COMMENTS

From a Gasp to a Gamble: A Proposed Test for Unconscionability

INTRODUCTION

> Do not devour one another's possessions wrongfully—not even by way of trade based on mutual agreement—and do not destroy one another.[1]

These words articulate the moral principle behind the American contract law doctrine of unconscionability, which empowers courts to invalidate oppressive or unfair agreements.[2] Yet this particular quotation comes not from an Anglo-American source, but rather from Islam.[3] The Islamic description of fair dealings between parties offers more than just an illustration of common

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[1] THE MESSAGE OF THE QURAN, 4:29 at 108 (Muhammad Asad trans., 1984 ed.) (footnote omitted).

[2] U.C.C. § 2-302 cmt. 1 (1990). This section of the Uniform Commercial Code enables courts to alter or to refuse to enforce a contract which they find unconscionable. U.C.C. § 2-302(1) (1990). The doctrine's purpose is "the prevention of oppression and unfair surprise." U.C.C. § 2-302 cmt. 1 (1990).

[3] Islamic law, the legal system based on the religion of Islam, for the most part draws on and interprets the *Quran* (the holy book of Islam) and *Sunnah* (the teachings of Prophet Muhammad). SOBHI R. MAHMASSANI, THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM 6-8 (Farhat J. Ziadeh trans., 1987); *see also* ABUL A'LA MAUDUDI, ISLAMIC LAW AND CONSTITUTION 60-62 (Khurshid Ahmad trans. & ed., 3d ed. 1967) (discussing unalterable elements of Islamic law). The quoted verse comes from the Quran. THE MESSAGE OF THE QURAN, *supra* note 1. Muslims consider the Quran the word of God, as revealed through his last prophet, Muhammad. MAHMASSANI, *supra*, at 9.

ground between Islamic law and Western common law.[4] An understanding of both legal systems can provide scholars of the East and West[5] with new perspectives on their own law and provoke improvements in each.[6] This Comment proposes a test that would aid scholars of both American and Islamic legal systems in developing a more precise doctrine of unconscionability.[7]

The common law concept of unconscionability first appeared in the common-law courts of equity,[8] and their refusal to enforce oppressive and harsh bargains.[9] As the common law developed, this goal of preventing oppressive bargains eventually appeared in section 2-302 of the Uniform Commercial Code (U.C.C.), which formalized the doctrine of unconscionability and applied it

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[4] *See* John Makdisi, *An Inquiry into Islamic Influences During the Formative Period of the Common Law*, *in* ISLAMIC LAW AND JURISPRUDENCE 135 (Nicholas Heer ed., 1990) (discussing significant influence of Islam on development of Western law and social structures); *see also* GEORGE MAKDISI, THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST (1981) (discussing history of Islamic educational institutions and noting parallels with those developed later in Christian West).

[5] Because this Comment is written for an American legal audience, it focuses on improving the American unconscionability doctrine. *See infra* notes 185-91 and accompanying text. Although it would be inappropriate here to also propose potential improvements in Islamic law, the limited audience does not prevent intellectual suggestions that Islamic law borrow and incorporate American legal concepts to benefit Islamic jurisprudence. *See infra* notes 6-7 and accompanying text.

[6] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 6-7 (1974) (arguing that comparing different legal systems helps us understand the nature of law). The benefits of comparative law are not new to the doctrine of unconscionability: evidence indicates that the American unconscionability doctrine was itself borrowed originally from Germany. JOHN H. JACKSON, CONTRACT LAW IN MODERN SOCIETY: CASES AND MATERIALS ON LAW OF CONTRACTS, SALES AND LEGAL METHODOLOGY 931-32 (1973); Dando B. Cellini & Barry L. Wertz, Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 195 (1967) (discussing French and German doctrines of unconscionability); James Whitman, Note, *Commercial Law and the American* Volk: *A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987) (discussing the German influences on Karl Llewellyn, the principle author of the Uniform Commercial Code).

[7] *See infra* notes 185-213 and accompanying text. I would like to express my sincerest thanks to Khaled Abou El Fadl, currently at Princeton University, for his constant support and guidance throughout the evolution of this project.

[8] *See infra* notes 38-43 and accompanying text.

[9] *See infra* notes 40-43 and accompanying text.

to all contract law.[10]

Paralleling this development in the common law, Islamic law also used various means to combat oppression in the marketplace.[11] The concepts that Islamic scholars developed to invalidate oppressive and unfair contracts included unfair dealing (*ghabn fahish*), unjust enrichment (*fadl mal bil 'iwad*), excessive speculation (*gharar*), and contracts of necessity (*bay' al mudtar* or *bay' al madghut*).[12] Eventually, the broader concept of *riba*[13] (literally "increase") effectively encompassed all these doctrines to generally prohibit contracts in which one party received an undeserved profit.[14] Islamic law invalidated contracts containing *riba* in either of two forms: *riba al-fadl*, in which a contracting party acquired an unlawful excess profit,[15] or *riba al-nasi'a*, in which a party used contract terms to gain an unlawful advantage by speculating on uncontrollable risks.[16]

Since its introduction into Western common law, the doctrine of unconscionability has lacked a clear and precise definition.[17] Although several different articulations of the doctrine exist, uncertainty,[18] ambiguity,[19] and irreconcilable results[20] pervade the cases in which courts have attempted to apply the doctrine.[21] This Comment proposes to resolve this lack of definition in American unconscionability doctrine by borrowing from the Islamic legal principles that share the same societal goal: preventing oppression.[22] Specifically, this Comment proposes a two-prong test for unconscionability by combining principles of Islamic and American law to offer an improved doctrine for both legal systems.[23] The first prong focuses on whether one party achieved a potentially unjust enrichment under the contract—a

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10 *See infra* notes 66-101 and accompanying text.
11 *See infra* notes 121-57 and accompanying text.
12 *See infra* notes 134-50 and accompanying text.
13 *See infra* notes 158-82 and accompanying text for further discussion of the concept of *riba*.
14 *See infra* notes 152-73 and accompanying text.
15 *See infra* notes 159-62 and accompanying text.
16 *See infra* notes 163-70 and accompanying text.
17 *See infra* notes 33-101 and accompanying text.
18 *See infra* notes 33-101 and accompanying text.
19 *See infra* notes 33-101 and accompanying text.
20 *See infra* notes 33-101 and accompanying text.
21 *See infra* notes 33-101 and accompanying text.
22 U.C.C. § 2-302 cmt. 1 (1990).
23 *See infra* notes 185-91 and accompanying text.

concept drawn from Islamic law.[24] The second prong, on the other hand, requires an oppressive relationship between the contracting parties, thus incorporating much of the existing common law's analyses.[25] A court must find that a contract meets both prongs of the test to declare the contract unconscionable.[26] With this proposed test, courts will have a clearer guide enabling them to avoid the confusion currently plaguing the common-law doctrine of unconscionability.[27]

Part I of this Comment briefly discusses the history of the doctrine of unconscionability from its inception in common-law equity courts to its present form as section 2-302 of the U.C.C. In addition, this section describes the courts' failure to develop a clear test for the doctrine,[28] and compares and contrasts the different judicial and scholarly opinions on the need for a clearer definition.[29] Part II then introduces and explains the basic relevant Islamic legal concepts regarding invalid contracts.[30] Finally, Part III proposes a test for unconscionability that brings together the Islamic and American doctrines,[31] and illustrates this proposed test by applying it to typical cases involving contracts challenged for unconscionability.[32]

I. UNCONSCIONABILITY: FROM EQUITY TO THE U.C.C.

When reviewing a contract for unconscionability, American courts do not have a precise definition or test with which to make their rulings.[33] This lack of a clear definition has historically cre-

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[24] *See infra* notes 192-200 and accompanying text.
[25] *See infra* notes 201-13 and accompanying text.
[26] *See infra* notes 214-17 and accompanying text.
[27] *See infra* notes 33-101 and accompanying text.
[28] *See infra* notes 33-120 and accompanying text.
[29] *See infra* notes 96-120 and accompanying text.
[30] *See infra* notes 121-84 and accompanying text.
[31] *See infra* notes 186-221 and accompanying text.
[32] *See infra* notes 222-58 and accompanying text.
[33] J. Francis Ireton, *The Commercial Code*, 22 MISS. L.J. 273, 280 (1950-51) ("no satisfactory definition of what is unconscionableness"); DANIEL W. FESSLER & PIERRE R. LOISEAUX, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE 173-74 (1982); Richard W. Duesenberg, *Practitioner's View of Contract Unconscionability (U.C.C. § 2-302)*, 8 UCC L.J. 237, 238-39 (1976); Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 528-33 (1967); Norman D. Jaffe, Comment, *Definition and Interpretation of Unconscionable Contracts (UCC)*, 58 DICK. L. REV. 161, 161 (1954).

ated uncertainty as to the validity of agreements.[34] It has also caused confusion among courts attempting to apply the doctrine in a consistent and predictable manner.[35] This section will review the history of the common law doctrine of unconscionability and discuss the various failed attempts to define the doctrine, both before and after the drafting of the U.C.C.[36] This section will also address the arguments for and against establishing a precise test for the doctrine, and will conclude that a clearer definition of unconscionability will improve the current state of American contract law.[37]

A. Development of the Common Law Doctrine of Unconscionability

Scholars trace the Anglo-American concept of unconscionability back to early common law and equity courts,[38] noting that equity courts have traditionally applied the doctrine more willingly and forcefully than courts of law.[39] Traditionally, equity courts denied equitable remedies to petitioners whose behavior

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[34] *See* Cellini & Wertz, *supra* note 6, at 201 (acknowledging that "some uncertainty will attend the application of section 2-302" because of lack of definition). *See infra* notes 106-07 and accompanying text. *See also* Cellini & Wertz, *supra* note 6, at 201 n.53 (listing critics of U.C.C. § 2-302).

[35] *See infra* notes 38-112 and accompanying text.

[36] *See infra* notes 38-101 and accompanying text.

[37] *See infra* notes 102-120 and accompanying text.

[38] JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9-37, at 399 (3d ed. 1987). The concept of unconscionability actually existed at least as far back as Roman law, which contained the "doctrine of *laesio enormis* ('large hurt'), allowing rescission of contracts for mere inadequacy of price." Cellini & Wertz, *supra* note 6, at 193. *Laesio enormis*, however, was only a very restricted exception to the general rule of contractual freedom. *Id. See also infra* note 149 (noting *laesio enormis* in Islamic law).

[39] Cellini & Wertz, *supra* note 6, at 196-98. In fact, it has been said that unconscionability underlies "practically the whole content of the law of equity." Harlan F. Stone, *Book Note*, 12 COLUM. L. REV. 756, 756 (1912) (reviewing R.M.P. WILLOUGHBY, THE DISTINCTIONS AND ANOMALIES ARISING OUT OF THE EQUITABLE DOCTRINE OF THE LEGAL ESTATE (1912)). To prevent the "unconscionable exercise of a legal right," the doctrine acted in the form of specific restrictions on mortgages, trusts, bargains including penalty clauses, and similar agreements. CALAMARI & PERILLO, *supra* note 38, § 9-38, at 399-400. The U.C.C. section on unconscionability, § 2-302 (which will be discussed in more detail later, *see infra* notes 66-120 and accompanying text), cites an equity case in its comments: Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir. 1948). *Campbell Soup* involved a contract containing a unilateral liquidated damages clause, resale restrictions, and other clauses. The court found that the "sum total of its

was reprehensible according to the mores and business practices of a given time and place.[40] Seeking "to avoid 'absolute' or 'drastic consequences' of an agreement,"[41] equity courts denied specific performance when the contract terms or subsequent events would cause oppression or hardship to one of the parties.[42] For example, early courts applying the equitable doctrine of unconscionability sought to protect "widows and the weak-minded" from those who would take advantage of their position.[43]

At law, the courts' struggle to keep contracts fair and equitable ultimately collided with the principle of freedom of contract, which nineteenth century courts, imbued with the spirit of *laissez-faire*, held almost sacred.[44] In some cases, freedom of contract prevailed, and as long as the contract complied with the necessary

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provisions drives too hard a bargain for a court of conscience to assist." *Id.* at 84, *cited in* U.C.C. § 2-302 cmt. 1 (1990).

40 Michael H. Terry & John C. Fauvre, *The Unconscionability Offense*, 4 GA. L. REV. 469, 473 (1970) (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 128, at 551 (2d ed. 1963)).

41 Terry & Fauvre, *supra* note 40, at 476 (quoting Emanuel College v. Evans, 21 Eng. Rep. 494, 495 (1625)).

42 Paul M. Morley, Comment, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 WM. & MARY L. REV. 1143, 1144 (1968); *see also* Leff, *supra* note 33, at 531 (stating that among the kinds of contracts which equity will not enforce are those that are "unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would be oppressive or harsh upon the defendant"). Equity courts also found contracts unconscionable for lack of consideration as long as this inadequacy was accompanied by some other element of unconscionability. Cellini & Wertz, *supra* note 6, at 198; *see, e.g.*, Knott v. Cutler, 31 S.E.2d 359 (N.C. 1944).

Rather than objecting to a specific unconscionable clause in a contract, equity courts usually denied contracts which contained a gross overall imbalance. Leff, *supra* note 33, at 538.

43 Morley, *supra* note 42, at 1144-45. Illustrating equity's focus on protecting the weak from the strong are two frequently cited early cases involving imbalanced bargains between "amateur confidence men and country bumpkins." Comment, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843, 847 (1960) (citing James v. Morgan, 83 Eng. Rep. 323 (1664); Thornborow v. Whitacre, 92 Eng. Rep. 270 (1706)).

44 Eugene M. Harrington, *Unconscionability Under the Uniform Commercial Code*, 10 S. TEX. L.J. 203, 204 (1968). In fact, one commentator states that the conflict between the equitable doctrine of unconscionability and freedom of contract has at times strained judicial interpretation "almost to the limits of reasonableness." *Id.* (citation omitted).

formation requirements, the parties were not entitled to relief.[45] In other instances, courts resorted to formalistic devices and strained interpretations to avoid enforcing a contract that they felt was unfair, despite the doctrine of freedom of contract.[46] As a result, the body of legal precedent regarding unconscionability became a confused collection of irreconcilable holdings.[47]

Equity courts also employed formalistic devices in denying specific performance, but in general, these courts had greater freedom to sacrifice form in order to pursue fairness and reason.[48] As a result, the leading cases specifically discussing unconscionability are equity cases.[49] One of the more famous of these is *Campbell Soup Co. v. Wentz*.[50] In *Campbell Soup*, a carrot farmer contracted to sell carrots to Campbell Soup Company at a future date for twenty-three to thirty dollars per ton.[51] When the market price rose and the farmer refused to perform,[52] the court denied the soup company specific performance.[53] According to the court, the imbalanced contract drove too hard a bargain for the farmer.[54] Specifically, the contract terms provided liquidated damages of fifty dollars per acre for any breach by the farmer, but provided no liquidated damages for any breach by Campbell

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45 *See id.* at 204 n.7 (noting view that legal certainty and established rules of contract law should not be sacrificed for social justice).

46 *Id.* at 204. *See also* CALAMARI & PERILLO, *supra* note 38, § 9-38, at 401-02. Calamari notes that courts of law generally did not directly rule a contract unconscionable, but instead "resorted to imaginative flanking devices to defeat the offending contract." *Id.* at 401. Although U.C.C. § 2-302 brought unconscionability into full view, the doctrine is still unclear and lacks a precise definition. *See supra* note 33 and accompanying text. The devices courts used to avoid enforcing an unfair contract included fraud, mistake, inadequacy of consideration, ambiguity, undue influence, adhesion, lack of mutual assent, public policy, and others. Terry & Fauvre, *supra* note 40, at 478; Cellini & Wertz, *supra* note 6, at 197-98.

47 Terry & Fauvre, *supra* note 40, at 478 ("techniques and resultant countervailing forces of opinion . . . often gave rise to express holdings that are irreconcilable").

48 *Id.* at 479.

49 *Id.*

50 172 F.2d 80 (3d Cir. 1948). This is the only equity case cited in Comment One of U.C.C. § 2-302. Leff, *supra* note 33, at 530. Comment One lists the case to illustrate the section's purpose of preventing "oppression and unfair surprise." U.C.C. § 2-302 cmt. 1 (1990).

51 *Campbell Soup*, 172 F. 2d at 81.

52 *Id.*

53 *Id.* at 84.

54 *Id.* at 83-84.

Soup.[55] It also gave Campbell Soup the right to reject any carrots it was unable to use, and prohibited the farmer from selling these carrots elsewhere without Campbell Soup's permission.[56] Thus, the court held that the contract was too one-sided and therefore unconscionable.

Campbell Soup illustrates the typical analysis which equity courts applied to cases involving unconscionable contracts. Although equity courts applied unconscionability more freely than law courts, equity still failed to develop a clear test with which to determine when the doctrine applies.[57] The *Campbell Soup* court's finding of overall imbalance and its "too hard a bargain" holding illustrate these early courts' failure to develop clear standards for the unconscionability doctrine.[58]

Like *Campbell Soup*, most early common law unconscionability cases provided very vague definitions of unconscionability.[59] For example, one of the earliest definitions of unconscionability appeared in the 1750 English case *Earl of Chesterfield v. Janssen*.[60] In *Chesterfield*, the court defined an unconscionable contract as one that a reasonable person would neither make nor accept.[61] This formulation, based on the imprecise reasonableness standard, had little practical utility[62] and led to numerous later attempts at better definitions.[63] One of the more famous of these attempts stated that an unconscionable contract contains such inequality

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55 *Id.* at 83.

56 *Id.*

57 *See, e.g.*, Stiefler v. McCullough, 174 N.E. 823, 826 (Ind. Ct. App. 1931); *see also* United States v. Bethlehem Steel Corp., 315 U.S. 289, 299-309 (1942) (finding contract between United States government and shipbuilder not unconscionable; although shipbuilder used desperate need for ships during World War I to obtain profit margin approximately 12% above customary margin, court found neither duress nor excessive price); *see infra* notes 64-120 and accompanying text.

58 *See infra* notes 61-120.

59 *See infra* notes 60-64 and accompanying text.

60 28 Eng. Rep. 82, 100 (1750); *see also* United States v. Hume, 132 U.S. 406, 411 (1889) (discussing *Chesterfield*).

61 *Chesterfield*, 28 Eng. Rep. 82, 100 (defining an unconscionable contract as "one no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other").

62 JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 96, at 486-87 (3d ed. 1990); *see also* Morley, *supra* note 43, at 846 (noting "lack of certainty" of early tests for unconscionability).

63 *See infra* notes 64-120 and accompanying text. Another early equity case defined unconscionability as one party taking advantage of the

that, when presented to a reasonable person, the contract would produce an "exclamation."[64] In other words, under this definition, unconscionability is that which would cause a reasonable person to gasp. This subjective gasp test offers nothing in the way of certainty or predictability for individuals or courts attempting to apply the doctrine.[65] After all, different people gasp at different things.

B. Unconscionability Under the U.C.C.

The U.C.C. represented the first modern effort to develop a uniform structured approach to contract law and the problems of inequitable contracts in particular.[66] The drafters of the Code found an unclear and unreliable doctrine of unconscionability in the existing common law.[67] The lack of any statutory provisions to aid courts' attempts to monitor the fairness of contracts prompted the drafters to create section 2-302, directly authorizing courts to strike down or alter a contract for unconscionability alone.[68] The U.C.C. thus refined and formally articulated for the first time the common law doctrine of unconscionability as part of

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"necessities and distress" of the other. United States v. Bethlehem Steel Corp., 315 U.S. 289, 327-29 (1942) (Frankfurter, J., dissenting).

64 Stiefler v. McCullough, 174 N.E. 823, 826 (Ind. Ct. App. 1931). An unconscionable contract contains " 'an inequality *so strong, gross and manifest*, that it must be *impossible to state it* to a man of common sense *without producing an exclamation at the inequality of it.*' " *Id.* (quoting GEORGE F. ELLIOTT, 1 ELLIOTT ON CONTRACTS § 159 (1913) (quoting Gwynne v. Heaton, 28 Eng. Rep. 949, 953 (1778))). The *Stiefler* definition of unconscionability also addresses price-value disparity, discussed *infra* notes 235-45 and accompanying text, as a ground for unconscionability. *Stiefler* at 826. The court stated: " '[W]here inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind it'." *Id.* (quoting ELLIOTT, *supra* (quoting Hough v. Hunt, 2 Ohio 495, 502 (1826))). While illustrating another vague standard of unconscionability, the court's reference to "oppression" and "advantage" echoes the underlying concerns of the unconscionability doctrine, *see infra* notes 73-75 and accompanying text, and foreshadows the applicability of this Comment's proposed test. *See infra* notes 201-03 and accompanying text (discussing oppression), notes 192-200 and accompanying text (discussing advantage), notes 218-21 (discussing both).

65 *See* Leff, *supra* note 33, at 530-33.

66 Harrington, *supra* note 44, at 204. All of the United States, except Louisiana, now have adopted Article 2 of the U.C.C. David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. REV. 1, 9 n.20 (1985).

67 Terry & Fauvre, *supra* note 40, at 477.

68 *Id.* at 476.

general contract law, eliminating the courts' need to resort to artificial, formalistic devices to strike down unfair contracts.[69]

Nevertheless, although the U.C.C. codified the concept of unconscionability and made it more readily available to law courts, it failed to give unconscionability any definition or test beyond that already existing in equity.[70] The text of U.C.C. section 2-302 does not provide a workable unconscionability test. Section 2-302 provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[71]

Although this articulation of the doctrine describes what a court may do once it finds a contract or clause unconscionable, it leaves open the question of when such a finding is justified.[72]

Furthermore, the comments to U.C.C. section 2-302 do not provide any clarification of the text. Comment One to section 2-302 states that the purpose of the doctrine is to prevent oppression and unfair surprise.[73] This statement reiterates equity's

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69 Although Article 2 of the U.C.C. applies to sales, its section on unconscionability, § 2-302, has now "entered the general law of contracts." CALAMARI & PERILLO, *supra* note 38, § 9-39, at 403.

70 MURRAY, *supra* note 62, § 96, at 489.

71 U.C.C. § 2-302(1) (1990).

72 *See supra* note 33 (discussing confusion surrounding unconscionability standard). Further illustrating the confusion surrounding the doctrine, the Restatement 2d section on unconscionability merely replicates the U.C.C. articulation. MURRAY, *supra* note 62, § 96, at 488-89. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

73 U.C.C. § 2-302 cmt. 1 (1990). The text of Comment One states:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer & acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances

traditional refusal to enforce unfair and oppressive bargains,[74] and makes the doctrine of unconscionability readily available to previously reluctant courts of law.[75] In offering a test for determining when unconscionability exists, however, the comment fails. It states: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[76]

This basic test merely defines the concept in terms of itself,[77] in effect saying "[t]hat is unconscionable which is unconscionable."[78] In sum, the U.C.C. offers little help in guiding courts' efforts to determine when a given contract is unconscionable.[79]

> 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 and not of disturbance of allocation of risks because of superior bargaining power.

Id. (citations omitted).

74 *See supra* notes 40-43 and accompanying text.

75 CALAMARI & PERILLO, *supra* note 38, § 9-39, at 402; *see also supra* notes 44-47 and accompanying text.

76 U.C.C. § 2-302 cmt. 1 (1990).

77 Comment, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401, 404 (1961). Not only is such a definition unhelpful, but it also violates basic rules of proper literary style. *See* LYNN B. SQUIRES & MARJORIE D. ROMBAUER, LEGAL WRITING IN A NUTSHELL 96-98 (1982) (advising writers to eliminate unnecessary words and avoid stating the obvious).

78 Duesenberg, *supra* note 33, at 239. As Mr. Duesenberg notes, "[b]usy lawyers have little time for that kind of help." *Id.* The first drafts of the U.C.C. unconscionability doctrine included references to equity's " 'ancient policy of policing contracts for unconscionability or unreasonableness.' " Comment, *supra* note 77, at 403 (quoting U.C.C. § 2-302, cmt. (Tent. Draft 1949)). Such references at least point to equity cases and history as a possible source for a clear definition. *Id.* at 405. The final draft of U.C.C. § 2-302, however, deleted these references and replaced them with the "basic test," which one commentator has called an "unhelpful tautology." *Id.* at 404.

79 *See supra* note 33. Demonstrative of the lack of clarity in the unconscionability doctrine is the confusion that surrounds the warranty disclaimer and remedy limitation cases listed in the official comments to U.C.C. § 2-302 as the section's "underlying basis." U.C.C. § 2-302 cmt. 1 (1990). Some commentators believe that because warranty disclaimers and remedy limitations are covered elsewhere in the U.C.C., these cases do not elaborate on unconscionability as a separate doctrine, and therefore § 2-302

The twofold purpose of U.C.C. section 2-302, preventing both oppression and unfair surprise,[80] has led commentators to distinguish between substantive unconscionability, involving oppression, and procedural unconscionability, caused by unfair surprise.[81] The distinction merely corresponds to the difference between unconscionability in *what* the contract contains and unconscionability in *how* the contract was formed.[82] Courts disa-

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should not cite those cases. Comment, *supra* note 77, at 516-23 (concluding that cases cited in comment are inconclusive and merely indicate the drafters' general concerns); Leff, *supra* note 33, at 793 (concluding that because §§ 2-316—Exclusion or Modification of Warranties—and 2-719—Contractual Modification or Limitation of Remedy—exist, § 2-302 is probably not relevant to warranty disclaimers or remedy limitations). Warranty disclaimer and remedy limitation cases are discussed later in this Comment. *See infra* notes 246-48 and accompanying text.

[80] U.C.C. § 2-302 cmt. 1 (1990).

[81] CALAMARI & PERILLO, *supra* note 38, § 9-40, at 406; *see also* Leff, *supra* note 33, at 487 (referring to "bargaining naughtiness as 'procedural unconscionability' and to evils in the resulting contract as 'substantive unconscionability' "). Courts applying California law have interpreted the principle slightly differently. In Premier Wine & Spirits, Inc. v. E. & J. Gallo Winery, 644 F. Supp. 1431, 1440 (E.D. Cal. 1986), the court described the two types of unconscionability as "(1) an absence of meaningful choice by one party (the 'procedural' element) and (2) contract terms which are unreasonably favorable to the other party (the 'substantive' element)." *Id.* at 1440 (citing A. & M. Produce Co. v. F.M.C. Corp., 186 Cal. Rptr. 114, 121 (Ct. App. 1982)). This definition comes from an earlier California court's description of unconscionability as "the absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party." A. & M. Produce Co. v. F.M.C. Corp., 186 Cal. Rptr. 114, 121 (Ct. App. 1982) (cited in *Premier*, 644 F. Supp. at 1440) (citation omitted). The *Premier* court went on to divide the procedural element into "oppression" on the one hand and "surprise" on the other:

> The procedural element is itself made up of two components: proof of 'oppression' and 'surprise.' 'Oppression' exists where the inequality of bargaining power between the parties results in no real negotiation and the absence of meaningful choice. 'Surprise' involves the extent to which the supposedly agreed upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed forms.

Premier, 644 F. Supp. at 1440 (citations omitted).

[82] Leff, *supra* note 33, at 487.

Commentators have noted that disparity in bargaining power and other procedural considerations often accompany elements of substantive unconscionability. *See* Terry & Fauvre, *supra* note 40, at 475 (stating that "courts presume that one party must not have been in an equal bargaining

gree as to whether procedural or substantive unconscionability, or both, are necessary to strike down or alter a contract under U.C.C. section 2-302.[83] As will be seen in Part III, this Comment proposes a test for unconscionability that incorporates both concepts.[84]

The first case to discuss the U.C.C. unconscionability doctrine[85] was *American Home Improvement, Inc. v. MacIver*,[86] in which a seller and installer of home improvements contracted to install certain materials in a buyer's home.[87] Shortly after the seller began installation, the buyer changed his mind and requested the

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position by the mere existence of extremely unfavorable terms"). Thus, judicial analyses of unconscionable contracts often blur the distinction between procedural and substantive elements. *Id.*

[83] *Compare* Stanley A. Klopp, Inc. v. John Deere Co., 510 F. Supp. 807, 811 (E.D. Pa. 1981) (stating that unequal bargaining power is not enough to render a contract unconscionable) *and* Central Ohio Coop. Milk Producers, Inc. v. Rowland, 281 N.E.2d 42, 44 (Ohio Ct. App. 1972) (stating that not only must the contract be one-sided, but it must also contain terms which bear no relation to the business risk of the transaction) *and* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 766-67 (1969) ("*mere* disparity of bargaining strength, *without more*, is not enough to make out a case of unconscionability") *with* Bennett v. Behring Corp., 466 F. Supp. 689, 696-97 (S.D. Fla. 1979) (requiring a finding of substantive unconscionability first, and only if that exists should a court go on to evaluate the contract for procedural unconscionability as well). California requires both procedural and substantive unconscionability in order to strike down or alter a contract under § 2-302, although, as discussed earlier, it defines these terms differently than most courts and commentators. *See supra* note 81.

Other courts and commentators advocate a type of sliding scale, so that the greater amount of one type of unconscionability exists, the less of the other will be tolerated. *See, e.g.*, A. & M. Produce Co. v. F.M.C. Corp., 186 Cal. Rptr. 114, 122 (Ct. App. 1982) (citations omitted) ("enforceability of the clause is tied to the procedural aspects of unconscionability such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated"); Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634-35 (Mo. Ct. App. 1979); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 960-62 (1969) (discussing "interest-balancing" test for unconscionability). In addition, several cases have found that "gross excessiveness of price is itself unconscionable." CALAMARI & PERILLO, *supra* note 38, § 9-40, at 406 (citations omitted) (suggesting that a substantively unconscionable contract, if egregious enough, can be found unconscionable under § 2-302 without evidence of procedural unconscionability).

[84] *See infra* notes 185-258 and accompanying text.

[85] Terry & Fauvre, *supra* note 40, at 495.

[86] 201 A.2d 886 (N.H. 1964).

[87] *Id.* at 886-87.

seller to stop.[88] The seller ceased performance, then sued for breach of contract.[89] The court found that the financing agreement, which the seller arranged for the buyer, contained so large a discrepancy between the price paid and the value received that it made the contract unconscionable.[90] Price-value disparity constituted the main indicator of unconscionability in *American Home Improvement*. This case illustrates the inability of many courts to develop a clearer test for unconscionability, even after the U.C.C.[91] Although the U.C.C. doctrine of unconscionability was not directly at issue in this case,[92] the court chose to address the doctrine but still failed to offer a clear interpretation of what the U.C.C. doctrine means.[93]

The next case to interpret unconscionability under the U.C.C. was *Williams v. Walker-Thomas Furniture Co.*[94] In contrast to *American Home Improvement*, the *Williams* court specifically mentioned U.C.C. section 2-302 as persuasive authority for its holding that the contract in question was unconscionable. In *Williams*, a woman of "limited education"[95] bought several household items from the defendant furniture company on a printed installment sales contract.[96] Under this contract, the seller secured the buyer's cumulative debt with the right to repossess all the items Mrs. Williams had bought from the furniture company at any time in the past.[97] Mrs. Williams subsequently defaulted in her payments, and Walker-Thomas Furniture sought to seize every item

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88 *Id.* at 887.

89 *Id.*

90 *Id.* at 889.

91 *Id.* at 889. In the court's words, "[i]nasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying $1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features." *Id. See also* CALAMARI & PERILLO, *supra* note 38, § 9-39, at 403-05 (discussing development of unconscionability law since enactment of § 2-302).

92 *American Home Improvement*, 201 A.2d at 888-89. Unconscionability was not directly at issue in *American Home Improvement* because the contract in question violated a New Hampshire disclosure statute. *Id.*

93 *See supra* note 91. The court's failure to provide a clear understanding of unconscionability in this case is especially puzzling since the analysis of the U.C.C. doctrine is dicta and therefore could easily have been ignored. *See supra* note 92.

94 350 F.2d 445 (D.C. Cir. 1965).

95 Leff, *supra* note 33, at 551.

96 *Williams*, 350 F.2d at 447.

97 *Id.* In other words, even when the buyer pays off one item, the item is

she had previously purchased.[98] The appellate court reversed judgment in favor of the defendant furniture company and remanded the case for findings on the issue of unconscionability.[99] Although the appellate court did not decide the issue of unconscionability, it gave guidance to the lower courts by interpreting U.C.C. section 2-302 to mean that unconscionability is one party's lack of meaningful choice combined "with contract terms which are unreasonably favorable to the other party."[100]

The *Williams* definition perhaps better clarifies the concept of unconscionability by articulating two elements of the doctrine, but it remains inadequate. Courts do not relieve parties of their contractual obligations every time there is a lack of meaningful choice and unreasonably favorable terms. For example, a person who applies to many employers but is only accepted by one has little meaningful choice. Yet, regardless of employment terms that are particularly harsh to the employee and favorable to the employer, she remains bound by whatever employment contract she accepts.[101]

C. The Need for a Clearer Doctrine of Unconscionability

Given the absence of any clear definition or test for the modern unconscionability doctrine, one might conclude that the Code's drafters purposely left the doctrine vague. Indeed, several commentators argue that it is inappropriate to ask for a theory or defi-

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still subject to the seller's lien when she buys something else, until everything is paid off and she purchases nothing more. *Id.*

98 *Id.*

99 *Id.* at 450.

100 *Id.* at 449 (footnote omitted). The court defined unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (citing Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948)). The *Williams* court primarily concerned itself with the oppression of one party by contract terms skewed to favor the other party. *Id.* Here, Walker-Thomas's right to repossess not only the item on which the buyer had defaulted payment, but also every item previously purchased and paid for under the installment contract, violated the court's interpretation of a fair contract. *Id.* at 448.

101 Unreasonably favorable employment contract terms might include long working hours, low benefits, little room for promotion, and so on. *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (discussing contracts of adhesion and freedom to contract).

nition of unconscionability[102] because a precise definition would be too restrictive.[103] These commentators suggest that applying a precise definition to the doctrine of unconscionability would be dangerous because the doctrine involves many variables and is subject to rapid and extensive change.[104] Proponents of this view also point to the great body of equity case law on unconscionability as an adequate source from which to form a workable understanding of the doctrine.[105]

Critics of U.C.C. section 2-302, on the other hand, argue that its lack of a clear definition leads to uncertainty and impairs transactional security.[106] They point out that contracting parties will be unable to safely predict at the time of formation if a court will later strike down their bargain for violating section 2-302.[107] Perhaps lack of clarity is inevitable in any legal standard, but, as one commentator notes, the U.C.C. description of unconscionability refers to neither the imbalance nor the quality of the contract,[108]

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102 Ellinghaus, *supra* note 83, at 758. Examples of this position include statements like "[w]e cannot do without such regrettably vague standards," *id.* at 815, "unconscionability is a concept incapable of exact definition," Morley, *supra* note 42, at 1146 (footnote omitted), and "unconscionability must remain flexible in order to be useful." Ellen A. Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 203 n.10 (1963).

103 Peters, *supra* note 102, at 203 n.10. The principle behind leaving the doctrine of unconscionability without a definition is that "[s]ome boundaries work best if they are left purposely vague." *Id.*

104 Cellini & Wertz, *supra* note 6, at 201.

105 *Id.*; *see also* Leff, *supra* note 33, at 528 n.164 (listing additional sources).

106 Cellini & Wertz, *supra* note 6, at 201.

107 *Id.* In fact, one scholar has gone so far as to suggest how parties may attempt to guard their contract against being later deemed unconscionable:

> If you are going to prepare a contract . . . which contains anything that you think might look unfair or "unconscionable" later on, you should safeguard yourself by putting into the contract whatever background or supporting material you think would help to show that, all things considered, the particular provision was not unreasonable, at least at the time it was made.

Bernard D. Broeker, *Articles 2 and 6: Sales and Bulk Transfers*, 15 U. PITT. L. REV. 541, 557 (1954).

108 Leff, *supra* note 33, at 516. Before U.C.C. § 2-302, courts looked for overall imbalance and the general inequitable quality of the contract in determining unconscionability. *See supra* notes 50-65 and accompanying text.

but rather to the emotional state of the judge.[109] That is, courts will declare contracts unconscionable not because the contracts contain oppressive or surprising terms, but rather, because they cause judges to suspect oppression or feel surprised.[110] Because judges themselves differ in their standards, they need a uniform definition or test to guide them in making correct determinations.[111] Thus, critics argue, if the law fails to develop a clear unconscionability test, then the fate of every contract will be left to the unfettered discretion of each individual judge.[112]

Further, case law developed in equity courts provides inadequate guidance to judges because, some critics argue, equity's unconscionability precedent was quite vague[113] and also addressed only one form of unconscionability: overall contractual balance.[114] Because equity courts evaluated contracts in terms of their overall effect, they did not address the unconscionable effect of one individual clause.[115] Thus, such analyses prove inadequate

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109 Leff, *supra* note 33, at 516.

110 *Id.* Leff concludes that "the attitudes relevant under section 2-302 are not those of the parties but those of the judges. . . . [and represent] what may permissibly make the judges' pulses race or their cheeks redden, so as to justify the destruction of a particular provision." *Id.*

111 *See id.*

112 *See id.*; *see also* Cellini & Wertz, *supra* note 6, at 208-09 (discussing Louisiana courts' failure to develop a workable unconscionability standard). In evaluating this concern, an article by Judge Younger of New York provides valuable insights. Hon. Irving Younger, *A Judge's View of Unconscionability*, 5 UCC L.J. 348, 352 (1973). Judge Younger sat on the Civil Court of the City of New York at the time he wrote the article. *Id.* at 348 n.*. In his article, Judge Younger listed the various factors which he considers important in unconscionability cases. *Id.* at 349-51. Such an article illustrates that this unpredictable, discretionary interpretation of the U.C.C. doctrine of unconscionability indeed occurs, and thus the situation is ripe for inconsistent holdings and confusing precedent regarding the doctrine. *See id.* at 352.

Judge Younger not only offered his subjective interpretation of the meaning of unconscionability, but also stated his opinion that leaving the determination of unconscionability to the discretion of a judge's conscience is not only permissible, but beneficial. *Id.* Putting aside the fact that the recommendation came from a sitting judge, this is precisely what § 2-302's critics are concerned about: the arbitrary and unpredictable varying consciences of America's many judges. *See supra* notes 108-12 and accompanying text.

113 *See supra* notes 33-65 and accompanying text.

114 Leff, *supra* note 33, at 533.

115 *Id.* The equity case Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948), discussed earlier, illustrates the irrationality of the "overall

in understanding the U.C.C. doctrine, which is presumably not so limited in scope.

Unrestricted judicial discretion and equity's inability to offer an accurate unconscionability test are not the only problems with the modern unconscionability doctrine. One commentator notes that the vagueness of the word "unconscionability" and the varying circumstances in which equity applied it allow courts and judges to leave the bases of their decisions unclear to the public and perhaps even themselves.[116] Without a definite test, it is argued, the concept of unconscionability is so broad, encompassing so many possible interpretations, that a court can easily avoid focusing specifically on what it is about a contract that offends the court and why.[117] In light of these facts, the multiplicity of variables involved in the unconscionability doctrine, and its propensity for change,[118] tend to add to rather than subtract from the need for a clear definition of unconscionability.[119]

In sum, the uncertainty that accompanies unrestricted judicial discretion, and the equally uncertain equity interpretation of unconscionability, indicate that the inherent vagueness in the U.C.C. definition necessitates a clearer, more precise test.[120] While there may be truth in the proposition that some legal boundaries are better left vague in order to prevent too much restriction, it appears that the existing doctrine of unconsciona-

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imbalance" approach to contract unconscionability. *See supra* notes 50-65 and accompanying text. In *Campbell Soup*, a carrot farmer willfully refused to perform his contract with Campbell Soup, but the court nevertheless denied the plaintiff soup company specific performance. *Campbell Soup*, 172 F. 2d at 84. The court found the contract invalid because it contained terms unfavorable to the farmer, although the terms that the court found unfavorable had nothing to do with the farmer's actual loss and consequent breach. Leff, *supra* note 33, at 515 n.114. Thus, under the "overall imbalance" analysis, a court may strike down any unbalanced contract even if the party with the better deal does nothing to take advantage of the weaker party. *Id.* at 515. As a result, the weaker party who commits a wrong by breaching the contract goes unpenalized. *Id.*

116 Leff, *supra* note 33, at 557. Leff states that the vague term "unconscionability" "tends to make the true bases of decisions more hidden to those trying to use them as the basis of future planning," and "more important, it tends to permit a court to be nondisclosive about the bases of its decision even to itself." *Id.*

117 *See id.*

118 *See supra* note 104 and accompanying text.

119 *See supra* notes 105-06 and accompanying text.

120 *See* Leff, *supra* note 33, at 528-33.

bility does not yet have such a boundary. Thus, the doctrine would not run the risk of too much restriction if the law set out a clearer test than what exists at present. Ultimately, litigants in the common law system, and perhaps any legal system, cannot have absolutely accurate predictability. Some measure of predictability, however, is desirable, and thus the law must provide some systematic method of analysis.

II. ISLAMIC LAW: A DISTASTE FOR EXCESSIVENESS AND EXPLOITATION

Islamic law suffers from some of the same problems as the common law.[121] Its doctrines allowing courts to invalidate contracts are also unpredictable, vague, and subject to diverse interpretations.[122] Combining principles of both American law and Islamic law, however, would enable scholars of both legal systems to improve their unconscionability doctrines.

Islamic law, like American common law,[123] holds the principle of freedom of contract in great respect.[124] The rationale behind

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121 *See infra* notes 122-84 and accompanying text.

122 *See infra* notes 138-84 and accompanying text.

123 *See supra* notes 44-47 and accompanying text.

124 JUDGE ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE: ACCORDING TO THE *HANAFI, MALIKI, SHAFI'I* AND *HANBALI* SCHOOLS 282-83 (1981 ed.) (Judge of the High Court of Judicature at Madras, India) (discussing the nature of contract in Islamic law). The presumed validity of contracts comes from the Quranic verse: "O you who have attained faith! Be true to your covenants!" THE MESSAGE OF THE QURAN, *supra* note 1, 5:1, at 139 (footnote omitted). (The Arabic word *'aqd* translated here as "covenants" has also been translated as "obligations," "promises," and "contracts." *See* THE HOLY QURAN: TEXT, TRANSLATION AND COMMENTARY 5:1 at 238 & n.682 (Yusuf Ali trans., U.S. ed. 1987)). Muslim jurists commonly regard this verse as the foundation for the basic principle of freedom of contract in Islamic law. Saba Habachy, *The System of Nullities in Muslim Law*, 13 AM. J. COMP. L. 61, 63 & n.6 (1964) [hereafter Habachy, *System of Nullities*]. As the famous Muslim scholar, Ibn Taymiya, wrote:

> If proper fulfillment of obligations and due respect for covenants are prescribed by the Lawgiver [citation to QURAN 5:1], it follows that the general rule is that contracts are valid. It would have been meaningless to give effect to contracts and recognize the legality of their objectives, unless these contracts were themselves valid.

Id. (footnote omitted) (quoting III TAKI-D-DIN IBN TAYMIYA, THE FATAWA OF *SHIKH*-UL ISLAM 387).

Islam's respect for freedom of contract is summarized in the phrase "the

freedom of contract in Islamic law, akin to that in common law, acknowledges the central role of free trade and commerce in society.[125] Muslim jurists recognize that the right to enter freely into binding contracts is essential to the social and economic life of any society.[126] Nevertheless, also similar to common law,[127] freedom of contract in Islam is not absolute,[128] and in some instances a court may invalidate or alter a contract in the interests of justice.[129] Oppression constitutes one of these instances.[130]

As indicated by this Comment's opening quotation, Islamic law condemns oppressive and unfair bargains.[131] In addition to admonishing people to deal justly with each other,[132] Islamic law also prescribes several general contractual and economic principles to help society guard against unjust practices.[133] Among

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contract is the *shari'a* [sacred law] of the parties." Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 465 (1962) [hereafter Habachy, *Property*]. *Shari'a* is the Arabic word generally used to refer to Islamic law as a whole. *Id.* When used in the context above, it indicates the extreme respect to be given to the parties' agreement. *Id.*

125 *See* Frank I. Schechter, *A Study in Comparative Trade Morals and Control*, 19 VA. L. REV. 794, 797-98 (1933).

126 Habachy, *Property*, *supra* note 124, at 460 (stating that "Muslim jurists [acknowledge] that the social and economic life of the community would come to a standstill if its members weren't able to enter freely into binding contracts").

127 John E. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 3, 6 (1969) (stating that freedom of contract is not absolute).

128 *See generally* THE MEJELLE: AN ENGLISH TRANSLATION OF *MAJALLAHEL-AHKAM-I-ADLIYA* AND A COMPLETE CODE ON ISLAMIC CIVIL LAW 16-59 (C.R. Tyser et al. trans. 1967) (setting down general rules of Islamic contracts and showing restrictions placed on freedom of contract in Islamic law).

129 *See* RAHIM, *supra* note 124, at 294 (stating that the Islamic doctrine of *riba* "lies at the root of many of the restrictions which hamper freedom of contracts").

130 *See infra* notes 148-77 and accompanying text discussing oppression as a reason for invalidating a contract.

131 *See* THE MESSAGE OF THE QURAN, *supra* note 1 and accompanying text.

132 *Id.* Other Quranic verses prescribing contracting parties to deal justly with each other include: "Always give full measure, and be not among those who unjustly cause loss to others; and in all your dealings weigh with a true balance, and do not deprive people of what is rightfully theirs." THE MESSAGE OF THE QURAN, *supra* note 1, 26:181-83, at 571 (footnote omitted).

133 *See generally* MONZER KAHF, THE ISLAMIC ECONOMY: ANALYTICAL STUDY OF THE FUNCTIONING OF THE ISLAMIC ECONOMIC SYSTEM (1978). An Islamic economy is fundamentally a free market system, with a high regard for the continuous distribution of wealth. *Id.* at 41-56. The fourth pillar of Islam, *zakat* (a loose translation is "compulsory charity"), provides a good

these principles are the doctrines of unjust enrichment (*fadl mal bil 'iwad*),[134] unfair dealing (*ghabn fahish*),[135] contracts of necessity (*bay' al-mudtar* or *bay' al-madghut*),[136] and excessive speculation (*gharar*).[137]

The Islamic doctrine of unjust enrichment (*fadl mal bil 'iwad*) is somewhat vague.[138] Generally, when a contract unjustly enriches one party, Islamic law rules the contract invalid when the enriched party manipulated the circumstances to her advantage and to the other party's detriment in a way that either social customs or market norms would find oppressive.[139] Unjust enrichment involves the concept of getting something for nothing (which also exists in *gharar* and *riba*[140]) but only in a narrow sense—not some sort of lack of consideration.[141] Oppression is a key factor in determining unjust enrichment.[142]

Unfair dealing (*ghabn fahish*), likewise, is also imprecise.[143] The

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illustration of the Islamic incentive to invest wealth into the marketplace rather than hoarding it in excessive savings. MASUDUL ALAM CHOUDHURY, CONTRIBUTIONS TO ISLAMIC ECONOMIC THOUGHT: A STUDY IN SOCIAL ECONOMICS 135 (1986); Muhammad Nejatullah Siddiqi, *Muslim Economic Thinking: A Survey of Contemporary Literature*, *in* STUDIES IN ISLAMIC ECONOMICS 191, 252 (Khurshid Ahmad ed., 1980). Each year, every Muslim is required to pay *zakat* to the needy. KAHF, *supra*, at 59. The annual *zakat* is a monetary amount required from each person, calculated as an amount equal to about 2.5% of one's stagnant wealth (any assets which are not reserved or used for daily work and living expenses). CHOUDHURY, *supra*, at 18, 170; *see also* KAHF, *supra*, at 59 (describing macro-economic effect of *zakat*). Thus, the more wealth one keeps invested and circulating in the economy, the less one must pay in *zakat* each year. Siddiqi, *supra*.

134 *See infra* notes 138-42 and accompanying text.

135 *See infra* notes 143-46 and accompanying text.

136 *See infra* notes 148-50 and accompanying text.

137 *See infra* notes 163-70 and accompanying text.

138 *See* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 145-46 (1964).

139 *Id.* at 146.

140 *See infra* notes 151-70 and accompanying text.

141 *See infra* notes 151-70 and accompanying text.

142 SCHACHT, *supra* note 138.

143 *Compare* BABER JOHANSEN, THE ISLAMIC LAW ON LAND TAX AND RENT 33 (1988) (translating *ghabn fahish* as unfair dealing creating a "*laesio enormis*") *with* THE MEJELLE, *supra* note 128, art. 165, at 20 (describing *ghabn fahish* as an "excessive deception in the value of goods"). *See also* ABRAHAM L. UDOVITCH, PARTNERSHIP AND PROFIT IN MEDIEVAL ISLAM 216 (1970) (describing *ghabn yasir* as a "slight deception"). As discussed later, however, deception in the sense of fraud is not the operative legal factor in *ghabn fahish*. *See infra* notes 145-46 and accompanying text. In fact, fraud

primary evil that the doctrine seeks to abolish is one party's manipulation of the bargaining process in order to put the other party in a position of being unfairly surprised.[144] The notion of unfair dealing carries with it the concept of deception, an illegal trading practice in Islam.[145] Muslim jurists consider deception a factor indicating unfair dealing. They look at deception, however, not so much as one party tricking another, but instead as one party preventing the other from being fully aware of the true nature of the transaction, especially with regard to the value of the subject matter.[146]

The concern about oppression, illustrated by the doctrines of

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constitutes an entirely separate area of Islamic law, as it does in American law. *See* 'ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 348-98 (1984) (discussing prohibited trade and commerce practices under Islamic law). Instead, the notion of deception involved in *ghabn fahish* is limited to that involved in a discrepancy in the market value of goods. THE MEJELLE, *supra*, note 129, art. 165, at 20.

144 Although the phrase "unfair surprise" is not a standard term of art in Islamic law, the basic elements of a valid contract indicate that Islamic law considers most surprises in a contract unfair. *See* THE MEJELLE, *supra* note 128, art. 286, at 41 (stating that when buyer is unaware of location of object sold, buyer has option to annul contract); RAHIM, *supra* note 124, at 291 (stating that conditions of contract usually require subject matter in existence, and capable of delivery; "subject matter must be known and certain, otherwise the sale will be bad").

The term "unfair surprise" occurs in Comment One to U.C.C. § 2-302. *See infra* notes 219-21 and accompanying text for a discussion of the relationship between the U.C.C. concept and the Islamic concept as applied in the proposed test.

145 *See* IMAM MALIK, AL-MUWATTA 308 (1982) (quoting a tradition of Muhammad which stated "no trickery"). *See also* THE MESSAGE OF THE QURAN, *supra* note 1, 26:181-84, at 571 (discussing fair dealings).

146 *See* RAHIM, *supra* note 124, at 291 (stating that "if a transaction be of such a nature that it involves deception of one of the parties, in other words in which there is an element of speculation, it will not be upheld"). Although Judge Rahim's statement does not mean that deception and speculation are always synonymous, this statement does indicate that the concept of deception is linked to the principle of preventing oppression. *Id.* This quotation also illustrates the very narrow sense of the word speculation as used in Islamic law. *Id.* Speculation constitutes grounds for invalidating a contract only when it amounts to some sort of a deception. *Id.*

Other references to deception include Article 30 of the Mejelle which states that "repelling mischief is preferred to the acquisition of benefits." THE MEJELLE, *supra* note 128, art. 30, at 7. *See also* M. UMER CHAPRA, TOWARDS A JUST MONETARY SYSTEM 240 (1985) (referring to a tradition of Muhammad which states that "deceiving a *mustarsal* [an unknowing entrant into the market] is *riba*").

unjust enrichment and unfair dealing, is pervasive in Islamic law.[147] Another example appears in the doctrines of contracts of necessity (*bay' al-mudtar* or *bay' al-madghut*) and contracts of a coerced person (*bay' al ilja'*), both dealing with contracts formed under circumstances in which one party had little or no choice.[148] Although opinions vary, one school of Islamic thought holds these types of contracts invalid when they amount to oppression.[149] This concept is very similar to the common law analyses of contracts of adhesion.[150]

Another very broad, imprecise Islamic doctrine is *riba*.[151] Jurists often use *riba* as an umbrella doctrine to incorporate all the above concepts into one analysis.[152] Although often translated as interest or usury,[153] *riba* literally means increase or excess,[154] and actually encompasses much more than the common law concept of usury,[155] which is merely an excessive rate of interest.[156] In

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147 *See infra* notes 148-84 and accompanying text.

148 Khaled Abou El Fadl, *The Common and Islamic Law of Duress*, 6 ARAB L.Q. 121, 152 n.126 (1991).

149 *Id.* This perspective on invalidating contracts of necessity is held by the *Maliki* school of Islamic law as well as others. *Id.*; *see also* JOHANSEN, *supra* note 143, at 33 (stating that contract for rent of land could be invalidated if contract term for rent fell so far below fair rent as to constitute *laesio enormis* on the other party); THE MEJELLE, *supra* note 128, art. 18, at 5 ("[when a] hardship is experienced in a business, latitude and indulgence are shown").

150 *See* Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM L. REV. 1072, 1075 (1953); Leff, *supra* note 33, at 505 n.68 (listing additional sources); Murray, *supra* note 127, at 6; *see generally* Kessler, *supra* note 101 (discussing adhesion).

151 *See infra* notes 152-70 and accompanying text.

152 *See* Fazlur Rahman, Riba *and Interest*, 3 ISLAMIC STUD. 1, (1964) [hereafter Rahman, Riba *and Interest*]. No single commentator specifically states the proposition that *riba* incorporates all the above concepts. This conclusion results from a study of various scholarly works researched for this Comment. *See also* Fazlur Rahman, *Economic Principles of Islam*, 8 ISLAMIC STUDIES 1 (1969) [hereafter Rahman, *Economic Principles*] (discussing economic fairness as important basis of Islamic society).

153 RAHIM, *supra* note 124, at 294.

154 *See* Ziaul Haque, *The Nature of* Riba Al-Nasi'a *and* Riba Al-Fadl, 21 ISLAMIC STUD. 19, 19 (1982).

155 CHOUDHURY, *supra* note 133, at 11-12, 15 (*riba* not limited to loan interest on capital); Ziaul Haque, *Some Forms of* Riba Al-Fadl *in Trade and Commerce*, 22 ISLAMIC STUD. 73, 73 (1984); Schechter, *supra* note 125, at 799 n.20, 802 (*riba* more than just money loans for interest, but rather means any illicit commercial gain); Peter D. Sloane, *Status of Islamic Law in the Modern Commercial World*, 22 INT'L LAW. 743, 744-45 (1988). The most common understanding of the doctrine of *riba* is that it prohibits collecting

most cases, the doctrine requires a valid contract to be free of *riba*.[157]

Muslim jurists traditionally divided *riba* into two types: *riba al-fadl* (*riba* by way of excess) or *riba al-nasi'a* (*riba* by way of deferment).[158] A contract containing *riba al-fadl* gives one of its parties

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interest on loans. RAHIM, *supra* note 124, at 294. For an elaboration on the applications of *riba* other than prohibiting interest, see *infra* notes 158-177 and accompanying text.

Although not discussed by this Comment, this application of *riba* is worthy of study by Western scholars. *See generally* NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW: *RIBA, GHARAR* AND ISLAMIC BANKING (1986). In their efforts to avoid interest on loans, Muslim businessmen and scholars have developed unique and interesting profit-sharing schemes, banking systems, and partnerships that might prove useful to Western interest-heavy markets burdened by inflation. *See* KAHF, *supra* note 133, at introduction; SALEH, *supra*, at 86-109; MUHAMMED N. SIDDIQI, PARTNERSHIP AND PROFIT-SHARING IN ISLAMIC LAW 5 (1985); UDOVITCH, *supra* note 143, at 249-61.

156 *See* BLACK'S LAW DICTIONARY 1545 (6th ed. 1990) (defining usury as "the laws of a jurisdiction regulating the charging of interest rates").

157 *See* SALEH, *supra* note 155, at 3; Haque, *supra* note 154, at 21. Among the Quranic verses that establish the prohibition of *riba* are:

> God has made buying and selling lawful and usury unlawful. QURAN 2:275.
>
> God deprives usurious gains of all blessing whereas He blesses charitable deeds with manifold increase. QURAN 2:276.
>
> O you who have attained faith! Remain conscious of God, and give up all outstanding gains from usury, if you are [truly] believers. QURAN 2:278.
>
> O you who have attained faith! Do not gorge yourselves on usury, doubling and re-doubling it—but remain conscious of God. . . . QURAN 3:130.
>
> And [remember:] whatever you may give out in usury so that it might increase through [other] people's possessions will bring [you] no increase in the sight of God. . . . QURAN 30:39.

THE MESSAGE OF THE QURAN, *supra* note 1, at 62, 87, 622-23 (footnotes omitted).

158 *See* CHAPRA, *supra* note 146, at 240-46 (discussing the two types of *riba* and summarizing different Islamic schools of thought regarding *riba*). For purposes of this Comment, however, it is not necessary to understand the technical distinctions between the two types of *riba*. The discussion in the text is merely a cursory summary of the principal concepts. *See infra* notes 159-70 and accompanying text.

The above translations of *riba al-fadl* and *riba al-nasi'a* come from Nabil Saleh. *See* SALEH, *supra* note 155, at 13. Another definition describes *riba al-nasi'a* as an "increase charged in direct sales and exchanges of capital and commodities, from hand to hand" and *riba al-fadl* as an "increase charged in

an excessive profit.[159] Excessive profit does not refer simply to a lot of profit.[160] A contracting party can make a large profit and yet remain entirely within the law.[161] Excessive profit becomes illegal only when it forms the basis of some type of unjust enrichment or oppression.[162]

Riba al-nasi'a is a bit more complicated to explain. When a contract involves a time disparity between its formation and performance, the parties run the risk of *gharar* (excessive speculation).[163] That is, the deferment carries the risk that the anticipated future events will not occur.[164] Although Islam does not forbid speculative and uncertain contracts *per se*,[165] it does prohibit taking

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loans of capital and commodities against fixed time extensions." Haque, *supra* note 155, at 73.

159 SALEH, *supra* note 155, at 13.

160 *See id.* at 20.

161 *Id.* at 14.

162 *Id.*

163 Literally, *gharar* means "hazard." SCHACHT, *supra* note 138, at 146.

164 *Id.* at 146-47. A classic example of *gharar* involves a contract for the sale of fruit which has not yet ripened. MALIK, *supra* note 145, at § 31.8. Such a transaction carries the risk that the produce will never ripen, due to weather, natural disaster, or other uncontrollable forces. *Id.*

165 Nabil A. Saleh, *Financial Transactions and the Islamic Theory of Obligations and Contracts*, *in* ISLAMIC LAW AND FINANCE 13, 19-21 (Chibli Mallat ed., 1988). Early Islamic law suggested that agreements containing any uncertainty were unlawful. Noor Mohammad, *Principles of Islamic Contract Law*, 6 J.L. & RELIGION 115, 121 (1988). According to early scholars, a contract contained prohibited *gharar* when the subject matter, price, or both were not fixed in advance, at contract formation. Mohammad, *supra*, at 121 (1988). Under this theory of *gharar*, contracts required clear knowledge of the existence of the exchanged items, their characteristics, quantity, and time of performance. Saleh, *supra*, at 19. The concept of certainty in contracts exists in the common law as well. LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS, §§ 43-49 (2d ed. 1965) (discussing uncertainty of price, time of performance, quantity term, and duration).

With the emerging complexity of the commercial world, however, later Muslim jurists modified their views. Habachy, *System of Nullities*, *supra* note 124, at 66. Ibn Taymiya, for example, "wrote that 'speculative contracts involving a measure of *mayser* [gambling] had to be authorized; otherwise too much rigor in the application of the theory of *gharar* in all its purity would make social and economic life impossible. . . . He remarked that it is difficult completely to exclude an element of uncertainty in sales, where, more often than not, the equivalence of the values exchanged is based on approximation (*jagrib*) rather than on exact appraisal'." *Id.*

Although an absolute doctrine proved impractical, the insistence on certainty reveals the underlying concern Islamic law and jurists have with oppression. *See infra* notes 174-77 and accompanying text for further

undue advantage of such risks. This rule is based on the Quranic injunctions against gambling.[166] The mere existence of risk in a contract, however, does not render it unlawful under Islamic law, for to hold otherwise would virtually outlaw commerce altogether.[167] Indeed, speculation in a broad sense exists in every aspect of one's life.[168] *Gharar* refers to speculation in a very narrow sense: *excessive* speculation.[169] Thus, it is not speculation itself that brings a contract under scrutiny, but whether or not

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discussion of oppression. Certainty of subject matter, for instance, provides some assurance that a buyer enters a contract with full knowledge of what he is buying. RAHIM, *supra* note 124, at 285-86. Judge Rahim acknowledges this concept when he states that, with respect to the rule of certainty of subject matter, "What is considered of importance in connexion with the question of fairness or unfairness of a bargain is . . . the state of . . . mind [of the buyer] with reference to the subject matter. . . . [C]onsent without knowledge . . . [is] incomplete." *Id.* at 286.

166 *See* UDOVITCH, *supra* note 143, at 30 ("[a]ny outside or unknown source of gain is classified in the same category as gambling").

Some of the Quranic verses addressing gambling include:

> They will ask thee about intoxicants and games of chance. Say: "In both there is great evil as well as some benefit for man; but the evil which they cause is greater than the benefit which they bring." QURAN 2:219.
>
> O you who have attained faith! Intoxicants, and games of chance . . . are but a loathsome evil of Satan's doing: shun it, then, so that you might attain a happy state. QURAN 5:90.

THE MESSAGE OF THE QURAN, *supra* note 1, at 4, 162 (footnotes omitted).

It has been said that Islam's prohibition of gambling was itself an attempt to cleanse commerce of unconscionable practices, an interesting correlation between *gharar* and the doctrine of unconscionability. Mohammad, *supra* note 165, at 123.

167 *See* Ibn Taymiya's statement, *supra* note 124. Muslim scholars all agree that the Islamic legal restrictions on contracts are *not* intended to stifle commerce. *See supra* notes 123-26 and accompanying text; KAHF, *supra* note 134. The Quranic verse "God has allowed trade and forbidden usury," THE MESSAGE OF THE QURAN, *supra* note 1, 2:275, at 61-62 (footnotes omitted), clearly shows Islam's interest in a free, healthy market economy. *See also supra* notes 123-26 and accompanying text.

168 *See* Habachy, *Property*, *supra* note 124, at 465. Among the many instances of speculation in everyday life are the speculation that one will not lose an item immediately after purchase, the speculation that a purchased item will hold its value or will not turn out to be a "lemon," and so on. *Id.* Prohibiting speculation altogether would thus bring all commerce and societal agreements to a grinding halt. *Id.* at 472-73. The type of speculation that Islam discourages is a very limited type of speculative arrangement. *See supra* notes 163-67, 169-70 and accompanying text.

169 SALEH, *supra* note 155, at 64.

one of the parties attempted to use excessive speculation to gain an unearned profit.[170]

Although Muslim jurists often use the broad concept of *riba* (unearned profit) to incorporate all these doctrines into one general analysis for the validity of a contract,[171] some of the concepts do not clearly fit under *riba*. For example, contracts of necessity (*bay' al-mudtar*) may be more properly categorized under duress. Nevertheless, the ultimate purpose of *riba* is to prevent oppression,[172] which includes relieving people who are forced by circumstances of necessity to perform transactions which they would not otherwise perform.[173]

The underlying principle behind the doctrine of *riba* (unearned profit) is identical to that of the common law doctrine of unconscionability: to prevent oppression,[174] and protect the weak against exploitation by the strong.[175] The Islamic doctrine of unearned profit (*riba*) combats oppression by prohibiting parties from gaining excessive profits to which they are not otherwise entitled. The concept stems from Quranic injunctions against

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170 *See id.* The above discussion merely explains some principal concepts of Islamic law. *See supra* notes 131-69 and accompanying text. It does *not* propose that American law adopt the doctrines described above.

171 *See* Rahman, Riba *and Interest*, *supra* note 152.

172 *See infra* notes 174-77 and accompanying text.

173 *See* SALEH, *supra* note 155, at 11.

174 CHAPRA, *supra* note 146, at 64 (stating that eliminating exploitation is reason for rule against *riba*); CHOUDHURY, *supra* note 133, at 12 (stating that "the abolition of interest [*riba*] in Islam is considered important" to "end the oppression and exploitation of the labour force," while still maintaining free enterprise system); Schechter, *supra* note 125, at 816 (stating that without Islamic regulations of fair trade, "unfair and oppressive practices" would be prevalent); Siddiqi, *supra* note 133, at 253 (stating that "[t]he main reason why Islam abolishes interest [*riba*] is that it is oppression (*zulm*) involving exploitation").

175 SALEH, *supra* note 155, at 49. Although equity law did not develop in the same way and to the same extent in Islamic law as it did in Anglo-American law, the equitable forces involved in the Islamic doctrine of unjust enrichment offer an interesting parallel. M. Umer Chapra, *The Islamic Welfare State and its Role in the Economy*, *in* STUDIES IN ISLAMIC ECONOMICS 143, 154-56 (Khurshid Ahmad ed., 1983). *The Mejelle* (the famous codification of Islamic civil law, applied primarily in Ottoman Turkey) articulates the legal principle of "equitable relief from the law." THE MEJELLE, *supra* note 128, art. 17, at 5. This statement echoes the history of equity under the common law unconscionability doctrine. *See supra* notes 38-65 and accompanying text.

appropriating the property of others without justification.[176] Therefore, although not a perfectly encompassing concept,[177] unearned profit (*riba*) provides a suitable and convenient meeting point for the different Islamic concepts which all operate to prevent oppression.

Islamic law holds several different opinions regarding the scope of the doctrine of unearned profit (*riba*) and when it should invalidate a contract.[178] Some Muslim schools of thought look at the norms and customs of the market place,[179] while others insist on the formalities of the contract.[180] One school[181] focuses on the essential fairness of the contract, taking several factors into

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[176] THE MESSAGE OF THE QURAN, *supra* note 1, 2:188; 4:29, 161; 9:34; SCHACHT, *supra* note 138, at 12 n.2; *see also* THE MEJELLE, *supra* note 128, art. 97, at 15 (stating "without legal cause, it is not allowed for anyone to take the property of another"). One commentator compares those who take *riba* [unjust enrichment] to those who wrongfully appropriate other people's property. CHAPRA, *supra* note 146, at 56.

[177] *See supra* notes 171-73 and accompanying text.

[178] RAHIM, *supra* note 124, at 294.

[179] *See* MAHMASSANI, *supra* note 3, at 19-24 for a discussion of the *Hanafi* school. The *Hanafi* school focuses on the norms of the marketplace as a major factor in evaluating a contract's validity. *Id.* The *Maliki* school also looks at market custom, but local customs and local fields of expertise are not enough to constitute market custom according to *Maliki* jurists. *See id.* at 24-26 for a discussion of the *Maliki* school. Market custom to these jurists is defined according to widespread practices ("*ahkam ul-'urf*"). *Id.*

The Mejelle, which is a codification of primarily *Hanafi* law with a bit of *Maliki* jurisprudence included, illustrates the importance of market practices. *See* THE MEJELLE, *supra* note 128, arts. 36, 38, 39, 41, 45, at 7-8. (36: "Custom is of force"; 38: "A thing impossible by custom is as though it were in truth impossible"; 39: "With change of times, the requirements of the law change"; 41: "Custom is only given effect to, when it is continuous or preponderant"; 45: "What is directed by custom is as though directed by law"). Judge Rahim considers unearned profit a doctrine "in the application of which the circumstances of the time and the practice of people of different countries should be given the greatest weight." RAHIM, *supra* note 124, at 294.

[180] *See* MAHMASSANI, *supra* note 3, at 27-32 (discussing *Shafii* and *Hanbali* schools). The *Shafii* and *Hanbali* schools insist on the formalities of the contract, investigating it for offer, acceptance, and consideration. *Id. Shafii* and *Hanbali* jurists often invalidated contracts for lack of consideration, resembling the old common law approach discussed earlier. *Id.*; *see also supra* notes 46-47 and accompanying text.

[181] *See* MAHMASSSANI, *supra* note 3, at 35-38 (discussing *Ja'fari* school). The *Ja'fari* school of Islamic law considers the essential fairness of a transaction in order to determine its validity. *Id. Ja'fari* jurists consider

account, including those listed above.[182]

Just as common law courts apply the doctrine of unconscionability to prevent oppression and to control the exploitation of disparate economic bargaining power, Islamic courts use *riba* to regulate economic activity according to social and moral standards.[183] Although both doctrines are vague and imprecise,[184] they focus on similar factors and their underlying purposes are identical. Thus, combining the best of each system would create an improved doctrine for both.

III. Proposal for Improving the Doctrine of Unconscionability

A. The Proposed Test for Unconscionability

The existing common law doctrine of unconscionability calls for a clearer, more precise test.[185] This Comment proposes to combine the relevant principles from both the American and Islamic legal systems to improve the law of unconscionability in each. Specifically, this Comment proposes that courts should find a contract unconscionable when both of two elements are satisfied:[186] (1) one of the contracting parties, through the contract,

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market practices, unjust enrichment, oppression, and other factors indicating fairness or unfairness. *Id.*

In an interesting overlap of different schools of Islamic thought, the *Mejelle*, although primarily a *Hanafi* and *Maliki* code, contains the provision that "damage is repelled as far as possible." The Mejelle, *supra* note 128, art. 31, at 7. This principle indicates that even non-*Ja'fari* schools considered fairness issues such as the amount of damage to the contracting parties. *Id.*

182 I would like to thank Professor Hossein Tabataba'i of Princeton University for this lucid summary of the positions of the Islamic schools of law on this issue.

183 Haque, *supra* note 154, at 22. In fact, the desire to control all economic activity also explains the division of *riba* into two forms. *Id.* If *riba* were interpreted to apply only to money-lenders' loans, then "a large part of economic activity would then remain out of social control and thus open to exploitation of economically weaker individuals and groups by those powerful individuals and groups who controlled commercial capital, all natural resources and means of production." *Id.*

184 *See supra* notes 33-183 and accompanying text.

185 *See supra* notes 33-120 and accompanying text.

186 One should bear in mind the importance of freedom of contract in both Islamic and American law when implementing the doctrine of unconscionability. *See supra* notes 44-46, 123-26 and accompanying text. Both systems follow the general rule that even fools should be held to their

creates a potential for unearned profits (in Islamic terminology)[187] or unjust enrichment (in Western common law terminology),[188] *especially* through excessive speculation;[189] *and* (2) the beneficiary of the unearned profit occupies the stronger position in an oppressive relationship between the contracting parties. The first prong comes from the Islamic legal principles of *riba*,[190] while the second draws on the existing common law unconscionability doctrine.[191]

1. Prong One: Unjust Enrichment and Excessive Speculation

The first prong applies the general principle of *riba*, incorporating the Islamic doctrines discussed above.[192] Thus, if a party uses the contract to gain more than she deserves, the contract meets the first prong.[193] Undeserved gain occurs in many different circumstances: through simple excessive demand or speculation on

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bargains; the law should not interfere every time someone makes a bad deal. *See supra* notes 44-46, 123-26 and accompanying text. The unconscionability doctrine threatens this general principle to some extent. Cellini & Wertz, *supra* note 6, at 203 ("[s]ection 2-302 represents an awareness on the part of the drafters of the U.C.C. that certain limitations upon freedom of contract are desirable and necessary and that courts must be properly equipped to impose these limitations"). While equity principles insist that certain contracts incur such severe economic consequences to one party that the law must grant relief, *id.* at 208, the law must view unconscionability as a very limited exception to the basic premise of contractual freedom. *See id.* at 203. Courts should apply the proposed test with this principle in mind.

187 *See supra* notes 151-83 and accompanying text. The term "unearned profits" comes from the Islamic doctrine of *riba*. *See supra* notes 151-83 and accompanying text.

188 This Comment uses the term "unjust enrichment" to represent common law terminology, as an alternative to Islamic legal terminology, because this term is familiar to common law courts. *E.g.* Kolentus v. Avco Corp., 798 F.2d 949, 959 (7th Cir. 1986) ("in order to recover for unjust enrichment under New York Law, the plaintiff must show that the defendant was enriched at the expense of the plaintiff under circumstances requiring that in equity and good conscience the defendant should make restitution") (citations omitted).

189 See *infra* note 200 and accompanying text for discussion of special relevance of excessive speculation.

190 *See supra* note 187, *infra* notes 218-21 and accompanying text.

191 *See infra* note 201 and accompanying text.

192 *See supra* notes 151-70 and accompanying text.

193 See *infra* note 200 and accompanying text for a discussion of why courts should give extra weight to excessive speculation under the first prong of the proposed test.

uncertain future events. That is, if a party is in a position in which she can demand and receive more value than she gives up, the first prong is met.[194]

Likewise, if a contract speculates on a future event in a way that creates the potential for unjust enrichment, it also satisfies the first prong. This type of unjust enrichment is described in prong one as "excessive speculation," or speculation that exceeds market norms. Excessive speculation not only meets the first prong, but it also creates an additional urgency for the contract in question to be found unconscionable, if the second prong is also met.[195] As discussed earlier,[196] not every form of speculation would meet this first prong, for such a rule would virtually outlaw all contracts.[197] Rather, the first prong is concerned with *excessive* speculation, when one party excessively speculates on risks in an attempt to gain an unearned profit. A court determines what is excessive based on the prevailing market standards and social customs.

In determining what constitutes unjust enrichment (the first prong) the factors to consider include: (1) whether one of the parties was unable to understand and evaluate the terms of the contract; (2) the unpredictability of the future events, if any; (3) the degree of control the parties have over the occurrence of those future events; (4) the relevance of future events to the other terms of the contract;[198] (5) the fair or unfair distribution of potential profits between the parties;[199] and (6) the reasonableness of potential speculated profits. In each case, market customs and norms will determine if a given contract or term gives a party an unjustified gain.

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194 *See* Kessler, *supra* note 101, at 632. These 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. *Id.*

195 See *infra* note 200 and accompanying text for explanation of the special status of excessive speculation.

196 *See supra* notes 167-70 and accompanying text.

197 *See supra* note 167 and accompanying text.

198 An example of a contract with irrelevant future events might be a contract for the sale of a car conditioned on whether or not it rains on a given date. Such a condition is an irrelevant speculation on a future event.

199 An example of unequal potential for return would be a contract in which, all other things being equal, if a certain future event occurs, one party receives $1000 dollars, whereas if it does not occur, the other party receives $1 dollar.

According to prong one, excessive speculation "especially" calls for an ultimate finding of unconscionability. That is, when oppression (the second prong) and unjust enrichment (the first prong) exist, but the unjust enrichment was not achieved through excessive speculation, then a court *may* find unconscionability. Such a determination will depend upon the facts of the case and whether or not the unjust enrichment went far beyond market norms. If, however, a contract involves oppression (the second prong), unjust enrichment (the first prong) and excessive speculation (that is, that the unjust enrichment was achieved through excessive speculation), a court *must* find the contract unconscionable.[200]

2. Prong Two: Oppressive Relationship

The second prong reflects the existing case law and commentary on the American unconscionability doctrine.[201] In American common law, courts determined unconscionability by evaluating different elements indicating unconscionability.[202] Likewise, under the second prong of the proposed test, courts would consider the same factors to determine whether an oppressive relationship existed at the time of contract formation. By incorporating these factors into elements indicating oppression (the second prong of the unconscionability test), the proposed test improves the existing common-law doctrine; these factors become part of a larger test rather than ends in themselves.[203]

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200 Excessive speculation occupies this unique position because of its connection with "unfair surprise," and represents those extreme circumstances involving unfair surprise contemplated by the U.C.C. *See infra* notes 218-21 and accompanying text.

201 *See supra* notes 33-101 and accompanying text.

202 *See supra* notes 33-101 and accompanying text.

203 *See supra* notes 33-65 (discussing common law unconscionability doctrines). Because the second prong would make existing unconscionability case law part of the new test, a concern arises: Would the confusion and inconsistent holdings of the existing common law doctrine cause the same confusion in the new test? Several facts distinguish the existing and proposed doctrines to prevent this result. First, the factors listed below are only that: factors. *See infra* notes 204-13 and accompanying text. For example, one-sidedness is not a test in itself, as it was in the existing common law, but it is rather only a factor contributing to the overall determination of oppression. *See infra* notes 204-13 and accompanying text. In addition, the second prong is not the whole test. *See supra* notes 186-89 and accompanying text. Even if the factors contributing to the second prong are unclear, the contract still has to meet the first prong in order to

Some of the factors that the American unconscionability doctrine has considered[204] include: (1) unequal bargaining power;[205] (2) limited time in which to read and understand the contract;[206] (3) use of fine print;[207] (4) absence of meaningful choice;[208] (5) excessively one-sided terms;[209] (6) a monopolistic market;[210] (7) an adhesion-type contract;[211] (8) the level of education and experience in the marketplace;[212] and (9) whether an unexpected risk is shifted to a party who does not usually assume it.[213] These same types of circumstances contribute to the existence of an oppressive relationship under the second prong.

B. Analysis of Proposed Test

Both prongs of the proposed test are crucial because either prong alone would create an unfair and impractical doctrine. For example, if the first prong were eliminated, a court could strike down a contract for oppression alone. This would be an undesirable result. If oppression alone rendered contracts unconscionable, any weak party to a contract between parties of unequal bargaining power could escape her agreement, regardless of the stronger party's actions.[214] If a contract is oppressive but does not give one party any undeserved benefit (prong one), then invalidating the contract is illogical. Other avenues exist to relieve whatever emotional harm that may occur in such situa-

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be invalidated for unconscionability. *See infra* notes 214-15 and accompanying text.

204 *See* Murray, *supra* note 127, at 18-24.

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.* Note that the factors contributing to a finding of oppression include both procedural and substantive issues. *See supra* notes 81-84, 205-13 and accompanying text.

214 *See* Ellinghaus, *supra* note 83, at 766-67 (stating that "[j]ust because the contract I signed was proffered to me by Almighty Monopoly Incorporated does not mean that I may subsequently argue exemption from any or all obligation: at the very least, some element of deception or substantive unfairness must presumably be shown"). Another commentator criticized *Campbell Soup* on the same grounds. *See supra* note 115 and accompanying text.

tions.[215] Declaring the contract unconscionable is unnecessary. A contract is invalid for unconscionability only if the oppressive relationship results in one party becoming unjustly enriched by exploiting the needs of the other party or gambling excessively on future events.

Alternatively, one might argue that unjust enrichment alone sufficiently defines unconscionability, rendering the second prong unnecessary. Unjust enrichment alone, however, would cause undue restrictions on the economy. The free market system central to both American and Islamic law recognizes that the law cannot arbitrarily limit a person's profit in the marketplace.[216] Making a large amount of money from a given transaction, or a "killing" in layperson's terms, is part of the potential of any bargain and in itself is insufficient for the law to interfere. When a party makes a "killing" by oppressing another party, on the other hand, the transaction violates society's notions of a free market to such an extent that a court will deem the contract unconscionable and relieve the oppressed party of her contractual obligations.[217] Thus, both prongs, unjust enrichment and oppression, are necessary to a complete, equitable definition of unconscionability.

Reflecting back on the U.C.C. doctrine, the proposed test essentially achieves what the U.C.C. sought to accomplish when it originally codified the doctrine. Comment One to U.C.C. section

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215 If the only objectionable aspect of a contract is the oppressive relationship between the parties, adequate remedies for emotional damages (caused by the oppression) exist in the law of duress, particularly economic duress and the tort of emotional distress. *See generally* John P. Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571 (1947); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Nicholas Rafferty, *The Element of Wrongful Pressure in a Finding of Duress*, 18 ALBERTA L. REV. 431 (1980). Unconscionability, as a distinct doctrine, however, offers something different from the law of duress. Dawson, *supra*, at 571-73. Duress tends to look at policy issues, and whether one party's conduct is so coercive that society will not tolerate it. *Id.* Unconscionability, on the other hand, focuses on the economic impact of such coercion, and other oppressive relationships. *See supra* notes 33-120 and accompanying text. Unconscionability considers whether a weak party was so disadvantaged by the bargain that principles of equity call on society to relieve that party of her obligations. CALAMARI & PERILLO, *supra* note 38, § 9-40, at 399. Thus, the first prong of the proposed test creates the distinguishing feature between the law of duress and unconscionability.

216 Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the FTC*, 68 B.U. L. REV. 349, 372-73 (1988).

217 *See supra* notes 33-100 and accompanying text.

2-302 states that the section's purpose is to prevent oppression and unfair surprise.[218] Unfair surprise and oppression form the basis of the first and second prongs of the proposed test. The first prong draws from Islamic legal principles and includes situations in which one party is unfairly surprised,[219] while the second prong, inspired by the American common law unconscionability doctrine, focuses directly on oppression.[220] Although Islamic law focused more precisely on unfair surprise and its role in unjust enrichment, it has not given unfair surprise a fair and restricted scope. That restricted scope exists in the second prong—oppression—on which the common law has focused more diligently, while largely ignoring unfair surprise.[221] Thus, combining the

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[218] U.C.C. § 2-302 cmt. 1 (1990). Because unfair surprise (excessive speculation) is one way to gain an unjust enrichment, one might argue that "unfair surprise," the term used in the U.C.C., embodies the first prong better than the term "unjust enrichment." Upon reflection, however, the necessity for unjust enrichment as the first prong becomes obvious: if a contract involves oppression (the second prong) and unfair surprise, but no material loss to the oppressed party (unjust enrichment), then no real economic damages exist and unconscionability is an inappropriate arena for relief. *See supra* notes 214-15 and accompanying text. As discussed earlier, some type of economic hardship must exist in order to warrant a finding of unconscionability. *See supra* notes 214-15 and accompanying text. Without it, an oppressed party should seek relief on the basis of duress or emotional distress. *See supra* notes 214-15 and accompanying text. Thus, using unjust enrichment as the decisive element of the first prong keeps the analysis within the scope of the unconscionability doctrine.

[219] Unjust enrichment does not always involve unfair surprise. *See supra* notes 192-200 and accompanying text. Unfair surprise exists in unjust enrichment when the party who achieved an unearned profit did so through excessive speculation on future events. *See supra* notes 198-99 and accompanying text. The uncertainty regarding the future events creates the surprise; the excessive nature of the particular speculation (which is determined according to market standards) creates the unfairness. *See supra* notes 198-99 and accompanying text.

[220] *See supra* notes 201-13 and accompanying text.

[221] Common law cases discussed the issues involved in the first prong in the sense of unfair surprise, but these cases did not flesh out the meaning of the term in any significant detail. *See* Ball Martty Med. Corp. v. St. Jude Med., Inc., 1988 U.S. Dist. LEXIS 1548, at *12 (E.D. La. 1988) ("the animating principle of unconscionability is the prevention of oppression and unfair surprise"); Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1376 (Mass. 1980) (unconscionability to be determined on case by case basis "giving particular attention to whether . . . the contract provision could result in unfair surprise and was oppressive").

wisdom of both systems corrects the failings of each and provides a clearer test for unconscionability.

C. Application of Proposed Test

To illustrate how the proposed test improves upon the existing state of the law, this Comment will analyze a few typical unconscionability cases in light of the proposal.[222] *Williams v. Walker-Thomas Furniture Co.*[223] offers a good starting point. Applying the first prong to the contract shows that the seller did indeed use the deferred installment contract to gain an unjust enrichment. Each time Mrs. Williams purchased an item on the seller's installment contract, the seller obtained a lien on all the items previously purchased from the seller, whether paid off or not.[224] This type of contract enabled the seller to speculate on the risk that the buyer would default, after which the seller would acquire title to all the encumbered items.

According to the proposed test, this speculation is excessive if it goes beyond the relevant market practices—a factual determination to be made with all the relevant evidence before the court.[225] Bearing in mind that any present analysis is limited by whatever facts the court revealed in its published opinion, the speculation in question here would be excessive: it goes beyond acceptable market practices.[226] Thus, the contract would meet the first prong of the proposed test by way of excessive speculation. Because the defendant achieved unjust enrichment through excessive speculation (unfair surprise), the court *must* find the contract unconscionable if it also meets the second prong.[227]

Turning to the second prong, the contract indicates several factors contributing to an oppressive relationship between Mrs. Williams and the Walker-Thomas furniture company. Some of these factors include: (1) the unequal bargaining power of the con-

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222 *See infra* notes 223-58 and accompanying text.

223 350 F.2d 445 (D.C. Cir. 1965). *See supra* notes 94-101 and accompanying text.

224 *See supra* note 97 and accompanying text.

225 *See supra* notes 198-200 and accompanying text.

226 *See Williams*, 350 F.2d at 447-48. Some of the evidence given in the opinion tending to show that the speculation was excessive beyond market practices included the lower appellate court's finding that the contract raised "serious questions of sharp practice and irresponsible business dealings." *Id.* at 448.

227 *See supra* notes 201-13 and accompanying text.

tracting parties;[228] (2) Mrs. Williams' limited education and market experience;[229] (3) the large corporate nature of Walker-Thomas in contrast to the individual customer, Mrs. Williams;[230] and (4) the probable lack of meaningful choice Mrs. Williams had due to her low credit status.[231] Considering all these and other relevant factors revealed in the published opinion, the contract would meet the second prong of the proposed test. Thus, under the proposal, the given facts would meet both prongs and a court would probably find the *Williams* contract unconscionable.[232]

The *Williams* case illustrates one of the important merits of the proposed test. It requires judges to explain their decisions beyond simply declaring that unconscionability exists or that each prong is met. In determining unconscionability, judges must break down their analyses into the two prongs and explain their rationale pursuant to the individual factors involved in each prong.[233] Thus, the test requires judges to consider a large number of specific factors before deciding to enforce their judicial gasp.[234]

The many price-value disparity unconscionability cases illustrate the key role which the marketplace plays in the proposed test.[235] For example, in *Miami Tribe of Oklahoma v. United States*,[236] an American Indian tribe protested the sale of its land to a federal agent for less than one half of its market value.[237] Although it

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228 *See Williams*, 350 F.2d at 449.

229 *Id.*; Leff, *supra* note 33, at 551.

230 *Williams*, 350 F.2d at 447.

231 *See id.* at 449. Mrs. Williams' low credit status probably put her in the position of facing similar or worse contract terms from every other furniture company. *Id.*

232 The word "probably" is included here only because the analysis above necessarily depends on only those limited facts revealed in the published opinion. *See supra* note 226 and accompanying text.

233 *See supra* notes 192-213 and accompanying text.

234 *See supra* notes 67, 198-99, 204-13 and accompanying text.

235 *See, e.g.*, Miami Tribe of Oklahoma v. United States, 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961). Price-value disparity cases also illustrate the need for both prongs of the proposed test. Unless oppression (the second prong) exists, the free market system frowns upon relieving parties of their obligations simply because of a difference between the price paid and the value obtained (unjust enrichment, the first prong). *See supra* note 186.

236 281 F.2d 202 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961).

237 *Id.* at 208. The payment price was $121,947, but the value of the land was $316,698. *Id.*

noted that drawing a line in such cases is difficult,[238] the court found the contract unconscionable due to inadequacy of price.[239] Likewise, a court would probably also find this contract unconscionable under the proposed test because it grants the buyer an unjust enrichment in the form of excessive profit.[240] The excessiveness of the profit, however, depends upon marketplace custom and norms.[241] Given the facts of the case and the court's attitude toward the low price, it appears that the price term did exceed market norms. Because this type of unjust enrichment does not involve unfair surprise, the court may find the contract unconscionable if it meets the second prong, but the urgency is not so great.

Miami Tribe also incorporates the second prong, oppression. The factors indicating oppression include: (1) the unequal bargaining power between the government and a sole Indian tribe;[242] (2) Miami Tribe's potential lack of understanding of the terms of the contract;[243] (3) their possible lack of meaningful choice;[244] and (4) the general one-sidedness of the contract.[245]

Comment One of U.C.C. section 2-302 lists several cases, all involving warranty disclaimers and remedy limitations, to illus-

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238 *Id.* (stating that "there is no exact dividing line between what is unconscionable and what is not"). The court went on to say, "The disparity between the price paid and the fair market value of the land must be very great. . . . [I]n this case . . . payment of less than half the true value is unconscionable." *Id.*

Some uncertainty still exists regarding exactly *what* is excessive in price-value disparity cases. *See id.* This is true both under the existing system and the proposed test. *See supra* notes 198-99 and accompanying text. Given the requirement in U.C.C. § 2-302(2) that the court grant the parties an opportunity to present evidence about the commercial setting of the contract, U.C.C. § 2-302(2) (1990), many of these determinations will turn on the specific variables of the marketplace. *See supra* notes 199-200 and accompanying text. Therefore, it would be prudent to leave the question to the trier of fact, and not attempt to fix a rule regarding the definition of "excessive." *See supra* notes 199-200 and accompanying text. Thus, such cases are very fact specific, and do not carry the implication of unconscionability inherent in cases involving unfair surprise. *See supra* note 194 and accompanying text.

239 *Miami Tribe*, 281 F.2d at 208-09.

240 *See supra* note 194 and accompanying text.

241 *Miami Tribe*, 281 F.2d at 207-08.

242 *Id.* at 211-12.

243 *Id.*

244 *See id.*

245 *See id.*

trate the underlying basis for the section.[246] It is possible to analyze these cases under the proposed test, although some commentators have argued that they do not directly fit under U.C.C. section 2-302 at all.[247] For example, the waiver of a merchant's warranty of merchantability meets the first prong, unjust enrichment. The seller gains undeserved profit by receiving binding obligations from the buyer (payment for the goods) but fails to live up to the obligations recognized by law.[248] The second prong, oppression, of course, depends upon the facts of each case. If a contract includes warranty disclaimers but contains no evidence of oppression, the parties are held to their freely bargained contract.

Although the cases discussed so far would reach the same result under the proposed test and the existing unconscionability analyses, this would not always be true. The *Campbell Soup*[249] case offers a good illustration.[250] The contract clause which might constitute unjust enrichment (in the form of excessive speculation) is the price term. By agreeing on a fixed purchase price for

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246 U.C.C. § 2-302 cmt. 1 (1990).

247 *See supra* note 79. Because the proposed test accommodates these cases, the decision of whether or not they should be dealt with under U.C.C. § 2-302 or relegated to other sections of the U.C.C. can be left to the legislature. In the absence of such a legislative decision, however, it would be harmless to analyze them under both.

248 Between merchants, a warranty of merchantability and of fitness for intended use are implied terms of every contract. U.C.C. §§ 2-314 (Implied Warranty: Merchantability; an implied warranty that the goods sold are fit for general use), 2-315 (Implied Warranty: Fitness for Particular Use; an implied warranty that goods sold are fit for a "disclosed use"). If the parties exclude or modify such warranties, they must comply with U.C.C. § 2-316 (Exclusion or Modification of Warranties) (including clear conspicuous language, etc.). *Id.*

249 Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); *see supra* notes 50-56 and accompanying text.

250 As an equity case, the court analyzed *Campbell Soup* under the poorly designed gross overall imbalance test. *See supra* note 115 and accompanying text. The hardship to the farmer, however, was in no way the result of the harsh one-sided terms. Leff, *supra* note 33, at 538. Rather, the farmer incurred harm because the market value of his goods increased between contract formation and performance and he was bound to a lower contract price. *Id.* Analyzing *Campbell Soup* under the proposed test eliminates the irrationality of the overall imbalance approach. *Id.* Under the proposed test, overall imbalance is only relevant as a factor contributing to oppression, the second prong. *See supra* notes 204-13 and accompanying text.

carrots to be delivered in the future, both parties, in effect, gambled on the fluctuation of the market price for carrots.[251] If the price fell before delivery, the farmer would receive a windfall. Conversely, if the price subsequently rose before delivery, the buyer would realize unanticipated savings. Such an agreement involves speculation.[252] Whether or not such speculation is excessive, however, depends upon the marketplace. If the seller could prove that setting the price in advance of performance was a common market practice, that term might not constitute excessive speculation; the contract would thus not meet the first prong, unjust enrichment.

Assuming that the first prong is met, however, facilitates an analysis of the second prong. Under the given facts, oppression exists. The factors contributing to finding an oppressive relationship between Campbell Soup and the farmer include: (1) unequal bargaining power between an individual farmer and a large soup company;[253] (2) a potential lack of meaningful choice (if the facts show that the farmer had little choice but to sell to Campbell Soup, or that other buyers would insist on virtually identical terms);[254] and (3) one-sided clauses providing exclusive damages for Campbell Soup in addition to the right to reject any carrots and further restrict the farmer's ability to sell them elsewhere.[255] Under the given facts, the contract would meet the second prong.

Due to the possible legitimacy of the price term,[256] a court analyzing the contract in *Campbell Soup* under the proposed test could find it valid, a result very different from that in the actual case. As harsh as this result might be to the farmer, this is an example of a situation in which oppression exists, but the contract gives no unjust enrichment, or even material gain, to the oppressive party. In such cases, as discussed earlier,[257] unconscionability does not

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251 *See supra* notes 195-200 and accompanying text.

252 *See supra* notes 195-200 and accompanying text.

253 *Campbell Soup*, 172 F.2d at 83.

254 *Id.*

255 *Id.* at 83-84.

256 *See supra* notes 250-52 and accompanying text. Ironically, if the price term were altered to avoid any type of speculation (which presumably increases the fairness of the transaction), such as reading "the prevailing market price," the contract would certainly be valid under the proposed test, despite the harsh contract terms and oppression of the farmer. *See supra* note 215 for a discussion of the farmer's possible avenues for redress.

257 *See supra* note 215.

provide the most appropriate avenue for relief.[258] Thus, if the price term was a common market practice, a court applying the proposed unconscionability test would uphold the *Campbell Soup* contract.

CONCLUSION

Roscoe Pound wrote: "History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law."[259] This articulation[260] of the central role of legal borrowing in the development of any legal system shows that a comparative approach to law is indispensable. By borrowing and lending their wisdom, the common law and Islamic law can only enrich each other. With this method in mind, this Comment has developed a proposed test for unconscionability. This test incorporates existing common law interpretations of oppressive contracts,[261] yet avoids some of the problems of the common law doctrine[262] by requiring an additional finding of unjust enrichment,[263] a principle drawn from Islamic law.

The proposed test provides a systematic judicial analysis upon which contracting parties can rely. The proposal will not, of course, end all uncertainty regarding the validity of a given contract. Such uncertainty is inevitable in any system of law. The test does, however, force both litigants and judges to explain their reasons for and against a finding of unconscionability in a uniform, systematic fashion.

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[258] *See supra* note 215 (discussing other avenues for relief including duress, economic duress, and emotional distress). Despite the seeming harshness of this conclusion to the oppressed farmer in *Campbell Soup*, the law of unconscionability must be definite, avoiding excessive overlap with duress analyses. *See supra* note 215. Thus, some sacrifices in equity are necessary to give the doctrine legal substance.

[259] *Quoted in* WATSON, *supra* note 6, at 22.

[260] Other commentators have made similar observations. *See* WATSON, *supra* note 6, at 22.

[261] See *supra* notes 201-13 and accompanying text for discussion of the second prong.

[262] See *supra* notes 33-101 and accompanying text for a discussion of the problems of the existing common law doctrine of unconscionability (including unfettered judicial discretion, ambiguity, and inconsistent results).

[263] See *supra* notes 192-200 and accompanying text for discussion of the first prong.

Although the law cannot guarantee consistent results, it can insist on consistent analyses. Thus, under the proposed test, courts may disagree on their interpretations of when a contract results in unjust enrichment or when oppression exists, but those differences merely concern evaluations of fact, not the general theory of what unconscionability means. As precedent accumulates, the marketplace will specify exactly what circumstances constitute unjust enrichment and oppression. In this way, society, through practical experience, will eventually define the appropriate factual contours of the test.

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