97 for an explanation of the distinction.

the one we saw with total consequentialism. Let us return to our old friends the Port Caledonia, Anna, and Sarah Jolliffe as examples. Had the Sarah Jolliffe demanded £200, £1,000, £83,058, or £1,000,000 for the tow, the total net gain would have been £83,018. Hence, no matter which of those prices we choose, the average net gain, or $£83,018/2$, is £41,509. This seems to me even more absurd than the result produced by total consequentialism. Not only does average consequentialism fail to forbid the intuitively unacceptable bargain, just as total consequentialism does. It additionally provides a preposterous and deceptive assessment of the Port Caledonia's gains. For example, at the £1,000,000 price, the Port Caledonia would have experienced a net loss of £916,962, but the average consequentialist must still say that, on average, the parties gained £41,509.

IV. Pre-contractual Baseline Measurement, 'Threat Advantage', and a Dilemma

It appears that any clear and plausible consequentialist accounts of contract cases must compare the net benefits of one party to those of another; i.e., it must consider the individual gains and losses of each party rather than the sum or average of all parties taken as a whole. In order to provide a clear and plausible account of the individual gains and losses of each party, we will need to think of them in terms of marginal utility. Roughly, marginal utility is a measure of the value of something to a particular individual or party. To determine marginal utility we must consider each party's pre-contractual baseline, i.e., the overall state of each party prior to the beginning of contractual negotiations. For example, \$50 would be a less significant gain for someone with hundreds of thousands of dollars on hand than it would be to someone with only a few hundred. The latter person has a much lower baseline relative to which \$50 is a much greater amount, and thus \$50 would be more useful or beneficial to the latter person than to the former.

We must take care not to insist that unconscionability always arises from simple disproportionality of net gain by the non-victim. That cannot be the source of unconscionability since many bargains that have been found unconscionable, including the one in *The Port Caledonia*, actually involve greatly disproportionate gain on the part of the supposed victim.¹⁶⁰

Thus far we have been measuring the gains produced by the bargain in *The Port Caledonia* strictly objectively; i.e., we have been considering the money and property at stake strictly in terms of their value in pounds without regard for the marginal utilities involved. We have considered that the Port Caledonia gave £1000 and received services typically worth only £200 or so, and so on. What we have failed to consider is the marginal utility for the Port Caledonia of the Sarah Jolliffe's services and the marginal utility of the £1000 for the Sarah Jolliffe. Doing so requires us to consider each party's pre-contractual baseline.

Recall that Wertheimer noticed that the reason one party is often able to bargain for an objectively greater share of the gains from a bargain is that otherwise she would gain less relative to her pre-contractual baseline than the other party. This allegedly makes the former party stronger by giving her a 'threat advantage': even if she has less to gain, she also has less to lose and will be willing to walk away if her terms are not accepted.¹⁶¹ It will be useful to have a terse label for the point of view we take when we look at parties' pre-contractual baselines from our consequentialist, marginal utilitarian perspective. (Eventually, this view will also include a utilitarian principle of fair division based on an important distinction Wertheimer overlooked.) Henceforth, when we take this kind of measurement of each party's pre-contractual baseline and use it to consider the marginal utility for each party of the goods or services being exchanged and

¹⁶⁰ Wertheimer, *supra* at 492.

¹⁶¹ Wertheimer, *supra* at 494.

that party's resulting threat advantage, we will say we are taking the 'pre-contractual baseline view.'

Unfortunately, these facts about the effects of marginal utility present at least one serious problem. As Wertheimer pointed out, when we take into consideration each party's pre-contractual baseline and consequently the marginal utility of what is being bargained for, the 'rich person/poor person' reductio of our intuitions arises. If a rich person and a poor person must agree to share \$200, we would tend to feel that it is morally repugnant that the rich person walk away with a greater share. However, the rich person can convincingly argue for a \$150-\$50 split in her favor because it would grieve the poor person more to lose \$50 than it would grieve the rich person to lose \$150. Another way of putting this is that the rich person has at least a *prima facie* convincing argument that a \$150-\$50 split in her favor is fair because the marginal utility of \$150 to the rich person is at most the same as the marginal utility of \$50 to the poor person.

Furthermore, according to Wertheimer, the rich person will have a threat advantage. She can walk away without making a deal, leaving each party with nothing, much more easily than the poor person. This is supposed to be because gaining nothing would be less damaging to her in terms of marginal utility than it would be to the poor person. We might complain that the differences in marginal utility of the potential monetary gains or losses and the resulting threat advantage are what will inevitably produce a bargain in which the parties' gains, measured objectively, are unbalanced. In that case, perhaps threat advantage is the root of the problem.

However, if the rich person is only using her threat advantage to reach an agreement in which the marginal utilities are balanced, what grounds do we have for complaint about threat advantage, or even about the outcome of the bargain itself? Once the negotiations have reached

the stage in which there is to be a \$150-\$50 split, the rich person does not seem to have a threat advantage any longer. The marginal utility of the \$50 to the poor person is supposed to be the same as the marginal utility of the \$150 to the rich person. Let us call that value n . Once a stage in the negotiations was reached at which it seems everyone ought to have been happy to make a deal, i.e., the stage at which each party would receive n marginal utility were an agreement settled, the rich person's threat advantage is spent. Therefore, after such an agreement is made, we cannot point at threat advantage and complain that it is the problem. It will have been spent in the process of reaching an apparently *fair* deal. In fact, the rich person will argue that it is the marginal utilities that make the deal fair, and that her threat advantage was only a means of reaching a fair agreement.

Despite the apparent convincingness of the rich person's argument, we tend to feel it must be specious. Despite the apparently equal marginal utilities, the rich person's exploitation of threat advantage and the resulting \$150-\$50 split in the rich person's favor are repugnant from a moral standpoint. It seems to us that, all else being equal, we ought to give at least half to the poor person, who needs the money more. Thus the fact that we must take into consideration each party's pre-contractual baseline to measure their gains and losses presents us with a dilemma concerning marginal utility and objective gain that we shall have to eventually solve if we wish to defend a consequentialist explanation of our intuitions about individual gains and losses: we must either show that the rich person/poor person *reductio* does not follow from the pre-contractual baseline view or abandon it as intuitively implausible.

The rich person/poor person *reductio* is not merely an annoying abstract problem. An analogous argument could be made by, for example, the tugmaster of the Sarah Jolliffe. Like the aforementioned rich person, the tugmaster had an incredible threat advantage. She was the only

tugboat available. Additionally, although she had been endangered somewhat by going out to the Port Caledonia and had incurred some expenses, she nonetheless had very little to lose relative to the Port Caledonia. What she probably stood to gain or lose relative to her pre-contractual baseline if a deal was not made was, let us say, £20 in fuel, personnel pay, and so on. If a deal was made at the £1000 price, she stood to gain around £980 after costs. Thus she could steam away without making a deal at very little loss to herself: she stood to lose only whatever marginal utility for her was in £20 plus whatever money she might have gotten out of the Port Caledonia.

On the other hand, under the conditions, the Port Caledonia would be in a very bad position if a deal were not struck. The Sarah Jolliffe's tow services were very, very valuable to the Port Caledonia in terms of marginal utility because if a deal were not struck, the Port Caledonia stood to lose many lives and much property and thus whatever marginal utility was in them for her and her crew. If a deal were struck, she stood to save all these things, but lose £1000.

As a result, the Sarah Jolliffe's captain could use his threat advantage to demand what might seem like an objectively absurd price for a tow, and he chose to do so. Like the aforementioned rich person, it is at least *prima facie* difficult to fault the tugmaster for demanding £1,000 if we consider the gains of each party relative to pre-contractual baseline. The tugmaster would argue that the marginal utility of £1,000 to himself was in fact less than the marginal utility of the Sarah Jolliffe's tow to the Port Caledonia, and that therefore the deal was fair or perhaps even favored the Port Caledonia. The Port Caledonia's loss of £1000 appears paltry next to the value of saving herself, her cargo, and her crew.

Hence the dilemma: if we wish to reject the rich person's convincing argument and analogous arguments such as that which that could be made by the tugmaster of the Sarah Jolliffe, we must either show that they do not follow from consequentialism or abandon consequentialism as intuitively implausible. However, these arguments can be plausibly rejected.

V. Wants and Needs: the Rich/Poor Case Resolved

To resolve the problem presented by the rich person/poor person case, what is needed is a richer or broader view of pre-contractual baseline that includes further morally relevant factors. Measuring gain in terms of utility, the rich person's argument in the rich person/poor person case is only convincing if we fail to look very far when we ask *why* the poor person would be more grieved to lose \$50 than the rich person would be to lose \$150. It is true that in certain terms \$50 might be as useful or more useful to the poor person as \$150 would be to the rich person, and if the split were objectively even, (i.e., if each got \$100,) the rich person could be seen as getting less marginal utility, i.e., less utility relative to her pre-contractual baseline, than the poor person, and that deal might be seen as unfairly tilted in the poor person's favor.

However, we might point out that a distinction must be made between wants and needs if we expect to come up with plausible account of marginal utility. This distinction is morally relevant because the latter are more important than the former and ought to be given greater weight. For instance, we will likely find that in many cases the marginal utilities in a \$50/\$150 rich/poor split cannot be called the same. In short, the poor person will at least have more unmet needs than the rich person and the money necessary to meet either party's needs must be considered before the marginal utility of the money insofar as it would satisfy either's wants.

Our intuitions in these matters will lead us to adopt at least the outline of what is classified as an eclectic objective list theory. Objective list theories "are usually understood as

theories which list items constituting well-being that consist neither merely in pleasurable experience nor in desire-satisfaction.”¹⁶² In other words, on these theories, there is a list of ‘good-making’ items that constitute well-being; when someone has these items, qualities, or states of affairs she has precisely what we mean when we say she has well-being. On purely objective theories, well-being is neither a hedonistic nor a subjective notion: it is not merely a state in which one’s subjective desires are satisfied, nor is it merely one in which one’s subjective experiences are pleasurable. Precisely what well-being is depends on the particular theory. For example, a theory recently developed by Thomas Hurka called perfectionism holds (roughly) that what makes something a constituent of well-being is that it perfects human nature, and ought to be pursued regardless of one’s contingent desires or inclinations.¹⁶³

On eclectic kinds of objective list theory, “‘well-being’ includes both basic needs and mere desires, but...needs have priority over mere desires.”¹⁶⁴ Although basic needs are contained in an objective list and are accounted more important than any mere desires, hedonism and subjective desire are not rejected outright as morally irrelevant.

Dale Dorsey initially approaches the distinction between desires and needs semantically, by characterizing it as one between ‘desire’ as an intentional verb and ‘need’ as non-intentional.¹⁶⁵ The difference between ‘desire’ and ‘need’ is supposed to be like the difference between ‘listen’ and ‘hear’, or the difference between ‘look’ and ‘see’.

¹⁶² Roger Crisp, *Well-Being*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2013).

¹⁶³ See *Id.* and Dale Dorsey, *Three Arguments for Perfectionism*, 44 NOÛS No. 1 60 (2010) (briefly describing Hurka’s theory. Both characterize Hurka’s theory as an objectivist theory of well-being despite Hurka’s rejection of the term ‘well-being’ as carrying a subjectivist connotation).

¹⁶⁴ James Griffin, *Well-Being: Its meaning, measurement, and moral importance* 41 (1986).

¹⁶⁵ *Id.*

Dorsey's semantic distinction is not the only way of approaching the matter. We can also proceed by giving an intuitive account of what constitutes a 'want' or desire and what constitutes a 'need'. Though a full account of that sort cannot be provided here, we can at least provide a basic account and apply it to some relatively clear cases.

Most would agree that the basics required for survival, like food, water, and shelter, could reasonably be called 'needs'. It also seems reasonable to stipulate that food, water, and shelter must be of a certain quality. It must be such that it promotes some minimum standard of health or well-being. We would not say that someone's needs are being met if he is subsisting on a diet of moldy white bread and dirty water and living in a discarded refrigerator box. Though these technically qualify as food, water, and shelter, they are inadequate. On the other hand, most would agree that many foods, kinds of water, and shelters, while they may be adequate to promote health, would not fall into the category of 'needs'. One does not need to drink only Perrier, to eat a wide variety of only scarce kinds of food from far-off sources, nor to live in a 10,000 square foot luxury home in Pacific Heights.

While there are certainly many other things that arguably fall into the category of 'wants' and perhaps some more that fall into the category of 'needs', let us try out a case using the roughly qualified list of needs we have got so far. If that the poor person in the rich person/poor person case were living like the first person we described in the preceding paragraph and the rich person were living like the second, it seems fair to say that for the poor person whose basic needs are not met, the marginal utility of any amount of money, no matter how small, is hardly comparable to the marginal utility of the same amount of money for the rich person. Until the poor person's needs are met, the marginal utility of anything that would go toward meeting those

needs is in a different class from the marginal utility of the same thing for the rich person whose needs are met.

When I say it is in a different class, I mean it is a different kind of marginal utility altogether. It is need-satisfying marginal utility as opposed to want-satisfying marginal utility. The above juxtaposition of circumstances is intended to illustrate that needs are clearly more important than wants: it would be unreasonable to refuse to agree that if \$200 in unowned money had to be divided up, to which nobody had any claim but the two people in question, someone subsisting on moldy bread scraps scavenged from garbage ought to be removed from that condition before anything at all is given to someone whose needs are met so the latter person can spend it on frivolities. The need-satisfying class of marginal utility clearly takes precedence.

So, if it takes \$50 to raise the poor person from his pre-contractual baseline to the level of his basic needs being met, we can only divide up what is left over after that to satisfy the wants for each party. The \$50 must be laid aside for the poor person's needs. That leaves the parties with \$150 to split in order to satisfy wants. In that case, perhaps a \$50-\$100 split (which is actually an even \$100-\$100 split) would be justifiable on the grounds that the poor person would get something like the same amount of pleasure from spending \$50 on wants as the rich person would get from spending \$100 on wants.

The rich person might say that, even if she concedes our point, if we have made any progress against her case at all with this distinction it has not been much. The bargain will be less lopsided but lopsided nonetheless. Someone so desperately poor would get just as much pleasure out of spending a much smaller amount, say \$25, as the rich person would get from spending \$125, and even in that assessment she is being generous. In that case, she has an apparently

plausible argument for a \$75-\$125 split. A similar objection will arise in less extreme cases of poverty and wealth, where the lopsidedness of the bargain will scale and still be lopsided.

Whether or not we can answer the rich person's first contention, viz. that as soon as both parties' needs are met a lopsided bargain can still be justifiable, will depend on further factors. We do not reject the moral significance of either party's desires altogether. However, we might, for example, extend the thought experiment chronologically and argue that if the rich person has an income that is large enough and stable enough to ensure that her needs will continue to be met in the foreseeable future and the poor person does not have such an income, then the poor person fairly ought to get as much of the \$200 as possible to ensure his needs are met for as long as possible (perhaps with the contractual stipulation that the money be spent on certain things.) Depending on the circumstances perhaps the poor person even ought to get all of it.

As for the rich person's second contention, viz. that the distinction has not resulted in much progress, if any, against the intuitive case the rich person has made: even if the reply in the preceding paragraph is rejected it seems we have made at least some significant progress. We have arguably increased the amount of money the poor person will get and thus ensured that such bargains will be at least somewhat less lopsided in a way that is morally relevant. We have at least ensured that the poor person's needs will be met before the parties' differing calibers of wants are considered. This ensures a more intuitively satisfying outcome.

To strengthen our justification for imposing Prong 2 we can rely on the wants/needs distinction in price gouging cases in general just as we did in the rich/poor case. Let us return, once again, to our friends in *The Port Caledonia*. The analogy between the rich person's argument and the hypothetical argument that could have been made by the tugmaster in *The Port Caledonia* illustrates well the relevant parallel between the two cases.

It can be safely assumed that, due to market forces, the fair market value of a tow was such that it at worst met the needs of the tugmaster, providing him enough to support himself, pay his crew reasonably, maintain his vessel, and cover other expenses like fuel (and, as we shall see, we need not even dispute that any of these are needs.) Possibly the fair market value even left him with a profit over and above what he needed. Even if somehow neither of those assumptions were true, it is difficult to believe that a price within three standard deviations of the mean for comparable services would not at least satisfy his needs.

On the other hand, the Port Caledonia's needs were dire. She not only faced the possibility of very great property loss, but even more importantly, a great many lives were at stake. Partially because I wished to adhere more or less to maritime legal tradition, the only morally relevant direct consequences I have thus far explicitly acknowledged have been money and then the marginal utility of money. However, maritime legal tradition's prohibition of considering anything other than monetary consequences is morally problematic. People's lives and limbs, at least, cannot be lightly cast aside. Most would readily agree that the need to be removed from a situation in which death is all but imminent qualifies as a need as opposed to a mere want. Thus the tow was necessary to meet an urgent need of the Port Caledonia, and had very great marginal utility for her.

It appeared earlier on in our analysis that the the tugmaster spent his threat advantage ensuring that the marginal utility to him of the money he received was something close to the marginal utility to the Port Caledonia of the tow, and perhaps even that the Port Caledonia made out on the deal. However, now that we have the wants/needs distinction in mind, it is clear that the tow, as product of the bargain, ought not be held against the Port Caledonia in the negotiations, so to speak, because it is required to meet a need that the Port Caledonia had and

the tugmaster did not have. Just as we set aside \$50 to meet needs the poor person had and the rich person did not before considering how the rest of the \$200 ought to be split up, so we must set aside the tow in *The Port Caledonia*.

The principal difference in this case is that we must allow that the tugmaster had needs which the bargain would provide something to meet, whereas the rich person's needs were already met. In other words, once his services were engaged (and even prior to the execution of the bargain due to the expense and danger of going out to the Port Caledonia in the storm,) the tugmaster's pre-contractual baseline was below the level of his needs being met. He needed something from the Port Caledonia to meet those needs. However, he did not need anything like £1000, or most likely even anything like an amount three standard deviations above the mean for comparable services, i.e., a price outside normal market range.

Nonetheless, let us assume, generously, that the bare minimum required to meet the tugmaster's needs without him making a profit was the £200 fair market value. On the other hand, we can safely assume that what was needed to meet the Port Caledonia's needs was a tow. Not until both parties' needs are met can we consider what either party fairly deserves, if anything, above and beyond whatever is necessary for meeting their needs.

We can allow without argument that the tugmaster fairly deserved to make a profit, even a healthy one, and that the Port Caledonia fairly ought to give it to him. This is compatible with the eclectic nature of our theory. However, at £1000 the tugmaster's profit would be an astronomical £800. Even if we are so magnanimous as to assume that the bare minimum for meeting the tugmaster's needs was a healthy £300, his profit of £700 would be difficult to justify. Even if we look beyond the immediate needs and means of each party, as we did in the rich person/poor person case, the Port Caledonia and co. would have to be very wealthy and the

tugmaster and co. very poor indeed for the difference in marginal utility of the money to be so great as to justify such profit. So, the bargain was unconscionable.

At least in *The Port Caledonia*, that much is clear. We shall consider the details in the next section. The significance of these arguments to price gouging in general is also clear: needs must be met before desires, and any bargain that results in one party's needs being thrust aside in the interest of the other party's desires is unconscionable. As we have seen in the course of our treatment of the rich person/poor person case and *The Port Caledonia*, marginal utilitarian views that fail to make the wants/needs distinction will come up with skewed, intuitively unacceptable answers in price gouging cases.

VI. Wants and Fair Market Value

Now that we have determined that both parties' needs ought to be met, we must consider wants. To completely capture our intuitions about price gouging contracts, a clear account of how to balance parties' wants is needed. One way of balancing the parties' wants against one another is to rely on fair market value. But what ought fair market value be? As mentioned above, we can allow that fair market value includes an amount necessary for meeting the seller's needs, and then something on top of that, namely profit. In a discussion of contracts, to claim that people's desire for profit and whatever marginal utility it provides them is morally irrelevant would be absurd. It seems fundamental to the nature of contracts that people make them with the aim of profiting, and in cultures with free market economies, we think people ought to be rewarded for their hard work and business acumen with profits.

However, we also tend to think there ought to be a limit on those profits. This is part of what is meant by the 'fair' in fair market value. Consider the diatribe given by Felix Leiter, James Bond's hard-boiled American counterpart and sidekick in Thunderball:

“The Martinis arrived. Leiter took one look at them and told the waiter to send over the barman. When the barman came, looking resentful, Leiter said, ‘My friend, I asked for a Martini and not a soused olive.’ He picked the olive out of the glass with the cocktail stick. The glass, that had been three-quarters full, was now half full. Leiter said mildly, ‘This was being done to me while the only drink you knew was milk. I’d learned the basic economics of your business by the time you’d graduated to Coca Cola. One bottle of Gordon’s Gin contains sixteen true measures – double measures that is, the only ones I drink. Cut the gin with three ounces of water and that makes it up to twenty-two. Have a jigger glass with a big steal in the bottom and a bottle of these fat olives and you’ve got around twenty-eight measures. Bottle of gin here costs only two dollars retail, let’s say around a dollar sixty wholesale. You charge eighty cents for a Martini, one dollar sixty for two. Same price as a whole bottle of gin. And with your twenty-eight measures to the bottle, you’ve still got twenty-six left. That’s a clear profit on one bottle of gin of around twenty-one dollars. Give you a dollar for the olives and the drop of vermouth and you’ve still got twenty dollars in your pocket. Now, my friend, that’s too much profit, and if I could be bothered to take this Martini to the management and then to the Tourist Board, you’d be in trouble. Be a good chap and mix us two large dry Martinis without olives and with some slices of lemon peel separate. Okay? Right, then we’re friends again.’”¹⁶⁶

Leiter’s complaint seems justified.¹⁶⁷ Though he neglects to consider labor in his calculations, he does acknowledge the bar’s overhead. He does not deny that the bar ought to make a profit on Martinis; rather, he complains that the bar is making *too much* profit on Martinis. He then points out, probably quite correctly, that if one were to complain to the authorities about such practices the barman would in fact be punished. But how much profit is fair?

VII. Further Morally Relevant Factors and Direct vs. Indirect Consequentialism

In order to balance wants, we must again expand our notion of what counts as morally relevant. Thus far it includes things required to meet people’s basic needs, like food and water (and tow services in storms), and money. However, as we have been assuming all along, most people do not desire money for its own sake. Rather, they desire it for its marginal utility. It can

¹⁶⁶ Ian Fleming, THUNDERBALL 275-76 (Thomas & Mercer ed., Oct. 2012).

¹⁶⁷ Any reader of the Bond novels will have noticed that Ian Fleming, or at least his character Bond, held many objectionable views, particularly considering women and non-whites. I do not endorse those views. However, Fleming seems to have at least gotten something quite right here.

buy us many useful things. Another way of putting this is to say that money is not an end in itself, but has what utilitarians care about: some kind of utility. Things with utility get us what is good, and what is good depends on the specific consequentialist theory. For example, hedonists would argue that the only kind of utility is pleasure or happiness. Hence on hedonistic utilitarian views the reason money is morally relevant is its utility, and it has utility in that it contributes to the satisfaction of our desires for pleasure.

We need not go so far as to endorse hedonism. As non-hedonists we can use the term ‘pleasure’ a little more loosely, and also simply say that although pleasure is a major good, at least when it comes to desires, it is not necessarily the ultimate good, even when it comes to desires. From there we will claim that money is morally relevant to most people because of its ability to get them what they need and fulfill their desires for pleasure.

The emphasis on pleasure as morally relevant but not uniquely so leaves the field open for us, as eclectic objective list theorists, to endorse many other kinds of things as morally relevant because they are desirable (or needful) without inheriting all the drawbacks of hedonism. It also allows us to balance the pleasure brought to one party by lots of money or any other want-satisfying goods against the displeasure of the other party at being price gouged.

In order to capture the full moral weight of the psychological consequences of price gouging, it will be necessary to shift our approach from a direct to an indirect consequentialist approach. In our consideration of *The Port Caledonia*, we focused only on the direct consequences of the behavior of the Sarah Jolliffe’s captain in order to determine whether that behavior was acceptable. Hence our approach was direct consequentialist. Generally speaking, direct consequentialism holds that the moral qualities (like rightness, wrongness, or

acceptability) of a thing (like an act) depend only on the direct consequences of that thing,¹⁶⁸ where the direct or immediate consequences that are morally relevant are whatever the particular direct consequentialist theory says they are. In our case, the direct consequences we considered morally relevant were those immediately bearing on the narrow list of needs and wants briefly laid out in our eclectic objective list theory.

According to indirect consequentialist approaches, the moral qualities of an act depend on consequences other than the direct or immediate ones. For example, for an indirect consequentialist approach called rule consequentialism, the moral qualities of an act do not depend on the direct consequences of any particular act, but rather on the consequences of general rules governing actions of certain kinds.¹⁶⁹

We can further divide rule consequentialism into acceptance rule consequentialism and obedience rule consequentialism, also called compliance rule consequentialism. Rules themselves are abstract entities, so strictly speaking they have no consequences. What actually has consequences is how people interact with those rules. Obedience rule consequentialists simply adopt or reject rules based on what is thought would be the result if everyone either obeyed or violated those rules. Acceptance rule consequentialists consider what would happen if everyone were permitted to do a certain act, then ask whether the act violates a rule which, if everyone accepted the rule, the consequences would be better than the consequences if everyone accepted an incompatible rule.¹⁷⁰

Significantly, acceptance rule consequentialists do not assume in their calculations that everyone will always comply with the rules. They are also particularly interested in the

¹⁶⁸ Sinnott-Armstrong, *supra*.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

consequences the acceptance of a rule will have beyond those arising from compliance with the rule. For example, the knowledge that a set of rules is generally accepted, even if not universally obeyed, might reassure people and thus contribute to happiness.¹⁷¹

For simplicity's sake, let us begin trying to capture our intuitions about unconscionability with obedience rule consequentialism. We have determined that what happened in *The Port Caledonia* offends our intuitions about fairness concerning the amount of profit made. Now we must come up with a general rule that would prohibit the Sarah Jolliffe's captain's behavior and decide what would happen if everyone obeyed it or its contrary. That is, as indirect consequentialists, we must decide what sorts of acts *in general* we find to be unconscionable under Prong 2.

The reader will perhaps be unsurprised to find that the rule we will test for prohibiting behavior like that of the Sarah Jolliffe's captain is a rule which calls for us to apply Prong 2 as a criterion for a certain kind of unconscionability called price gouging. Given that rule, the question is: what would happen if everyone violated the rule that calls for nullifying contracts that qualify as unconscionable under Prong 2? In other words, would the overall consequences be better if contracts that qualify as unconscionable under Prong 2 were never nullified than they would be if such contracts were always nullified?

We might cite negative psychological consequences when the possibility of price gouging exists. When we are price gouged or believe that we may be price gouged, our experience is polluted with fear and anger: fear of expending lots of resources or risking suffering the consequences, and anger at being price gouged. Even given certain foreknowledge that the rule that imposes Prong 2 (henceforth Rule P2) will be ignored, it is doubtful we would

¹⁷¹ Brad Hooker, *Rule Consequentialism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2011).

cheerily take being price gouged as a pleasant matter of course. We are angry and afraid when we are price gouged even when we expected it. We are particularly so when we feel we could not have been reasonably expected to predict the circumstances leading to the price gouging: we feel we are not morally blameworthy for not having been prepared. Hence we might be angry about people's flouting Rule P2 if we saw this state of affairs as, in effect, an unfair punishment. Even when we feel we could have been reasonably expected to predict extraordinary circumstances but failed to do so or did not bother to act on the prediction, most would not feel that the moral blameworthiness of these failures makes them deserve to be price gouged.

Note that while predictability of certain things and failure to predict them in fact can be exacerbating factors, our anger and fear are not necessarily functions of either. Our anger and fear will not even necessarily be anger at or fear of the extraordinary circumstances that would trigger the applicability of Prong 2. It will be anger at and fear of being price gouged. Thus it is price gouging *itself* that produces significant negative psychological consequences, and universal violation of Rule P2 would facilitate it.

Now, would the avaricious glee of sellers in this world of violation of Rule P2 offset the anger and fear of buyers? Perhaps the positive psychological consequences for sellers would tend to make the consequences in this world better by offsetting buyers' negative ones. Buyers' losses would be sellers' gains, and sellers' gains would presumably be accompanied by commensurate positive psychological consequences. On the other hand, if everyone obeyed Rule P2, the negative psychological consequences stemming directly from price gouging for buyers would be avoided, but sellers would rue not having larger supplies in certain cases.

Given this, it might be wise at this point to switch to an acceptance consequentialist approach. Of course we would need to provide sufficient legal disincentives to ensure that the

occasional disobedience of Rule P2 would be negligible. That way, we can take into account the peace of mind buyers would experience throughout their lives knowing that Rule P2 was not only universally accepted, but also would likely seldom be violated. Under these conditions it seems that buyers' peace of mind, combined with the avoidance of other negative psychological consequences for buyers thanks to Rule P2, must outweigh any occasional positive psychological consequences for price-gouging sellers if Rule P2 were violated.

It might be replied that sellers able to ignore Rule P2 would have a pleasant sense of anticipation that would offset buyers' peace of mind under Rule P2. However, it must be borne in mind that if Rule P2 were universally violated, sellers would risk being price gouged for anything they themselves needed to buy from others. It seems this must offset any positive psychological consequences from knowing that they will occasionally have opportunities to price gouge others for what they are selling.

We might also make the classic indirect consequentialist move regarding mistake. Fear and anger can lead to further negative consequences of all sorts by clouding our judgment and leading us to make unwise decisions. Furthermore, faced with hard, price gouging bargainers like the captain of the Sarah Jolliffe, parties might decline to contract based on potentially disastrous miscalculation of the risks involved in declining. For instance, had the captain of the Port Caledonia decided to decline the captain of the Sarah Jolliffe's terms and take his chances with the storm, the Port Caledonia might have ended up drifting into the Anna at great cost of property, lives, and limbs. Even if we refuse to count the loss of life and limb in our calculation in accordance with extant maritime law, we can still allow that the miscalculation could result in a huge net loss in terms of property for the Port Caledonia and a small net loss for the Sarah

Jolliffe in terms of time, trouble, fuel, whatever she stood to gain from a bargain, and so on, amounting to a very large net loss overall.

For these reasons, we can see that the consequences if everyone accepted Rule P2 would almost undoubtedly be better than the consequences if everyone violated Rule P2, i.e., if price gouging contracts were never nullified.

VIII. Further Applications of the Acceptance Rule Consequentialist Approach to Prong 2

By adopting eclectic objective list theory and acceptance rule consequentialist justification for Prong 2, have we managed to capture our intuitions about fairness in price gouging cases? In other words, can these justifications of Prong 2 show us why we ought to think of Prong 2 as a 'fair' prohibition of price gouging in general? Before declaring victory, we ought to try applying Prong 2 to some other cases which seem unlike *The Port Caledonia*.

Recall that earlier we decided that a principle that prohibits charging high prices when the buyer is under some shade of duress would not have applied to *Banaghan* because although Malaney was perhaps under some shade of duress, she was not under any pressure other than that of Banaghan's persuasiveness, which is a far cry from the position of the Port Caledonia. Thus the case did not involve price gouging in the traditional sense. However, there were unusual conditions involved. In that case, although Prong 2 itself still appears able to yield a judgment of unconscionability in *Banaghan*, we must explain how our consequentialist justification for Prong 2 covers this function of it.

To cover this function, we need only point out that *Banaghan* was a case of price gouging in every way except that it was not a case in which either party's needs seem to have been threatened, and then appeal to our argument in the previous section regarding the psychological consequences of price gouging. To flesh out the details, given our success with price gouging, it

seems best to stick with acceptance rule consequentialism and ask what the consequences would be if everyone acted like Banaghan and whether his behavior violates a rule which, if everyone accepted the rule, the consequences would be better than the consequences if everyone accepted an incompatible rule.

Banaghan took advantage of the fact that Malaney did not know the railroad was buying up a swath of property in which her house happened to be sitting in order to get her to sell the house to him at a price that, although fair under normal conditions, was almost certainly lower than what she could have bargained for with the railroad. Once again, the rule that will call for nullifying contracts under Prong 2 is Rule P2. What has changed from our earlier discussion is that we will consider a different kind of contract that is supposed to be unenforceable under Prong 2; more specifically, now we will consider whether the overall consequences will be better or worse if we never nullified contracts in which Party A takes advantage of Party B's lack of knowledge (due to unusual circumstance) in order to lowball Party B so egregiously that the price will be three standard deviations or greater below the mean market value, i.e., outside normal market range.

We will cite negative psychological consequences when the possibility of lowballing exists. When we are lowballed or believe that we may be lowballed, our experience is polluted with fear or anger: fear of potentially losing lots of resources, and anger at being lowballed after the fact. A culture of lowballing others whenever one can results in suspicion and mistrust. Even given certain foreknowledge that the rule that imposes Prong 2 (henceforth Rule P2) will be ignored, it is doubtful we would cheerily take being lowballed as a pleasant matter of course.

We are particularly angry when we feel we could not have been reasonably expected to find out about the unusual market condition. We feel we are not morally blameworthy for not

having known. Hence we might be angry about people's flouting Rule P2 if we saw this state of affairs as, in effect, an unfair punishment. Even when we feel we could have been reasonably expected to find out about the unusual market conditions but did not bother to do so, most would not feel that the moral blameworthiness of these failures necessarily makes them deserve to be lowballed.

It might be replied that buyers able to ignore Rule P2 would have a pleasant sense of anticipation that would offset sellers' peace of mind under Rule P2. However, it must be borne in mind that if Rule P2 were universally violated, buyers would risk being lowballed for anything they themselves needed to sell to others. It seems this must offset any positive psychological consequences from knowing that they will occasionally have opportunities to lowball others when they are buying. In light of this, we can see that the consequences if everyone accepted Rule P2 would likely be better than the consequences if everyone violated Rule P2, i.e., if lowballing contracts were never nullified.

It must be conceded that this sort of case has a weaker intuitive pull than those in which a party's basic needs are threatened, and as a result the above argument may be less persuasive than its counterpart. Psychological suffering over how fully one's desires will be satisfied is simply less intense than psychological suffering over whether one's needs will be met, and we are less apt to be compassionate toward the former than the latter.

This is perfectly in keeping with eclectic objective list theory. Needs are much more important than wants. However, recall that eclectic objective list theory also allows that some desires are morally relevant. To a certain extent, certain of people's desires ought to be fulfilled. A world in which people, on the whole, fulfill those desires less is worse than a world in which (all else being equal) they fulfill them more. Therefore we ought to endorse rules that produce

the latter kind of world rather than the former. If this means endorsing a rule under which we always nullify contracts in which Party A takes advantage of Party B's lack of knowledge (due to unusual circumstance) in order to lowball Party B so egregiously that the price will be three standard deviations or greater below the mean market value, then that's what we ought to do.

IX. Prong 1 and Paternalism

Under Prong 1, if set of terms X, at the time the contract was made, could have reasonably been expected to cause significant net harm to one or both parties, then set of terms X is unconscionable. Recall that one of the principal moral intuitions we relied upon in the formation of Prong 1 was Wertheimer's passing suggestion that perhaps "we would prefer that *no one* deal with consumers on terms that are likely to be harmful to them." We decided that what bothered us about some Prong 1 unconscionable bargains, like Murphy v. McNamara and Williams v. Walker-Thomas Furniture Company, was the exploitative relationships involved, where Party A exploits the fact that Party B makes an apparently free and informed but unwise decision that results in significant net harm to himself, and it could have reasonably been seen to have this result when the contract was made. Whether Party A stood to make a large profit or not, we found this unacceptable.

The intuitions driving us to apply a standard like Prong 1 to prevent and resolve these sorts of cases are decidedly paternalistic. On the one hand, we wish to rescue people from the consequences of their own mistakes, and the more egregious the consequences the more strongly we feel that they ought not to be left to suffer them. On the other hand is an element of strong distaste for people's exploitation of others' mistakes. It is not merely that Party A foolishly gambled and lost. Additionally, Party B knew or could have reasonably been expected to know that Party A would lose, and Party B used the opportunity to profit. This is contemptible and we

ought to intervene on Party A's behalf. Given that, as mentioned above, there are people with strong reservations who are likely to raise reasonable objections to the kind of paternalistic intervention called for by Prong 1, and indeed paternalism in general, it is worth taking some time to address their concerns.

Given our considerations so far, our wish to rescue people from their own mistakes is an expression of what Gerald Dworkin would call a kind of hard, narrow, welfare paternalism.¹⁷² Soft paternalism holds that paternalistic interference is justified only when it is uncertain whether a party being interfered with is acting fully voluntarily and with full knowledge. Once it has been determined that the party in question understands the consequences of her action and is acting voluntarily, further interference is not justified. On the other hand, hard paternalism holds that interference is justified, at least sometimes, whether the party understands and voluntarily decides or not.

Recall that we earlier agreed with Wertheimer's assessment that Murphy most likely did not underestimate the cost to her or vastly underestimate the value of the television and most likely bought it despite the fact that she knew she probably could not afford it. We also decided her case did not involve duress in any strong sense. We nonetheless argued for rescission on grounds of Prong 1. Prong 1 does not restrain us from interference when the parties in fact knew at the time the contract was made that net negative consequences would result from the contract for one or both of them; Prong 1 is indifferent to whether either of the parties in fact knew. In other words, even if the parties acted with full knowledge, Prong 1 may call for interference.

Furthermore, recall that I argued early in Chapter 3 that unconscionability is a problem in its own right, separate from duress. Prong 1 only concerns unconscionability in its own right. In

¹⁷² See Gerald Dworkin, *Paternalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2010) for a discussion of these kinds paternalism and their contraries.

fact, Prong 1 assumes the absence of duress, considering cases of duress to be different sorts of cases altogether and leaving justification of interference in cases of duress to other standards. So, even if duress was not present, i.e., even if the parties acted fully voluntarily, Prong 1 may call for interference. Because Prong 1 calls for interference, at least sometimes, whether the parties understand and voluntarily decide or not, it is hard as opposed to soft paternalism.

Narrow paternalism is only state coercion via legal means. Broad paternalism, on the other hand, is any kind of paternalistic action, be it perpetrated by the state, a non-state institution, or an individual. Since Prong 1 is a kind of legal coercion, i.e., it would act as a legal disincentive to enter certain kinds of contracts and provides a legal remedy when rescission of such contracts is desired, it is narrow rather than broad.

Moral paternalism is intervention intended to protect a party's moral well-being. For example, a moral paternalist might argue that prostitution ought to be prevented, regardless of how well it pays or how well prostitutes' health is protected, because prostitution corrupts people; i.e., allowing people to sell their sexual services allows them, indeed even encourages them, to be immoral, and they should not be encouraged to become immoral. Similarly, legal moralism is paternalistic legal intervention intended to prevent people from doing immoral things that degrade them. A legal moralist would argue that prostitution ought to be legally prevented not because it corrupts prostitutes, but because it is an immoral practice and it degrades prostitutes.¹⁷³

Welfare paternalism is intervention intended to protect a party's physical or psychological welfare.¹⁷⁴ It is not concerned with whether or not someone degrades himself in terms of some kind of abstract moral worth he may have, nor is it principally concerned with

¹⁷³ *Id.*

¹⁷⁴ *Id.*

whether or not allowing or encouraging an action makes him more likely to act immorally in the future. It is concerned with things that contribute or detract from physical welfare, like tangible resources, and things that make a person's life go better or worse psychologically by, e.g., contributing to happiness.

On one hand, Prong 1 is neither moral paternalist nor legal moralist, but rather pretty clearly welfare paternalist. At the core of it is a desire to protect parties from net utility losses. Cases like *Murphy* and *Williams* are particularly moving in part because the material harm would have been egregious. Both *Murphy* and *Williams* were quite poor, so the marginal utility of the money they spent and the goods they would have lost was substantial.

On the other hand, as mentioned above, part of what drives Prong 1 is our feeling that it is wrong to exploit others' mistakes for one's own gain. Recall, for example, how Judge Wright argued that Walker-Thomas, knowing full well what Williams' financial situation was, nonetheless sold her something she could not afford,¹⁷⁵ where Wright's particular attention to this fact seems to imply that Wright viewed Walker-Thomas as having hoped to profit when Williams defaulted. Given Wright's attention to the issue and the strong feelings most people have about exploitation of this kind, it seems unlikely this did not influence Wright's decision. This was not merely Wertheimer's preference that no one deal with consumers on terms likely to be harmful to them. It was a moral objection to exploitation.

X. Prong 1 and Anti-paternalism

It might be objected that this kind of paternalism is neither necessary nor morally acceptable. As for the empirical claim, among the oldest and most well-established tenets of traditional economics are that human beings are rational utility maximizers, they have stable

¹⁷⁵ *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445, 448.

preferences, and they accumulate optimal information for use in their decision making.¹⁷⁶ On this traditional view, contract law can expect people to act rationally and responsibly. The consequentialist version of the normative claim is that we ought to expect people to act rationally and responsibly because individuals will be the best judges of what will promote their own welfare and things will go best if we do not meddle.¹⁷⁷ Someone who misunderstood our own eclectic objective list theory might raise such an objection, as autonomy is often included on lists of goods by objective list theorists.¹⁷⁸ (This amounts to a misunderstanding because, as we shall see, there are things more needful than autonomy, at least under certain circumstances.)

To begin my response, I point out that there is growing consensus that the aforementioned tenets of traditional economics are fatally flawed. Citing numerous articles and studies published in journals of psychology; social psychology; economics; and law,¹⁷⁹ Christine Jolls; Cass R. Sunstein; and Richard H. Thaler argue that human beings are not fully rational utility maximizers; that they do not have stable lists of preferences; and that they do not accumulate optimal information for use in their decision making. Rather, humans exhibit *bounded* rationality and *bounded* willpower.

Bounded rationality refers to the fact that human rationality is bounded by limited brain power and time and by flawed memory. We try to mitigate the drawbacks imposed by our cognitive limitations using memory aids like lists and mental shortcuts like rules of thumb, and

¹⁷⁶ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW & ECONOMICS 13, 13-14 (Cass R. Sunstein ed., 2000).

¹⁷⁷ See *id.* at 46 (speculating that citizens, assuming they are given access to the relevant facts, are perhaps the best judges of what is best for them) and Dworkin, *supra* (speculating that it may be impossible to do good for others against their will because although doing good paternalistically is possible paternalistic efforts almost always produce more harm than good).

¹⁷⁸ See, e.g., Griffin, *supra* at 54, 58, 67, 70, 71 (making a qualified endorsement of autonomy as an important component of “the good life”).

¹⁷⁹ See Jolls et al., *supra* at 52-53 for a list of sources broken down by category and *id.* at 53-58 for a full list of sources.

to a certain extent we are successful. However, even with the aid of these techniques, and sometimes even because of them, our behavior differs in systematic, predictable ways from the unboundedly rational behavior forecasted by the traditional economic model. Our everyday judgments are biased and our actual decisions do not maximize utility.¹⁸⁰

Though not the only one, rules of thumb are a major source of bias in our actual judgments.¹⁸¹ For example, people often evaluate the frequency of a class of things or the probability of events by how easily they can bring instances or occurrences to mind. This heuristic technique is somewhat useful for assessing frequency and probability because instances of large classes of things and frequent events tend to be more easily and quickly brought to mind than smaller classes of things and less frequent events; i.e., they are more readily available to mind. For this reason Amos Tversky and Daniel Kahneman call this method of judgment the “availability” heuristic.¹⁸²

Unfortunately, reliance on the availability heuristic results in predictable biases. In support of this claim, Tversky and Kahneman cite their own experiment in which subjects were read a list of well-known persons of both sexes. Subjects were then asked to judge whether there were more men’s or women’s names on the list. Different groups of subjects heard different lists, some of which contained the names of men who were relatively more famous than the women on the list and some of which contained the names of women who were relatively more famous than the men. For every list the subjects erroneously judged that the class (in this case sex) that had

¹⁸⁰ *Id.* at 14.

¹⁸¹ *Id.* at 15.

¹⁸² Amos Tversky and Daniel Kahneman, *Judgment under uncertainty: Heuristics and biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 11 (Daniel Kahneman et al., eds., 1982).

the more relatively famous names in it was the more populous of the two classes (male and female) on the list.¹⁸³

Just as our everyday judgments are often biased, so our everyday decisions often fail to maximize utility. Manipulation of the formulation of options may result in different preferences even if the changes in the formulation of options are inconsequential, as may changes in the procedure used to elicit choices. In support of the former claim, Kahneman cites his own experiment in which people were asked to evaluate their options in the following two problems:

“Problem 1. Assume yourself richer by \$300 than you are today.
You have to choose between
a sure gain of \$100
50% chance to gain \$200 and 50% chance to gain nothing

Problem 2. Assume yourself richer by \$500 than you are today.
You have to choose between
a sure loss of \$100
50% chance to lose nothing and 50% chance to lose \$200”¹⁸⁴

Kahneman’s observations showed that people favored the ‘sure thing’ in Problem 1 and the gamble in Problem 2. However, the two problems are extensionally equivalent in terms of gains; i.e., they both offer the subject the option either to take the first choice and increase their current wealth by \$400 (\$300 + \$100 in Problem 1. and \$500 - \$100 in Problem 2.) or to take the second choice and gamble with even odds to increase their current wealth by \$300 or \$500. Despite this equivalence, subjects made different decisions when presented with each problem. Thus merely by framing the same objective outcomes in different ways, subjects could be caused to evaluate those outcomes differently. Kahneman calls this a “framing effect.”¹⁸⁵

¹⁸³ *Id.*

¹⁸⁴ Daniel Kahneman, *New Challenges to the Rationality Assumption*, in *THE RATIONAL FOUNDATIONS OF ECONOMIC BEHAVIOR: PROCEEDINGS OF THE IEA CONFERENCE HELD IN TURIN, ITALY 203, 206* (Kenneth J. Arrow et al., eds., 1996).

¹⁸⁵ *Id.*

Bounded willpower refers to the fact that humans often take actions that conflict with their own long-term interests despite the fact that they know the conflicts exist. Jolls, Sunstein, and Thaler point out that, for example, most smokers claim they would prefer not to smoke. Numerous examples of people's attempts to mitigate the negative effects of their own bounded willpower are strong testament to the general acknowledgement that human willpower is bounded: pension plans, popular support for Social Security, and Christmas Club savings arrangements which only allow withdrawal around the holidays, to name a few.¹⁸⁶

Kahneman, rather guardedly, argues that “the observed deficiencies suggest the outline of a case in favour of some paternalistic interventions, when it is plausible that the state knows more about an individual's future tastes than the individual knows presently.”¹⁸⁷ Jolls, Sunstein, and Thaler are similarly guarded in their analysis. They acknowledge that government actors, like judges and legislators, may themselves face the same cognitive limitations as the average citizen. Thus they claim that human deficiencies push “toward a sort of anti-antipaternalism – a skepticism about antipaternalism, but not an affirmative defense of paternalism.”¹⁸⁸

We can meet the consequentialist objection pretty convincingly by combining this reasonable skepticism about antipaternalism with carefully limited paternalism. Note that we cannot simply say, in the face of the consequentialist objection, that since people apparently cannot make rational choices, paternalism is justified. The core of the objection is that things will go better without paternalistic intervention. Thus we must qualify the second clause of the simple response: since people apparently cannot make rational choices, paternalism is justified *when it makes things go better*. By strictly and thoughtfully limiting the circumstances under which we

¹⁸⁶ Jolls et al., *supra* at 15.

¹⁸⁷ Kahneman, *supra* at 204-05.

¹⁸⁸ Jolls et al., *supra* at 46-47.

allow paternalistic intervention, we can sharply reduce the likelihood of mucking things up despite our good intentions.

A different version of the same normative worry might be expressed from a Kantian perspective. The claim would be that paternalistic intervention of the kind we have proposed amounts to treating people as mere means to their own good as opposed to ends in themselves, which on a certain strict reading would be a violation of the humanity formulation of the categorical imperative.¹⁸⁹ The humanity formulation occurs in the final sentence of the following excerpt from Kant's *Groundwork of the metaphysics of Morals*:

“If...there is to be a supreme practical principle and, with regard to the human will, a categorical imperative, it must be such that, from the representation of what is necessarily and end for everyone, because it is an *end in itself*, it constitutes an *objective* principle of the will, and hence can serve as a universal practical law. The ground of this principle is: *a rational nature exists as an end in itself*. That is how a human being by necessity represents his own existence; to that extent it is thus a *subjective* principle of human actions. But every other rational being also represents its existence this way, as a consequence of just the same rational ground that also holds for me, thus it is at the same time an objective principle from which, as a supreme practical ground, it must be possible to derive all laws of the will. The practical imperative will thus be the following: *So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means.*”¹⁹⁰

In other words (*briefly*), for the human will, it is a categorical imperative that humanity must never be used merely as a means to some other end, but rather also as an end in itself. According to Christine Korsgaard, by humanity Kant means our rational nature's capacity to propose ends to itself. The capacity to set ends according to reason rather than instinct is what sets us apart from other animals.¹⁹¹ The basis of this principle is that a rational nature is *necessarily* and end

¹⁸⁹ See, e.g., Dworkin, *supra* (speculating that it may be impossible to do good for others against their will because acting paternalistically is immoral from a Kantian standpoint regardless of outcome).

¹⁹⁰ Immanuel Kant, *Groundwork of the Metaphysics of Morals* 87 (Mary Gregor and Jens Timmermann eds. and trans., A German-English Edition, Cambridge Univ. Press 2011) (1786).

¹⁹¹ Christine Korsgaard, *CREATING THE KINGDOM OF ENDS* 110-11 (1996).

in itself, which is objectively true in virtue of the fact that every rational being necessarily represents its existence to itself in this way.

On Korsgaard's reading, whether an agent makes a decision in pursuit of an end that is morally obligatory or whether the end is set because of mere inclination or passion, "it is the capacity for rational determination of ends in general...that the Formula of Humanity orders us to cherish unconditionally."¹⁹² On Dworkin's reading, "[t]o deny...adult[s] the right to make their own decisions, however mistaken from some standpoint they are, is to treat them as simply means to their own good, rather than ends in themselves."¹⁹³ In sum, to intervene paternalistically is to fail to respect a human being's capacity for rationality as an end in itself. It is sacred and to be nourished. The humanity formulation of the categorical imperative forbids violation of it unconditionally.

This is merely a snapshot; the philosophy of Kant that bears on paternalism is broad and subtle. Fortunately, our particular anti-paternalist response does not require us to attempt to do Kant's work full justice here. That response is that Kant, or at least Kantians who share Dworkin's strict anti-paternalist interpretation of Kant, is or are simply misguided.

As Joel Feinberg has pointed out, an absolute prohibition of paternalism would be contrary to intuition, custom, and law. In most states, a victim's uncoerced consent is not a defense against the charge of homicide; no one may permit anyone to consent to her own killing.¹⁹⁴ Contract law refuses to recognize contracts in which one consents to sell oneself into slavery or to become a second wife. The purchase and use of certain drugs are prohibited without

¹⁹² *Id.*

¹⁹³ Dworkin, *supra*.

¹⁹⁴ *But see, e.g.,* OR. REV. STAT. § 127-805 (2011) (allowing that a "capable" adult resident of Oregon, under certain narrowly defined circumstances, may make a written request of the state "for medication for the purpose of ending his or her life in a humane and dignified manner").

the permission of a physician, and the purchase and use of other drugs is prohibited entirely. The rationale behind these prohibitions is that death, slavery, bigamy, and narcotics are always bad for people whether they know it or not,¹⁹⁵ and this is sufficient justification for paternalistic intervention in such matters.

In harmony with intuition, custom, and law, Kant himself argues on the very same page on which he presents the humanity formulation that “self-murder” is inconsistent with the idea of humanity as an end in itself. To murder oneself is to make use of a person “merely as a *means*, to preserving a bearable condition up to the end of life.” “Thus,” Kant argues, “the human being in my own person is not at my disposal, so as to maim, to corrupt, or to kill him.”¹⁹⁶ I tentatively suggest that we could take this (and perhaps some other passages) to mean that Kant might permit paternalistic intervention in certain cases, such as one in which a person is trying to commit suicide or “maim” or “corrupt” herself, on grounds of the categorical imperative: depending on the circumstances,¹⁹⁷ in preventing her from doing these things we could be preventing her from using herself as mere means, and in so doing we could be treating her humanity as an end in itself.

These replies aside, the reasonable paternalist must admit that the strict interpreter is on to something. In liberal democracies we do oppose excessive paternalism; however, certain things are so bad for people that their badness overrides the compunctions we tend to have about paternalism. Although his work against paternalism is misguided, the Kantian is only misguided in that he goes too far. Unfortunately, as Feinberg also points out, finding the appropriate limits

¹⁹⁵ Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. OF PHIL. No. 1 105, 105 (Sept. 1971).

¹⁹⁶ Kant, *supra*.

¹⁹⁷ *Cf. id* (where Kant qualifies his remark about self-maiming, corruption, and killing by saying “I must here pass over the closer determination of this principle, needed to avoid any misunderstanding, e.g. of amputating limbs to preserve myself, of putting my life in danger to preserve my life, etc.; that belongs to actual moral science.”)

is tricky.¹⁹⁸ Therefore, just as fully answering the consequentialist version of this objection will require normative development that sets limits on paternalistic intervention via contract law, so will fully answering the Kantian version of the objection.

XI. Prong 1, Consequentialism, and Reasonable Expectations

In general, taking into account consequences that a reasonable person could be expected to anticipate appears to be intuitively acceptable. No form of consequentialism that takes into account what consequences could reasonably have been expected will condone bargains that can reasonably be expected to cause net harm to everyone. However, the issue of anticipation of future consequences has long been a bugbear for consequentialism. A classic epistemological objection points out that it is absurd to expect actual, fallible moral agents to predict future consequences even within a narrow scope in order to calculate the consequences of the choices they have available to them.

This objection is most often raised against direct forms of consequentialism. However, a similar objection applies to indirect forms of consequentialism, including our own acceptance rule consequentialism. Rule consequentialism mitigates the problem by allowing agents to rely on thoughtfully crafted general rules rather than making on-the-fly calculations in every situation. However, someone must make the rules and agents must make decisions about which rules to apply. Both will require some measure of foresight. It might be objected that fallible moral agents, including rule-makers, cannot be expected to successfully make the predictions necessary to create or apply rules that will result in the best consequences.

The reader has most likely noticed that this objection is closely related to the consequentialist anti-paternalist objection discussed above. In fact, it might be fairly called a narrower, simpler version of the same objection. Fortunately for us, there are some plausible

¹⁹⁸ Feinberg, *supra* at 106.

answers to these kinds of objections dating back at least to Jeremy Bentham's work – answers that take us some way toward answering even the more complex anti-paternalist version of the objection presented above.

J.S. Mill appeals to experience, writing that

“[i]t is truly a whimsical supposition that, if mankind were to agree in considering utility to be the test of morality, they would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young and enforced by law and opinion. There is no difficulty in proving any ethical standard whatever to work ill if we suppose universal idiocy to be conjoined with it; but on any hypothesis short of that, mankind must by this time have acquired positive beliefs as to the effects of some actions....”¹⁹⁹

In other words, it is by no means absurd for even direct consequentialists to expect people to do what they in fact do every day in their decision making processes, moral or otherwise, viz., to rely on their experience. Even if they will not always be right, it does not seem unreasonable to expect moral agents to be able to make certain more or less accurate predictions under normal circumstances.

On its face, this reply actually seems to work in the anti-paternalists' favor. An anti-paternalist might argue that Mill is claiming that the average person can simply rely on her experience and, even if she is sometimes wrong, she can still come up with the right answers often enough. From there, we might argue that she will be the best judge of what will promote her own welfare.

However, Mill claims nothing of the sort. He claims it is absurd to suggest that we should fail utterly, with the benefit of experience, *to reach agreement together* about what is useful and what the effects of some actions tend to be, and that once we have reached agreement, it would be absurd to claim that we would be unable to create utility by teaching our “notions on the

¹⁹⁹ John Stuart Mill, *Utilitarianism* 24 (George Sher, ed., Hackett Publishing Co., 2nd ed. 2001)(1861).

subject” (or creating rules, for that matter) to the young and *codifying them in the law*. This is far from an individualistic, anti-paternalistic claim.

On the other hand, Bentham’s reply to the epistemological objection would most likely be that it is simply misguided. Bentham insists of his version of utilitarian calculus that it

“is not to be expected that this process should be strictly pursued previously to every moral judgment, or to every legislative or judicial operation. It may, however, be always kept in view: and as near as the process actually pursued on these occasions approaches it, so near will such process approach to the character of an exact one.”²⁰⁰

That is, although it may be better in terms of our consequentialist intentions if they are, consequentialist calculations need not always be carefully parsed out (and therefore consequences need not always be perfectly anticipated); rather, we may always make our decisions with the consequences borne in mind and still achieve something like the desired consequences.

Bentham’s reply is also readily adaptable for use in defense of rule consequentialism. Although things may go better if we do, we need not have a rule prepared for every sort of moral judgment, legislative operation, or judicial operation. (Even if the rules were general, that would be difficult or impossible anyway.) We need not even apply particular consequentialist rules every time we make a moral judgment, legislate, or make a judicial decision. Therefore, we need not parse out every calculation and we need not perfectly anticipate every consequence. Rather, if we always at least bear the rules in mind we will still achieve something like the desired consequences.

Note that Bentham’s reply is not anti-paternalist, either. Bentham implies consequentialism can be employed at least approximately successfully by legislators and judges,

²⁰⁰ Jeremy Bentham, *An Introduction to The Principles of Morals and Legislation* 30 (Hafner Publishing Co., 1948)(1789).

who make and interpret the laws that govern people. Nothing in his reply rules out approximately successful paternalistic employment of consequentialism by legislators and judges.

However, the maker of the consequentialist anti-paternalist objection might reply that Bentham's approximate success and Mill's more or less accurate predictions by paternalist actors may not be enough, in every kind of case, to produce better consequences than leaving people to their own devices. Given that we have already restricted our endorsement of paternalistic intervention to certain kinds of cases in a single area of law, this is a weak reply. However, it is not entirely unreasonable. Thus although the purely epistemological objection is satisfactorily answered by Bentham's and Mill's replies when paternalism is kept out of the question, once again we find that careful limitations on paternalistic intervention in contract law will be useful for answering the anti-paternalist fully.

XII. Two Further Problems for Prong 1

Prong 1 covers two kinds of bargains: those which could have reasonably been expected to cause significant net harm to both parties and those which could have reasonably been expected to cause significant net harm to one party. Let us begin with the former.

There are four possible kinds of such cases: the parties fail to anticipate negative net consequences that both ultimately suffer as a result of the bargain and both parties wish to rescind, the parties fail to anticipate negative net consequences both ultimately suffer and one wishes to rescind while the other refuses, the parties anticipate negative net consequences for both of them and make the bargain anyway but later both parties wish to rescind, and the parties anticipate negative net consequences for both of them and make the bargain anyway but later one party wishes to rescind and the other refuses.

We can lay aside both kinds of cases in which both parties are willing to rescind. No legal intervention relevant to our interests would be required in such cases. It seems very unlikely that after two parties knowingly and expectantly enter into a mutually net harmful bargain, one would wish to rescind and the other would refuse to allow it, requiring legal intervention; however, it is not impossible that this situation should arise. Therefore, we must consider it. It seems more likely, though not much, that two reasonable parties to a bargain would fail to see that both would suffer net consequences even where they could have reasonably been expected to anticipate them and only one would wish to rescind and the other would refuse. We must consider this possibility, as well.

Intuitively, there appear to be few good reasons to prevent one party from rescinding against the wishes of the other party when both parties would otherwise suffer significant net harm. We might consider both parties foolish and censure them accordingly, but it does not seem right to force either to remain in a position in which she will suffer significant net harm, and the fact that both parties would suffer significant net harm makes this a somewhat easier decision than that in a case in which only the party desiring rescission would suffer significant net harm. At least *prima facie*, no consequentialist theory would enjoin one or both parties from rescinding if the result would be the avoidance of net harm to both parties (as it appears it would be, in such cases.)

However, a closer look reveals two potential problems. First, it might be objected that allowing foolish parties to rescind whenever they like would lead to people making contracts carelessly. Though the courts would be able to allow contracting parties to avoid most of the harm of carelessly made contracts, it seems unlikely they could undo or allow the parties to

avoid all of it. Thus a culture of irresponsibility with regard to contractual obligations is not desirable from a consequentialist standpoint.

Second, there is a serious danger of defeating the purpose of making many kinds of contracts altogether. As a result of the difficulty of predicting the future in many cases, contracts inherently involve risks. Often, as a consideration for a contract, parties even explicitly agree to undertake some detriment, as forbearance, loss, responsibility or other prejudice.²⁰¹ This is a fundamental part of what it means to make a contract. Allowing a party to rescind at any time against the wishes of the other contracting party simply because they could reasonably have been expected to anticipate significant net harm at the time the contract was made would mean that in such cases, in effect, there would be no contract. Though perhaps net outcomes might be better in certain cases by allowing this, it may not be worth the cost, viz, weakening the institution of contracting itself.

Both these problems are shared by our approach to the latter kind of bargain, viz. those which could have reasonably been expected to cause significant net harm to only one party. As we have frequently seen, significant net harm to Party A to a contract does not necessarily mean net harm overall; Party B's gains might offset Party A's losses. According to Prong 1, a contract made with the reasonable expectation of significant net harm to *either* party is unconscionable, regardless of the other party's gains. These kinds of cases might be seen as even worse than those in which both parties are harmed because not only are we encouraging irresponsibility and undermining the institution of contracts, we are additionally depriving one of the parties of some net benefit.

²⁰¹ *Detriment Definition*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969), available at LexisNexis Legal Dictionaries.

Hence our normative approach will need to avoid the problems of encouraging irresponsibility with regard to contractual obligations and also avoid undermining the institution of contracts itself by rendering contracts unenforceable in many cases, and it will need to take into account contracts in which both parties are harmed and those in which only one party is harmed.

XIII. Finishing Off the Objections

Before we begin, let us take stock. In the preceding few sections, we have discussed five objections to paternalism in general or the kind of paternalistic intervention permitted under Prong 1. They are, in no particular order, those concerning a culture of irresponsibility with regard to contractual obligations, those concerning undermining the institution of contracts, those concerning reasonable expectations, those concerning the fallibility of government actors, and the Kantian prohibition. Some of these overlap; e.g., the fallibility of government actors stems, in part, from their presumed inability to do better than approximating the consequences they intend because they cannot predict the future perfectly. We have provided at least partial answers to most of these objections, but we decided in all cases that it would be necessary to place limits on the kinds of cases to which Prong 1 can be applied in order to mitigate or further mitigate the problems raised by the anti-paternalist.

Limiting paternalistic intervention in contracts is a fairly simple affair for eclectic objective list theory: Even if we allow that autonomy is at least an important desire, we can allow paternalistic intervention when a party's needs go unfulfilled or are threatened by the terms of a contract. Even if we go further, and allow that autonomy falls into the category of needs, as some objective list theorists do, we will argue that it must be balanced against other more pressing needs. Thus on a version of our theory that classifies autonomy as a mere desire, we will qualify

the significant net harm criterion of Prong 1 so that paternalistic intervention is only acceptable when one party suffered or would suffer so much net harm generally, or sufficient net harm of a particular kind, that the party's needs went or are in danger of going unmet. On the stricter version, according to which autonomy is a need, we will qualify the net harm criterion of Prong 1 so that paternalistic intervention is only acceptable when one party suffered or would suffer so much net harm generally, or sufficient net harm of a particular kind, that the party's basic or essential needs, like food, water, or shelter, went or are in danger of going unmet.

The latter, stricter version actually seems to fit our intuitions better. It does not seem absurd to claim that autonomy is good because allowing people to make their own decision generally makes things go better than they would with bungling government actors interfering all the time. Some of us might even wish to go so far as the prudential perfectionist James Griffin and claim that autonomy is valuable in any life, and is actually one of the ends of human life.²⁰² Most would not go so far as the Kantian, and claim that it is absolutely inviolable (Griffin does not even go so far.) Rather, most would agree that when more fundamental needs are threatened they will, at least in some cases, outweigh autonomy, and that we ought to intervene in such cases when we are reasonably certain we can improve matters.

Obviously the Kantian will not be satisfied with this limit. However, in light of the fact that people can make mistakes and harm themselves quite seriously sometimes, most would agree that this limit appropriately balances our intuitions about autonomy and self-harm: there is a healthy respect for human autonomy, but, on the other hand, we do not leave people to terrible fates as a result of their contractual mistakes.

This limit, combined with the *post hoc* nature of the intervention Prong 1 calls for, will also mitigate the effects of the fallibility of government actors stemming from their presumed

²⁰² Griffin, *supra* at 70.

inability to do better than approximating the consequences they intend. It is not as if officials will be patrolling around stopping people from making contracts because the officials anticipate that the contracts will turn out to be harmful. Contractors are left to make their own decisions based on their own predictions. Furthermore, intervention may occur only after a contract has already proven harmful. Where the starting point is grave demonstrable harm, if government actors can manage to at least approximate their intended consequences then at least one contractor will be acceptably better off and the other, at worst, will not be harmed too greatly.

Recall that earlier we decided that allowing a party to rescind at any time against the wishes of the other contracting party simply because one or both of them could reasonably have been expected to anticipate significant net harm at the time the contract was made would mean that in such cases, in effect, there would be no contract. Because parties' explicit agreement to undertake some detriment as a consideration for a contract is a fundamental part of what it means to make a contract, the institution of contracts was said to be undermined.

However, with our limit on intervention, this is not the case. We will not nullify contracts merely because they cause a bit of net harm and could reasonably have been expected to cause a bit of net harm at the time they were made. They must cause very serious net harm to a party – net harm that threatens the fulfillment of a party's basic needs. We permit them to gamble with their own well-being and to exchange things they desire, even to their own detriment. But when their gambles or exchanges cost them more than mere pleasure or other merely desirable things, we are willing to step in. Thus the relevant fundamental aspect of contract-making is preserved, but with a limit placed on it.

Similar arguments will help meet the irresponsibility objection. Under Prong 1 it would not be the case that parties could obtain rescission for just any old loss. The only safeguard is

against their harming themselves very seriously. They will still be held to their agreements and be made to suffer many kinds of losses as a result of their mistakes. Even those willing to take very dangerous risks would have to bear in mind that they would need to convince the court that they had suffered grave net harm and thus face the possibility of failing to do so, either because they were not in fact harmed quite seriously enough or because they are unable to make a convincing case. Thus there is still sufficient deterrent of cavalier contract behavior.

XIV. Final Case Analysis

Let us see whether our concessions to anti-paternalism match our earlier intuitions in some of the test cases where we found unconscionability. Recall that Ora Lee Williams of *Williams v. Walker-Thomas Furniture Company* was supporting herself and her seven children on a welfare stipend of \$218 per month, and that when she defaulted on her monthly payments to Walker-Thomas, Walker-Thomas sought to repossess not only the \$515 stereo set, but also all of the \$1,800 in merchandise Williams had paid Walker-Thomas about \$1,400 for over the course of about seven years. Thus Williams's net losses amounted to about \$1,400 and all of the furniture she got from Walker-Thomas.

Let us generously ignore Judge Wright's surmise that Williams did not understand the terms. We shall assume that she did. Then the question is simple. Were Williams's net losses so great that they threatened her basic needs to such an extent that the undoing of her autonomously made decision was warranted in order to save her from those losses?

Yes. In 1964, Williams's annual income of \$2,616 had a buying power equivalent to the buying power of about \$19,622 in 2013.²⁰³ Even assuming she spent no money at all on anything other than basic needs, it is difficult to imagine she could have adequately met all the

²⁰³ CPI Inflation Calculator, UNITED STATES DEP'T OF LABOR BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited June 1, 2013).

basic needs of herself and her seven children with only \$2,616 per year. In that case she was foolish to spend so much on furniture. So, the primary reason the bargain was unconscionable was that Walker-Thomas extended her credit for buying things like a \$515 stereo set that she did not need. As a result of the contract, Williams experienced significant net harm that threatened her ability to fulfill her basic needs. Walker-Thomas allowed her, to her own detriment, to give up \$1,400 (~\$10,501 in 2013²⁰⁴) and all the potentially need-satisfying marginal utility it had.

Note that we are again being generous to opponents by allowing here that Williams did not need the furniture. Under the contract terms, when she defaulted she would not merely have lost the furniture. She would have lost the \$1,400 she gave in exchange for the furniture and would have had no furniture to show for it. \$1,400 is quite a lot of money for someone who must meet her basic needs and those of her seven children with \$218 per month. Over the course of seven years she paid, on average, \$200 per year for the furniture. That is, on average, a loss of about 1/13 of her annual income, only \$18 short of an entire month's income, every year for seven years.

Walker-Thomas's repossession of the furniture would have effectively increased the price of the furniture greatly. Williams's losses in terms of dollars would have been effectively close to double the total value of the furniture minus whatever depreciation had occurred. The depreciated value must have been significant or it is doubtful Walker-Thomas would have bothered to try repossessing all of it. It may seem strange to treat Williams's losses this way, i.e., to combine her losses on the furniture terms dollars and the money she actually spent. However, consider that the value of the furniture was not necessarily merely a want-satisfying value. Had Williams at some point realized her mistake or suddenly found herself in very dire straits, she could have sold some or all of the furniture and used the money for food, utility bills, etc. The

²⁰⁴ *Id.*

terms of the contract would have deprived her of the \$1,400 (which was wrong to begin with) *and* of the furniture, which would have deprived her of the furniture's monetary value, which would have deprived her of the opportunity just mentioned. Even if extending her so much credit was not unconscionable in itself, the combination of that and the terms that allowed Walker-Thomas to repossess the furniture certainly was.

The unconscionability of such a combination of factors is perhaps why, as Judge Berdon pointed out, “[t]he federal trade commission has held that the representation of ‘easy credit’ to a consumer with unequal bargaining power and the charging of an unconscionable price for the item constitute an unfair trade practice.”²⁰⁵ In the opinion in *Tashof v. F.T.C.*, to which Berdon refers, Judge Bazelon wrote for the majority that

“[i]t is clear that the main charge [against the appellant merchant] is misrepresentation by the term ‘easy credit,’ not, as NYJC [the appellant merchant] has urged throughout the course of proceedings, unconscionably high prices per se. High prices were but one of the two independent grounds said [by F.T.C.] to make the representation deceptive. The other was NYJC’s collection policies.”²⁰⁶

There are strong analogies between *Williams v. Walker-Thomas* and *Tashof v. F.T.C.* If we allow repossession to stand in for the wage garnishment²⁰⁷ and higher than prevailing prices²⁰⁸ as the unconscionable price to which the above quotation refers, we can see that what the F.T.C. and the majority in *Tashof v. F.T.C.* really wished to prohibit, at bottom, was poor customers being extended credit and thus being allowed to foolishly harm themselves by agreeing to pay amounts they could not afford. The labeling of NYJC’s practices as “deceptive” is irrelevant; what clearly matters is the harm the deceptiveness caused.

²⁰⁵ *Murphy v. McNamara*, 416 A.2d 170, 175.

²⁰⁶ *Tashof v. F.T.C.*, 437 F.2d 707, 712.

²⁰⁷ *Id.* at 711

²⁰⁸ *Id.* at 710

The circumstances of Carolyn Murphy of *Murphy v. McNamara* were similar to Williams's. Murphy was a mother of four children and was poor enough to receive welfare. She too was extended 'easy' credit she ought not have been offered, and she also faced repossession despite the fact that she had already paid \$436, only \$63 short of the \$499 prevailing retail price and over 1/3 the contract price. Furthermore, the contract called for her to pay a price much higher than the prevailing price for the television: \$1268 total. Hence the extension of credit to her for that purchase price would have caused her unconscionable harm to begin with, and the terms that allowed McNamara to repossess the television so that Murphy lost that and the \$436 she had already paid only made matters worse.

Recall that in his opinion in *Henningsen v. Bloomfield Motors*, Judge Francis argued that the ordinary person cannot be expected to have the knowledge, capacity, or even the opportunity to make adequate inspection of "mechanical instrumentalities" in order to decide whether something like a car is reasonably fit for the intended purpose, and that as such, ordinary consumers have no choice but to rely on the warranties of the manufacturers. What is it that Francis thought ordinary consumers had no choice but to rely on manufacturers for? What is the moral relevance of something like a car being reasonably fit for its intended purpose?

It is morally relevant that something like a car be *safe* to operate, and given the complexity of such machines, ordinary consumers have no choice but to rely on manufacturers to ensure that cars are safe to operate. According to our theory, the needs of the ordinary consumer for safety and survival are more important than the desire of the automobile manufacturers to save money.

Contractual terms that allow manufacturers to abandon their obligation to ensure that cars are safe to operate can reasonably be expected to endanger the lives and limbs of ordinary

consumers. First of all, without such an obligation hanging over them, manufacturers would have little incentive to protect ordinary consumers' safety by spending money on quality control.

Second, even if lack of quality control would not be epidemic without such an obligation, in an era in which a serious injury can result in a lifetime of crushing medical bills, consumers' basic needs are still endangered. Automobile manufacturers are in much better financial positions than most consumers to afford the medical care necessary after serious injuries.

Note that these are not vague claims that such terms are contrary to 'public policy'. That is, we do not, e.g., obscurely appeal to "society's interests" (whatever they are) as Francis did in his opinion on *Henningsen*,²⁰⁹ or, more generally, simply claim that "a person should not be allowed to do anything that would tend to injure the public at large."²¹⁰ Rather, we compare what can be reasonably expected to be the net losses of one class of party to what can reasonably be expected to be the net losses of another class of party and conclude that one class of party will experience unconscionable net losses according to a narrow definition of unconscionable net losses that is different from 'public policy'. Pointing out the fact that we apply it to classes of parties is a red herring, so to speak: the principle we rely on can also be plausibly applied to many other kinds of cases involving other kinds of parties. It is *the* principle of unconscionability.

The reader may already have noticed that in order to fully adequately test our theory in cases like Gianni v. Gantos, in which both entities involved are entities other than individuals, a plausible list of wants and needs must be developed for other kinds of legal entities, e.g., corporations (Gianni Sport, Ltd. and Gantos, Inc.). It would be impractical to attempt such an

²⁰⁹ *Henningsen*, *supra* at 80.

²¹⁰ BLACK'S LAW DICTIONARY, *supra* at 1351.

undertaking here. However, in the interest of giving a plausible account of *Gianni*, let us briefly discuss corporations.

According to American Jurisprudence, “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. As a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence,” which may include “the power to sue or be sued in the corporate name,” among other things.²¹¹ American Jurisprudence further informs that a “corporation’s declared objects and purposes are determinative [of the corporation’s nature and status].”²¹²

The charters of Gianni, Ltd. and Gantos, Inc. are unavailable. However, we can infer the basic facts about them that will be necessary for our analysis. Given their legal status, we will find that it is not unreasonable from a legal standpoint to treat them as entities with desires and needs analogous to those of an individual human being.

As Gantos was sued in its corporate name in *Gianni*, its charter obviously contained the necessary content for it to be treated as an individual for such purposes. Likewise, as Gianni sued in its corporate name, its charter obviously contained the necessary content for it to be treated as an individual for such purposes. Given the nature of most private corporations, that Gantos, Inc. tried to defend itself against the financial losses that it was facing, and that Gianni, Ltd. sued over its financial losses, we can reasonably infer that both corporations’ charter provided, implicitly or explicitly, that Gantos, Inc. and Gianni, Ltd. were money-making entities by nature and that making money was at least incidental to their very existence. In fact it was probably essential: in the face of serious financial losses, they would be dismantled and cease to exist.

²¹¹ 18 AM. JUR. 2D *CORPORATIONS* § 1 (2012).

²¹² *Id.*

Another way of saying that money was “essential to their very existence” is to say that they *needed* money. In that case, terms that allowed Gantos to effectively deprive Gianni of twenty to twenty-two percent of its business for the year for the purposes of saving Gantos (a corporation with a cash flow twenty times larger than Gianni’s) only so Gantos could save a small portion of its money, or even without any reason at all, were unconscionable by our normative standard: it could reasonably have been expected, at the time the contract was made, that such terms could threaten Gianni’s very existence. On the other hand, the clause did not threaten Gantos at all, but rather allowed Gantos to threaten Gianni’s existence in the interest of Gantos’s desires.

Now, legal status aside, the reader might find it odd from a moral standpoint to consider corporations’ needs for money morally relevant. However, it must be borne in mind that corporations are made up of people, many of whom rely on the corporations for their livelihoods. People’s livelihoods *are* morally relevant. The financial losses of a corporation are particularly morally relevant to employees near the bottom of the corporation, who depend on the corporation entirely for their income; it is these people to whom, from a moral standpoint, clauses like the cancellation clause in Gianni’s contract with Gantos are unconscionably dangerous.

Conclusion

Have we accomplished the goals we set out in the beginning of this work? That is, have we answered the hard questions of what is wrong with unconscionable contracts and how intervening in them is justifiable? Have we provided a unified theory of and test for unconscionability that distill and then synthesize views of unconscionability in statutory law and case law, make sense of the disagreement in case law and the legal literature, and avoid the shortcomings of other theories in the legal literature?

We have. Unconscionability is about balancing desires and protecting vital needs. Paternalistic intervention in unconscionable contracts is only justified when people make free and informed mistakes that endanger their welfare greatly, and when we are not rescuing people from their own mistakes but rather from being price gouged, intervention is justified only because the consequences of failing to prevent price gouging are so much worse than allowing it.

Thanks to our efforts to ferret out the subtle common undercurrents in case law and our careful analysis of U.C.C. § 2-302, we have been able to produce a theory that captures what is essential in both case and statutory law and a test that is consistent with the conclusions rendered by both despite their apparent (and sometimes real) contradictions of one another. We have avoided the shortcomings of Wertheimer's and Quraishi's theories by, among other things, explaining threat advantage; mitigating the threats of paternalism; solving the apparent paradoxes stemming from subjective utilitarian measurement of gains; and creating a broad, robustly developed version of the pre-contractual baseline view. We have, in short, developed a clear, consistent, practical, normatively unified theory of unconscionability.