Unconscionability's Greatly Exaggerated Death

Jacob Hale Russell[*]

Reports of unconscionability's demise are greatly exaggerated. According to conventional wisdom, the common-law contracts doctrine is rarely used, except in limiting clauses that purport to waive consumers' remedial rights. In fact, as this Article documents, the doctrine is quietly flourishing, and courts regularly use it to strike down substantive terms. In recent years judges across the country have rewritten or voided payday loans, signature loans, overdraft fees, and mortgage contracts on the grounds that their interest rates, prices, or other core terms were unconscionably unfair.

Since unconscionability is alive and well, the time is ripe to answer an unexplored question in the doctrine's contours: How tailored should the unconscionability analysis be to the characteristics of a particular consumer entering into a contract, versus untailored to the typical or median consumer? This Article advances an argument in favor of tailoring unconscionability. In addition to consistency with unconscionability's theoretical underpinnings, tailoring brings the doctrine in line with modern contracting practices. Today's consumer contracts involve increasing market segmentation, individualized pricing, and customization of terms, in stark contrast to the stylized view of boilerplate that most scholars take for granted. Unconscionability can thus play an important role in consumer protection policy, which faces the challenge that consumers are highly heterogeneous and need different protections. Courts have a particular edge

 Associate Professor of Law, Rutgers Law School. Particular thanks are owed to librarian Nancy Talley and my research assistant Heather O'Brien. For helpful comments, I thank Jay Feinman, David Hoffman, Richard Hyland, Mark Kelman, Arthur Laby, Carlos Gómez Ligüerre, Pat McCoy, and Oren Bar-Gill. Thanks also to participants at the following workshops: the Boulder Summer Conference on Consumer Financial Decision-Making, the civil law colloquium at the University Pompeu Fabra in Barcelona, a workshop on consumer financial protection law sponsored by the Rutgers Center for Corporate Law & Governance, the Richmond Law School Mid-Atlantic Junior Faculty Forum, and the Household Finance CRN at Law and Society's annual meeting.

here; they specialize in individualized fact-finding, in contrast to regulations, which are generally one-size-fits-all.

TABLE OF CONTENTS

INTRODUCTION

Nearly every first-year Contracts class studies *Williams v. Walker-Thomas Furniture Co.*,[1] the seminal 1965 case on unconscionability. The *Walker-Thomas* court invalidated a clause in a furniture rental contract that would have allowed the lender to repossess six years' worth of products after the borrower defaulted on a loan stemming from a single, more recent acquisition. The case remains the most-quoted explanation of when judges can void or rewrite a contract on grounds of unconscionability, or the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[2] For most teachers and scholars of contracts, *Walker-Thomas* does not just provide the doctrine's explanation, but also its eulogy. "Looking back, it is clear that the doctrine reached the height of its influence within the decade following *Williams*," writes Anne Fleming in an influential piece on unconscionability's history. "Today, it is rarely invoked to protect low-income borrowers."[3] According to conventional wisdom, unconscionability survives only in one narrow exception, allowing courts to strike down contractual clauses that limit procedural remedies. Otherwise, the doctrine's role in protecting consumers is seen as marginal.

But reports of unconscionability's death are greatly exaggerated. As this Article documents, in stark contrast to the conventional wisdom, the doctrine has quietly flourished in courts in recent years. Courts from New Mexico to Delaware have used unconscionability to question, and frequently to invalidate, payday loans, mortgages, medical bills, and checking account fees.[4] These cases undermine two key aspects of the conventional wisdom. First, unconscionability remains a vibrant doctrine for eliminating consumers' liability for certain contracts. Second, these courts are doing precisely what many have claimed the doctrine doesn't allow: invalidating central price terms, not just ancillary or procedural terms. That undermines the widely held belief, repeated in treatises and numerous judicial opinions, that "price alone is insufficient to establish unconscionability."[5]

---

[1] 350 F.2d 445 (D.C. Cir. 1965).

[2] *Id.* at 449.

[3] Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1386 (2014). For more examples of obituaries for unconscionability, *see infra* Part I.A.

[4] For a sampling of recent cases, *see infra* Part I.B.i.

[5] *See, e.g.*, Whirlpool Corp. v. Grigoleit Co., No. 1:06-cv-0195, 2011 WL 3879486, at *5 (W.D. Mich. Aug. 31, 2011) (summarizing cases that make a similar point).

After documenting the modern prevalence of "rotten-deal" unconscionability,[6] this Article raises and answers a critical question about how the doctrine should be used. How tailored should the unconscionability analysis be to the characteristics of a *particular* consumer entering into a contract, versus untailored to the typical, median, or "reasonable" consumer? Courts and scholars have neither identified nor answered this question. But an example, drawn from two recent cases with contrasting analyses,[7] will illustrate that this choice is outcome determinative.

Consider a consumer who takes out a payday loan with an annual percentage rate ("APR") of 800%. If that consumer challenges the loan as unconscionable, should the court care about the context of the *particular* borrower and loan? Is an 800% APR either "fundamentally fair" or "fundamentally unfair" as to all borrowers, or does its fairness depend on context? A court that engages in tailoring might note that although the interest rate is very high, its expected impact will differ between borrowers. For many borrowers, the loan may be the result of irrational choice, cognitive error, and misleading sales tactics. For others, circumstances may make such a loan entirely rational under a simple cost-benefit analysis. For instance, if a credit-constrained borrower faces a bill they cannot pay and will incur high late fees by not paying the bill, taking out a short-term, high-interest loan and repaying it quickly may be the best available choice. A tailored analysis would take into account such context, possibly examining how the lender itself assessed the borrower's ability to repay the loan. By contrast, an untailored analysis would consider only the objective characteristics of an 800% loan, asking if such a rate is objectively too high to ever be enforceable. That choice to tailor or not tailor may well determine the loan's enforceability — and yet the case-law yields mixed signals, and scholarship has ignored the issue.

Treatises make similar claims. "Courts have been more reluctant to pass judgement on the fairness of the price term. . . . [R]arely can a party claim surprise as to price." E. ALLAN FARNSWORTH, CONTRACTS 306-07 (4th ed. 2004) (leading treatise summarizing the conventional wisdom).

[6] I use the phrase "*rotten-deal unconscionability*" to refer to unconscionability rulings based on a core contract term, such as price (and interest rate). I use the term "*access-to-justice unconscionability*" for the doctrine's better known contemporary use: knocking down terms that limit subsequent procedural access for aggrieved consumers, most notably mandatory arbitration and class action waivers. I am not concerned with access-to-justice unconscionability in this Article because it is well-treated elsewhere in recent scholarly literature. *See infra* Part I.A.

[7] These facts are based on two recent cases — one in New Mexico and the other in Delaware — which are discussed in detail *infra* Part II.A.

This Article ultimately advances several grounds for tailoring unconscionability to the individual consumer. First, this approach is consistent with many of the rationales for unconscionability, including the one I adopt, which focuses on the bad acts of the merchant offering the contract. Expressed very generally, unconscionability is how courts avoid becoming complicit in enforcing contracts that merchants knew, or should have known, was unfair to the consumer.[8] Second, a tailored unconscionability analysis has the promise of helping match consumer protection doctrine to consumer heterogeneity, and uses a particular institutional competence of the judicial system: courts are accustomed to individualized fact-finding. Finally, it is consistent with the contemporary era of contracting, where merchants can and do carefully tailor their contracting to the individual consumer.

Contracts scholarship has missed not only the current spate of unconscionability cases, but also failed to keep up with the revolution in consumer contracting practices. The heyday for unconscionability scholarship was the 1970s, when law and economics scholars criticized the doctrine on grounds that it was unpredictable, beyond the ken of judges, and, most importantly, inapt for a world of mass consumer contracts with boilerplate text. That early critique remains the foundation of most modern discussions of unconscionability, for scholars who both agree or disagree with its ultimate conclusions. But the era of mass consumer contracting contemplated by the 1970s literature is less relevant today than scholars assume. Although boilerplate is hardly gone, it has evolved: modern technology enables firms to more readily identify consumer heterogeneity and design products and contracts that are more narrowly discriminating as to consumer type. We live in a world where merchants engage in micro-marketing, hyper-segmentation,[9] and individualized pricing,[10] a trend

[8] *See infra* Section II.B.3.

[9] *See* Ali Kara & Erdener Kaynak, *Markets of a Single Customer: Exploiting Conceptual Developments in Market Segmentation*, 31 EUR. J. MARKETING 873, 873-74 (1997) (identifying the rise of increasingly targeted marketing that customize campaigns "to the needs and wants of narrowly defined geographic, demographic, socio-economic, psychographic, or benefit segments") (citing RICHARD TEDLOW, NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA (1990)).

[10] *See* Neil Howe, *A Special Price Just for You*, FORBES (Nov. 17, 2017, 5:56 PM), https://www.forbes.com/sites/neilhowe/2017/11/17/a-special-price-just-for-you; Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), https://www.wsj.com/articles/SB10001424127887323777204578189391813881534.

which will only accelerate with the use of big data.[11] Discussions of the unconscionability doctrine have not kept pace with these developments. Indeed, many of the fears of early law and economics scholars — about, for instance, the expensive printing costs merchants would face in customizing contracts — seem quaint today.

Tailoring unconscionability both narrows and broadens the doctrine, and gives it an important role in consumer protection. Although unconscionability is only applied *ex post*, its contours will affect *ex ante* incentives of sellers and lenders. Even if a seller ultimately prevails in an unconscionability case, few sellers would choose the costs and uncertainty of such a challenge if their contracting practices could be designed to easily avoid it. In other words, unconscionability is best seen as a tool, like regulation, in the broader portfolio of consumer protection approaches. A key problem facing consumer protection law is the heterogeneity of consumers. One consumer's mistake may be another consumer's preference.[12] Unconscionability, because it arises in the context of actual cases, has a particular advantage over regulation: it is not one-size-fits-all. Courts, as specialists in individualized fact-finding, have an edge in dealing with the heterogeneity of consumers that regulators do not.

This Article has two core components. Part I is descriptive. I undermine the conventional wisdom regarding unconscionability's demise by describing an active vein of cases striking down loans and other consumer contracts for high prices and unfair terms. Part II is normative. I identify tailoring[13] as a central question of the doctrine, show that unconscionability scholarship remains rooted in a defunct

[11] *See, e.g.*, ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY vii (2016) (identifying and describing potential dangers of the use of algorithms in price discrimination). This issue is further discussed *infra* Part II.B.

[12] *See* Jacob Hale Russell, *Misbehavioral Law and Economics*, 51 U. MICH. J.L. REFORM 549, 549 (2018).

[13] I use the terms "*tailored*" and "*untailored*"; some readers may prefer "*particularized*" and "*average*"; and others may wish to substitute "*subjective*" and "*objective*." I chose to avoid "subjective" and "objective" because those terms are imprecise, overused, and risk conflating my discussion with other, unrelated debates, as I discuss later in the piece *infra* Part II. For ease of use and consistency, this Article employs the term "consumer" to refer to the individual seeking to avoid enforcement of the contract on grounds of unconscionability. Although traditionally a defense, unconscionability today is raised both by consumers as plaintiffs and as defendants; moreover, it is not limited to consumers or consumer contracts. As this Article focuses primarily on its use in consumer and loan contracts, the term "consumer" also encompasses borrowers.

vision of contracting from the 1970s, and explain why and how the unconscionability analysis should be tailored.

I. UNCONSCIONABILITY IN MODERN PRACTICE

Unconscionability's roots run deep in the common law. It originates from early theories about the nature of the assent needed to form a contract. While its doctrinal contours developed later, there are echoes of judges being willing to consider fundamental aspects of fairness in enforcing contract law. In a passage that remains widely quoted, one British judge in 1750 indicated that courts might not enforce agreements that "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; which are unequitable and unconscientious."[14] Unconscionability gradually crept its way into U.S. courts in the late nineteenth century through courts that refused to enforce contracts on grounds of "public policy," using analysis that closely parallels modern unconscionability.[15]

The 1965 decision in *Walker-Thomas* has become the most influential modern statement of the doctrine, a staple of nearly all Contracts casebooks. Over a five-year period, Ora Lee Williams (and another consumer, who did not make it into the case title and thus has been largely ignored by history) purchased $1,800 in goods over a five-year period on an installment sales plan.[16] When her balance reached just over $150, she purchased a $500 stereo. A few months later, she failed to make her payments and defaulted. Citing a cross-collateralization clause in the contract, under which *all* items purchased were deemed security for each item subsequently purchased, the furniture store seized all of the items Ms. Williams had purchased over the five-year period, including those which had largely been paid down. The cross-collateralization provision was, as the court put it, "rather obscure" — indeed, it is so poorly written and confusing that arguably the court should have simply invalidated it on those grounds. The court held that

[14] Earl of Chesterfield v. Janssen (1750) 28 Eng. Rep. 82, 100 (dictum); *see also* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 81-82 (2006).

[15] For examples and a longer discussion of the doctrine's history, see Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 787-94 (2016).

[16] The purchase of the goods at issue totaling $1,800 occurred between 1957-1962. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965). Adjusted for inflation, $1,800 in 1962 amounts to approximately $15,338 today.

unconscionability was a valid defense in D.C.,[17] contradicting the lower court, and remanded the case for fact-finding as to unconscionability.[18]

Walker-Thomas's formulation of the unconscionability test remains dominant today. In describing the test, the court distinguished between procedural and substantive unconscionability,[19] both of which remain elements of the standard black-letter law test for unconscionability. Procedural unconscionability refers to flaws in the bargaining process, inequalities of bargaining power, or unfair surprise; substantive unconscionability involves terms that are unreasonably unfavorable or fundamentally unfair to the consumer. The case has also been central to all aspects of scholarship on unconscionability, ranging from doctrinal history,[20] to the problematic role of stereotypes in the classroom,[21] to fears that unconscionability may have negative impacts on those it seeks to help (for instance, by making the price of goods more expensive).[22]

Part I.A sketches the conventional, and incorrect, scholarly and judicial consensus, which holds that the *Walker-Thomas* breed of unconscionability is moribund. Part I.B shows that this consensus is wrong by canvassing a range of recent cases. In addition, it notes other ways in which unconscionability remains vibrant, including its explicit incorporation into consumer statutes and its significant, and controversial, role in an ongoing American Law Institute project.

---

[17] At the time of the contract, the Uniform Commercial Code, which explicitly allows unconscionability as a defense, was not yet in force in Washington, D.C.

[17] *See Walker-Thomas Furniture*, 350 F.2d at 448-50.

[19] While almost all courts and commentators agree that both prongs exist, there is frequent scholarly discussion about (1) whether there is a "sliding scale" of weight, where extreme substantive unconscionability makes procedural unconscionability less important, and vice versa; and (2) whether the procedural prong is largely ignored (or treated with conclusory analysis) by courts, who will always find procedural unconscionability in undickered contracts of adhesion. For a good discussion on procedural and substantive unconscionability, see Richard Craswell, Two Different Kinds of Procedural and Substantive Unconscionability (UC Berkeley L. & Econ. Workshop, Working Paper, 2010), https://escholarship.org/uc/item/0hf7v16t.

[20] *See generally* Fleming, *supra* note 3 (explaining the historical developments of the unconscionability doctrine).

[21] *See* Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & C.R. L. REV. 89, 89-90 (1994) (discussing assumptions commonly made about the plaintiffs in classroom discussions).

[22] *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 304-05 (1975).

A. Premature Eulogies for Unconscionability

The conventional wisdom locates the peak of unconscionability in *Walker-Thomas*, which rapidly became the linchpin of both academic and judicial discussions of the doctrine. According to these accounts, unconscionability soared into attention and controversy quickly in the 1960s following the decision — and then faded from view almost as dramatically. As contracts doyen Allan Farnsworth put it in his discussion of the "trend disfavoring the unconscionability defense," the 1970s represented the first, and final, "decade of the consumer in contract law." By the 1980s, in a swath of cases where courts declined to strike down due-on-sale clauses in mortgages, unconscionability challenges began failing. "During the 1980s, the pendulum swung in the opposite direction," he writes. "In sum, continued expansion of unconscionability and related doctrines did not occur in the 1980s as expected." Farnsworth concludes that unconscionability in consumer contracts represents an "arrested development" that was "noteworthy mainly for its lack of success."[23]

Accounts of unconscionability's demise generally argue that the doctrine survives in one limited and inconsistent context: protecting certain judicial-procedural safeguards for consumers, by limiting the application of certain mandatory-arbitration provisions and class action waivers.[24] (Following the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*,[25] the Federal Arbitration Act preempts state laws that undermine "fundamental attributes of arbitration," but scholars have disputed the reach of *Concepcion*,[26] and some states have read the

---

[23] E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222, 225 (1990).

[24] STEWARD MACAULAY ET AL., CONTRACTS: LAW IN ACTION 686 (3d ed. 2010) ("In recent years, the greatest volume of litigation raising issues of unconscionability has concerned enforceability of arbitration clauses."). *See, e.g.*, Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 39-41, 47-48 (2006) (finding that California appeals courts in 1982-2006 held arbitration provisions unconscionable nearly half the time, versus just over one in ten for other contract terms); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 621-25 (2009) (analyzing the use and success of unconscionability from 1990 through 2008).

[25] 563 U.S. 333 (2011).

[26] *See, e.g.*, Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 17 J. DISP. RESOL. 225, 227-28 (2014) (arguing that the reasoning of *Concepcion* actually suggests that "it should have a narrow impact on unconscionability and public policy defenses rather than a broad one").

case quite narrowly.[27]) Throughout this Article, I call the better known types of unconscionability cases "*access-to-justice unconscionability*," which I distinguish from "*rotten-deal unconscionability*," the kind of old-school challenges that focus primarily on price and central, rather than post-contract remedial, terms. This Article is concerned exclusively with rotten-deal unconscionability, the kind which scholars have left behind but whose prevalence I document in the next Section.

An empirical study of the unconscionability doctrine by Charles Knapp found a rise in unconscionability cases between 1990 to 2008, but he attributed that rise almost entirely to cases taking issue with mandatory-arbitration clauses.[28] His eulogy for unconscionability echoes Farnsworth's: "By the early 1970s, however, the case law applying the doctrine of unconscionability appeared to have run its course, and a decade or two of relative dormancy for the doctrine lay ahead. . . . [T]he use of individual lawsuits to develop a generally consumer-protective common law is by itself an inefficient and probably ultimately ineffective strategy."[29] More recent empirical updates have agreed the uptick has continued but still remains attributable to access-to-justice unconscionability cases.[30]

Further evidence of the widespread consensus that rotten-deal unconscionability has died can be found by paging through first-year contracts casebooks. Nearly all of them include *Walker-Thomas*, but few include any more recent cases where unconscionability strikes down a core term. Casebooks typically conclude this is a result of the doctrine's decline. "[Scholars since the mid-1960s] have concluded that the courts, in fact, have shown considerable restraint in applying the unconscionability doctrine," as one popular casebook puts it.[31] Some scholars even doubt that *Walker-Thomas* itself caused anything more

[27] *See, e.g.*, James Dawson, Comment, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233, 234 (2014) (noting that "state courts have developed a number of innovative, narrow readings of *Concepcion*").

[28] *See* Knapp, *supra* note 24, at 621-22 (empirical study of 750 cases, finding an increase but not an "explosion" of cases, from sixteen in 1990 to 155 in 2008, of which the "lion's share of the overall increase," or 115 cases in 2008, related to arbitration clauses).

[29] *Id.* at 613-14.

[30] This is well-documented by McCullough's recent comment. *See* McCullough, *supra* note 15, at 786-87 n.40 (updating statistics to include new cases that document a rise in unconscionability); *but see* sources cited *infra* note 44 (nearly all of her cases are about class action waivers and arbitration).

[31] CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 600 (7th ed. 2012).

than a blip when it came to creating successful rotten-deal cases.[32] Most treatises agree such cases are few and far between.[33]

According to the conventional wisdom, the void in consumer protection is instead filled — if it is filled at all — by statute rather than common law. This patchwork includes enforcement actions by state and federal agencies, state consumer-protection acts, and specific statutes that restrict specific categories of putatively abusive contract terms. Unconscionability plays a critical role in that story, as reactions to *Walker-Thomas* influenced a swath of consumer reform efforts across the country.

Legal historian Anne Fleming has traced *Walker-Thomas*'s influence on state legislatures in passing consumer protection laws. The case itself was heavily featured in congressional testimony and "catalyzed a process of local legislative reform to put in place new regulations for installment sales."[34] The very type of clause — the particular cross-collateralization or add-on clause — at issue in *Walker-Thomas* was restricted in a variety of statutes, including the widely adopted Uniform Consumer Credit Code.[35] Federal legislation followed, including the Truth in Lending Act, which attempted to use disclosure to limit the ills of lending, and the Equal Credit Opportunity Act, which focused on discrimination in lending. But at the same time, she argues, the doctrine of unconscionability itself became increasingly unmoored from its origins — concern about the poor, which were central to, among others, the author of the *Walker-Thomas* opinion.[36]

Fleming's careful tracing of the rise of consumer protection legislation contrasts with a competing explanation for unconscionability's demise. This explanation, more of a "folk" story that is typically raised without much evidence, attributes the alleged decline in rotten-deal

[32] *See* McCullough, supra note 15, at 785-86; *see also* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1100-01 (2006) (finding no statistically significant increase in success under unconscionability between the period immediately after *Walker-Thomas* and a period several decades later).

[33] *See, e.g.*, JOSEPH M. PERILLO, 7 CORBIN ON CONTRACTS § 29.4 (2002) (noting that "most claims . . . fail," findings of unconscionability on the basis of a bad bargain are "rare," and scholarly arguments for how to evaluate such bargains have "had little impact on the courts").

[34] Fleming, *supra* note 3, at 1422, 1424.

[35] *See* UNIF. CONSUMER CREDIT CODE § 3-303 (UNIF. LAW COMM'N 1974) ("If debts arising from two or more consumer credit sales . . . are secured by cross-collateral[,] . . . payments received by the seller . . . are deemed . . . to have been first applied to the payment of the debts arising from the sales first made.").

[36] *See* Fleming, *supra* note 3, at 1436-37.

unconscionability to the two basic concerns raised time and again by legal scholars: first, that unconscionability went beyond the competence of most courts, and second, that it was hopelessly vague. Indeed, concerns about institutional competence permeated even the original dissent in *Walker-Thomas:* Judge Danaher expressed little love for the cross-collateralization clause that had ensnared Mrs. Williams, but rather echoed the lower court's view that the solution to Mrs. Williams' plight was legislative rather than judicial.[37] A third reason for unconscionability's disuse might be the economics of such claims: legal services lawyers are in short supply, and unconscionability may be difficult to bring as a class action.[38]

Most commentators agree on another tenet about the (dis-)use of unconscionability: even if courts were to look at core deal terms, they wouldn't use unconscionability to strike down high prices. "The mere assertion that the price was excessive has thus been deemed conclusory and insufficient to establish the defense of unconscionability," says one major treatise.[39] Other treatises agree.[40] Several courts think this accurately states the law.[41] Arguably, such a rule would comport with other first principles of contract formation. In particular, courts don't inquire into the adequacy of consideration: one peppercorn, as the

[37] *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448-51 (D.C. Cir. 1965) (Danaher, J., dissenting) (agreeing with the lower court: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar").

[38] On the class action point, see *infra* Part II.B.3.

[39] 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §18:15 (4th ed. Supp. 2019).

[40] Farnsworth's treatise is similarly dismissive of "price-alone" unconscionability. *See* FARNSWORTH, *supra* note 5, at 306-07 (noting that "courts have tended to avoid square holdings that an excessive price without more is unconscionable," and approving of that trend, because "it is no simple matter for the court to make a judgment as to the fairness of the price term"). Similar language can be found in Corbin's treatise. *See* PERILLO, *supra* note 33, at 7 (noting that typical unconscionability cases involve terms "disclaiming a warranty, limiting damages, or granting procedural advantages"); *see also* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1821-23, 1847-49 (1994) (reviewing price cases and noting problems under contract theory with using the doctrine to invalidate high prices, but also noting that the cases are more predictable than many critics of unconscionability charge).

[41] *See* Whirlpool Corp. v. Grigoleit Co., No. 1:06-cv-0195, 2011 WL 3879486, at *5-6 (W.D. Mich. Aug. 31, 2011) (citing a series of cases where courts held that unconscionability could not be based solely on price, and holding that Michigan law would not allow for unconscionability based on price alone); *but see* Jones v. Star Credit Corp., 59 Misc. 2d 189, 191-92 (N.Y. Sup. Ct. 1969) (holding in a case about high credit charges for a home freezer that unconscionability "is intended to encompass the price term of an agreement").

saying goes, could be adequate consideration.[42] Bargains are in the eye of the beholder, and under the dominant common law approach, second-guessing bargains because one side has sour grapes does nothing to further freedom of contract. Thus, it's no surprise — if an inaccurate statement of current practice — that many courts state that a contract can't be unconscionable simply because of its high price. "Though the residency fees were substantial, when a buyer is free to engage in comparative shopping, price alone will not render a contract substantively unconscionable," one court says, characteristically.[43] Another court, reviewing decisions across the country, noted that "'the general rule' was that an excessive price was not, by itself, sufficient to support a claim of unconscionability."[44]

As my next Section will show, the conventional wisdom is in need of revision on all fronts. It is possible that scholars missed some of these cases, but equally possible that the 2008 financial crisis either gave rise to more claims, or made them more salient to plaintiffs' lawyers and to courts. Either way, the result is that consumers today are regularly raising and prevailing on theories of rotten-deal unconscionability. And courts find contracts unconscionable based solely on their view that the prices — including, in many of the examples of interest to me, interest rates on loans — are unreasonably high. Consumers prevail in these cases even when a loan is fully legal under other state laws, such as usury caps.[45]

---

[42] *See* Chappell & Co. v. Nestle Co. [1960] AC 87 (HL) 114 (Eng.) ("A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.").

[43] Guthmann v. La Vida Llena, 709 P.2d 675, 680 (N.M. 1985). Ironically, the same court — New Mexico's Supreme Court — wrote the payday loan decision, voiding signature loans on the basis that their APRs were too high, which originally inspired this Article.

[44] *Whirlpool*, 2011 WL 3879486, at *5 (citing Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 227 (N.D. Ill. 1969)). "Whirlpool argues that excessive price alone may render a contract unconscionable. The parties have not provided any Michigan or Sixth Circuit cases on this direct proposition of law, and the Court has not been unable to locate any. Plaintiff Whirlpool cites four cases arising in the 1960s which support the conclusion that an excessive price may render a contract unconscionable." *Id.* The court went on to distinguish all four: "The Court does not find these consumer cases apt for guidance in this case involving mutually sophisticated business parties." It then noted cases standing for the opposite proposition, that "excessive price, standing alone, will not render a contract unconscionable" including: In re *Pyramid Energy*, Ltd., 160 B.R. 586 (Bankr. S.D. Ill. 1993); *Bennett v. Behring Corp.*, 466 F. Supp. 689 (S.D. Fla. 1979); *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210 (N.D. Ill. 1969). *Id.*

[45] *See, e.g.*, State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 663 (N.M. 2014) (finding unconscionability based on excessive loan interest rates).

B. The Bite of Modern Unconscionability

Unconscionability bares its teeth in three ways in modern consumer protection practice, beyond its well-documented use in access-to-justice cases. First, and most crucially, traditional unconscionability is still used by courts to remedy rotten deals, by striking down or rewriting terms. In recent years there appears to be a particular willingness by courts to invalidate interest rates in consumer loan contracts. As noted above, scholars have missed this trend. Beyond this, moreover, unconscionability is relevant in at least two other ways. Unconscionability's contours have been incorporated into the interpretation of codified consumer protection statutes; these in turn reference, either explicitly or implicitly, common-law reasoning and doctrine: those statutes often use fairly general language that tracks that of unconscionability, and results in courts simply replicating common-law unconscionability analysis when applying the statutes. Finally, unconscionability is treated with unusual vigor in the American Law Institute's draft restatement on consumer contracts — and is at the heart of controversies that beset the restatement project — which, if the project is ever adopted, may buttress the doctrine further.

This Section reviews each in turn, which collectively demonstrate that unconscionability retains its teeth, contrary to conventional wisdom. This Article does not make a statistical claim or otherwise attempt to count or quantify the number of unconscionability cases or the change over time.[46] (To give an extremely rough sense of numbers, Westlaw reports 747 decisions under its "substantive unconscionability" key number between 2008 and 2018, and thousands under the broader heading of oppressive contracts, which includes procedural unconscionability and public policy defenses.) A statistical approach is difficult — to the point that most such efforts wind up being misleading — because of selection issues in the types of cases brought, the likelihood of settlements in cases that tend to be low dollar amount, and general difficulties with counting dockets. It also is not necessary to my point, which is simply to overcome the low hurdle the conventional wisdom — which states unconscionability's death in no uncertain terms — has set.

In addition, these cases may serve an even stronger channeling effect on lenders than their numbers and scope suggest. Lenders are not just concerned about losing unconscionability cases — they are concerned about having them brought and surviving preliminary motions. Lenders

[46] For other reasons not to do this, see David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 727-33 (2007).

want certainty, predictability, and speed in the collections process. Even if they could ultimately prevail in a trial on an unconscionability issue, lenders prefer — indeed, their business model relies on — the stable ability to obtain fast entries of judgment. Courts regularly note that unconscionability relies on the court examining the "totality of the circumstances,"[47] including the details of the negotiation process. Procedurally, this means unconscionability is often a fact-sensitive issue that is not well suited to summary judgment. This fact will generally work to consumers' favor in that it drags out proceedings and inhibits collection of loans, and thus incentivizes settlement by lenders.

1. Modern Unconscionability Cases

The Appendix *infra* summarizes recent state decisions involving unconscionability in consumer contracts, which suggests the breadth and reach of unconscionability. The key takeaway is this: none of these cases hinge on the types of procedural-justice issues typically noted in discussions about unconscionability; I excluded that genre of cases, as it is well-noted by the conventional scholarly consensus. Instead, these cases exclusively involve the type of cases assumed moribund in the conventional wisdom — that is, courts who strike down, or at least permits consumers to proceed with further fact-finding (by surviving a motion for summary judgment), a central term on the basis of unconscionability. In many cases, the central term that offends the court is price. Because many of these examples are consumer credit contracts, the price in question is often in the form of a high interest rate.

The cases surveyed in the Appendix are representative but non-exhaustive. Rotten-deal unconscionability has found recent relevance in everything from striking down negligence waivers at ski resorts,[48] to

[47] *See, e.g.*, Hanjy v. Arvest Bank, 94 F. Supp. 3d. 1012, 1032 (E.D. Ark. 2015) (courts must "review the totality of the circumstances surrounding the negotiation and execution of the contract").

[48] *See* Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 44 (Or. 2014) (finding an anticipatory release from negligence unconscionable, because the plaintiff had no opportunity to negotiate the terms and because "a harsh and inequitable result would follow if defendant were immunized from negligence liability, in light of . . . defendant's superior ability to guard against . . . its own negligence . . . [and] superior ability to absorb and spread the costs," as well as "broad societal concern" about safety of skiers).

stalling a bank's attempts to foreclose on a mortgage,[49] to weighing rights of first refusal on sales of land.[50]

What is perhaps most striking, in light of the conventional wisdom, is that these cases generally do not implicate particularly unusual consumer-credit practices. Many of the cases involve relatively common products, and, in many instances, were sold by mainstream players in the credit industry, like Citibank, U.S. Bank, and Quicken Loans. Moreover, the opinions rarely characterize the decisions as unusual or the remedies as extraordinary, and are notable for their routine tone.

How did conventional wisdom come to get the state of unconscionability so wrong? I can only speculate, but two possibilities seem likely, and are not mutually exclusive. First, scholarly conventional wisdom can be slow to update. Most of these are state cases and thus fly under the radar. Like many contracts teachers, I dutifully repeated what I had read in casebooks and taught my students to be skeptical of unconscionability, without independently verifying it. I began researching this Article after coming across the New Mexico case cited in the Appendix *infra*[51], which I initially assumed was a one-off outlier.

Second, the time period of these cases follows the 2008 financial crisis, and many of the cases involve consumer credit contracts. This claim is necessarily speculative, but it may well be that there is a causal link if the financial crisis resulted in an uptick of consumer defaults, and perhaps also reshaped fundamental views among judges and plaintiffs' lawyers about the morality of lending practices. Plaintiffs may have become more creative with their claims, and courts may well have been more skeptical of lenders. Most cynically, one can see this as

[49] *See* Bank of America, N.A. v. Aubut, 143 A.3d 638, 660-61 (Conn. App. Ct. 2016) (reversing summary judgment in favor of a bank, finding that the defendants' defense of "predatory lending" could be read broadly as a pleading defense of unconscionability; the court particularly focused on an affidavit by a defendant about the struggles they made to make their mortgage payments, their financial difficulties that existed at the time the loan was issued, and the defendant's claim that the mortgage broker had told him the payments were feasible: "We were told by the lender's representative that the loan was affordable based on our household income and expenses. I believed the lender's representative had my best interest in mind but now know better.").

[50] *See* Christ Holdings, LLC v. Schleappi, 67 N.E.3d 47, 54, 60-61 (Ohio Ct. App. 2016) (appeals court ultimately did not find unconscionability, though the lower court had found it; appeals court reversed the lower court's directed verdict, where the lower court found that certain terms of the right of first refusal — for instance, that it did not *explicitly* indicate that the right only became available when sellers planned to accept another offer, not if sellers were offered a price by a third party that they had no intention to accept — were substantively unconscionable).

[51] *See infra* note 169 and accompanying text.

judicial activism run amok: judicial entrepreneurs may have found a malleable common law doctrine that allowed them to exact revenge against those who they believed were culprits in the financial crisis. An excerpt from *Citibank, N.A. v. DeCristoforo* suggests something along those lines was on at least one judge's mind. He repeatedly indicated his overall displeasure towards the credit card industry, based largely on a Frontline documentary he had seen,[52] and stated, without evidence, that "[i]nterest charges at these [penalty] rates drain needed resources and slow economic growth."[53]

This is at least suggestive of the possibility of judges becoming more sympathetic to unconscionability claims in the wake of the financial crisis. In addition, it may explain why judges turn to unconscionability, when many of the cases would have permitted narrower rulings that would still invalidate the particular loans. For instance, in *State ex rel. New Mexico v. B & B Investment Group, Inc.*, the court noted that employees were instructed to describe interest rates as "between $1.00 and $1.50 per day" per $100 borrowed, an amount that was flat-out wrong at the actual APRs.[54] (Actual financing charges were roughly $1,000 per year, versus the $547.50 implied by the highest end of the range given by employees to customers.[55]) But the court did not pursue a fraud or misrepresentation theory, perhaps in part because unconscionability permitted a more sweeping, prospective result: nearly all payday loans were made effectively illegal in New Mexico under the court's reasoning.

2. Unconscionability in Statutes

Cases where consumers use the unconscionability doctrine to avoid enforcement are not the only way unconscionability continues to have modern relevance. Consumer protection statutes frequently use the term "unconscionability," or refer to unfair bargains or other phrases commonly used in unconscionability cases, without much further elucidation. (Indeed, these statutes likely originated partly as a response to courts' use of unconscionability.[56]) As a result, these statutes' application will generally result in courts referring to the doctrinal

[52] *Frontline: Secret History of the Credit Card* (PBS television broadcast Nov. 23, 2004).

[53] *See* Citibank, N.A. v. DeCristoforo, No. 0902536C, 2011 WL 1020497, at *4-6 (Mass. Supp. Jan. 4, 2011).

[54] State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 667 (N.M. 2014).

[55] *Id.*

[56] *See* Fleming, *supra* note 3, at 1424-30.

background of common-law unconscionability. The same goes for another common-law defense, public policy, which is frequently indistinguishable in analysis from unconscionability. Courts often discuss both interchangeably and in the same analysis.[57]

Best known is unconscionability's explicit incorporation into the Uniform Commercial Code ("UCC"). In § 2-302, the UCC essentially restates the common law test: "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." The vagueness of this provision gave rise to Leff's famous criticism about the "amorphous unintelligibility" of the UCC's unconscionability provision: "[i]f reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative."[58] Nonetheless, it survives, and is used in both business-to-consumer and, more controversially, business-to-business settings.[59]

But the UCC is not the only example of unconscionability's incorporation into statutes. It is similarly incorporated in the Uniform Consumer Credit Code ("UCCC"), a model act designed to apply to all consumer credit contexts and that has been influential, if inconsistently adopted. Under the UCCC approach, a consumer credit contract may be unenforceable if the court finds "the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct."[60] In applying the section, courts are offered a non-exclusive list of factors to consider, which closely track the procedural and substantive prongs. These include whether the seller knew the consumer was unlikely to be able to repay the loan,[61] would be unable to "receive substantial benefits from the property or services sold or leased," had overpaid relative to "like consumers," or took advantage of the consumer's "ignorance." The drafters' comments give

[57] *See, e.g.*, *B & B Inv. Grp.*, 329 P.3d at 670.

[58] Arthur Allen Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487-88 (1967).

[59] *See, e.g.*, Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1066-67, 1074-84 (1986).

[60] UNIF. CONSUMER CREDIT CODE § 5.108 (UNIF. LAW COMM'N 1974).

[61] *See id.* § 5.108(4)(a). The drafter's comments note, as an example, a situation where the lender expected to "repossess[] the goods sold and resell[] them at a profit." *Id.* at cmt. 4.

a wide range of examples of potentially unconscionable sales, which again parallel closely their common-law progenitors: selling an item the lender expects to repossess and resell; "selling to a Spanish speaking laborer-bachelor of an English language encyclopedia set" (the comment's phrasing raising the peculiar question of whether a married laborer could buy such a set?); selling "two expensive vacuum cleaners to two poor families sharing the same apartment and one rug" or "a home solicitation sale of a set of cookware or flatware to a housewife for $375 in an area where a set of comparable quality is readily available on credit in stores for $125 or less."[62] Other provisions of the UCCC also restrict practices that might, if not directly covered, be restricted by unconscionability — including the cross-collateralization clause at issue in *Walker-Thomas*.[63]

A search for "unconscionable" in the full text of state statutes on Westlaw returns thousands of results.[64] The term is incorporated into many general consumer protection statutes. Many states have adopted Unfair Trade Practices Acts, defining "unconscionable trade practice" broadly as acts "in connection with the sale, lease, rental or loan . . . of any goods or services . . . or in the extension of credit . . . that . . . (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid."[65] Unconscionability also appears as a term of art in several other uniform acts, like the Uniform Consumer Sales Practices Act,[66] and is incorporated, in nearly identical language, into numerous regimes covering specific areas, including landlord-tenant relationships (as well as the uniform residential landlord and tenant act),[67] RV and mobile

[62] *See* UNIF. CONSUMER CREDIT CODE § 5.108 cmt. 4. Courts are given additional specific factors to consider in the unconscionability analysis for debt collection practices and for insurance contracts. *See id.* § 4.106 (in analyzing unconscionability in an insurance contract, a court should consider "(a) potential benefits to the consumer including the satisfaction of his obligations; (b) the creditor's need for the protection provided by the insurance; and (c) the relation between the amount and terms of credit granted and the insurance benefits provided").

[63] *See* UNIF. CONSUMER CREDIT CODE § 3.302.

[64] This includes, of course, state codes adopting the Uniform Commercial Code and/or the Uniform Consumer Credit Code.

[65] *See, e.g.*, N.M. STAT. ANN. § 57-12-2(E) (2019).

[66] *See, e.g.*, OHIO REV. CODE ANN. § 1345.03 (2019). The Ohio Consumer Sales Practices Act was modeled after the Uniform Consumer Sales Practices Act. *See* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1169 (2004).

[67] *See, e.g.*, R.I. GEN. LAWS § 34-18-13 (2019); S.C. CODE ANN. § 27-40-230 (2019).

home parks,[68] rent-to-own goods,[69] foreclosures,[70] nursing homes,[71] and even driving instructors.[72]

These statutes suggest the continued modern relevance of understanding how courts apply the unconscionability doctrine. Since the definition in these statutes (when it is even defined) typically tracks the bipartite common-law definition of procedural and substantive unconscionability, prevailing approaches to the common-law doctrine of unconscionability may be relevant to courts interpreting these statutes.

3. The ALI Consumer Contracts Restatement

Unconscionability has played a controversial role in the American Law Institute's ("ALI") ongoing draft restatement on consumer contracts. That project in general has been highly fraught, in part because of debates (not uncommon to the ALI process) as to whether the restatement "restates" law or instead tries to push it in a new normative direction.[73] It remains unclear whether it ultimately will be adopted; the most recent revised version was put up for a vote by the full membership of ALI in 2019, and gave rise to a rare, multi-hour floor fight. Only section 1, which defined the project, was approved; a conflict ensued over a proposed amendment to section 2, dealing with the "reasonable expectations" of a consumer; and the authors ultimately decided not to seek further approval at the meeting.[74] Although it was not central to the floor fight in 2019, a noteworthy aspect of the draft

[68] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-2104 (2019).

[69] *See, e.g.*, W. VA. CODE § 46B-8-2 (2019).

[70] *See, e.g.*, COLO. REV. STAT. ANN. § 6-1-1119 (2019); NEV. REV. STAT. § 76-2726 (2019).

[71] *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-1967a (2019).

[72] *See, e.g.*, MICH. COMP. LAWS ANN. § 256.687 (2019).

[73] Such debates commonly beset Restatements, but are also somewhat misleading. Restatements are not intended simply to be exercises in counting a majority rule (were such a thing even possible) but are meant to give a "coherent" account of a broad body of law. *See* Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 16-17 (2015) (discussing the issue in the context of debates over whether the law of liability insurance restatement accurately "restates" the law).

[74] See David Dayen, *Controversial Change to Consumer Rights Postponed*, AM. PROSPECT (May 22, 2019), https://prospect.org/article/controversial-change-consumer-rights-postponed, for a one-sided account of the meeting that primarily summarizes the opposition to the proposal, calling the ALI an "obscure group" and adopting critics' argument that the entire proposal is a "drastic reinterpretation of law." Needless to say, the proposal's backers disagree.

restatement is its focus on unconscionability. The proposal has at times been mischaracterized as eliminating unconscionability. In fact, significant portions of ALI's language track the conventional wisdom about unconscionability: it has a particular carve out for terms that limit access to procedural justice, which are presumed to be substantively unconscionable.

But the draft Restatement goes further. Its substantive prong is relatively uncontroversial: unconscionability involves weighing market forces and the balance between harshness to consumers and the purported benefits from such a term. Problematic terms are those that are harsh and "for which the business cannot show a reasonable justification," and the inquiry necessarily involves balancing the deal as a whole: "What might appear as unfair may be merely a bargain-basement deal in which the pro-business term is matched by a pro-consumer price or other consumer advantage."[75] The drafters note that a "competitive market environment does not preclude a finding that a term is substantively unconscionable."[76]

The Restatement is more controversial on the procedural side. Although it no longer formally uses the term "salience," the draft effectively encourages a salience-based approach, as the reporters' notes make clear. Terms that are not salient to most consumers are likely procedurally unconscionable, and vice versa. The Restatement does not address my central question in the next Part, as to whether the inquiry should be tailored, but on the procedural prong, the adoption of the salience test suggests the reporters believe the inquiry should be untailored. In other words, a term's acceptability would not depend on the awareness of the particular consumer at issue, but rather whether an "ordinary consumer would be aware of the term." The premise of the drafters is that if a term is salient, it "affects the contracting decisions of a large enough number of consumers."[77] This could cut in either direction with respect to a particular consumer's ability to claim unconscionability. A consumer who was *unaware* of a salient term would not be protected by unconscionability, but a consumer who was *aware* of a non-salient term could be.

---

[75] *See* RESTATEMENT OF CONSUMER CONTRACTS § 5 cmt. 3 (AM. LAW INST., Tentative Draft, 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf.

[76] *Id.*

[77] *Id.* at cmts. 6(b), 6(c), rep. notes, (arguing that "[a]s a normative matter, salience is a suitable underlying test because competition can . . . be counted on to police salient terms, but not nonsalient ones. If competition scrutinizes salient terms, courts need not provide additional discipline").

Although logical, this position does not find much explicit endorsement in case law. Courts have largely eschewed open analysis of law and economics principles in applying unconscionability, which is part of why the Restatement has come under criticism as failing to restate the law. But the proposed test is consistent with the basic economic notion, expressed by other scholars,[78] that salient terms in a competitive market will be adequately policed without court help. It is also consistent with the extent to which the growing behavioral economics literature has shown the difficulties that real-world consumers, when compared to their hypothetically rational counterparts, have in evaluating contract terms.[79]

The draft does not discuss what I believe to be a sea-change in contracting practices, identified in this Article's introduction and extensively discussed in the next Part, towards increasingly individualized contracting. The drafters note in a passing parenthetical that in a segmented market, a salient term may only affect decisions of consumers in that segment. But if nearly all markets are increasingly segmented, this parenthetical exception swallows the rule. The next Part addresses this issue, argues that this is increasingly the norm in modern contracting, and suggests, therefore, that even the procedural test should be more tailored to the individual consumer. My argument is consistent with the Restatement's claim that an individual consumer's knowledge of an unconscionable term should not automatically preclude a finding of unconscionability. What is more ambiguous is the Restatement's view of an "ordinary" consumer; how is the relevant market for that consumer defined? As noted, the Reporters consider the possibility of market segmentation: "if the market is segmented, the question is whether a term is likely to affect the contracting decisions of a large enough number of consumers in the relevant segment." That sentence has largely been overlooked in discussions of the draft, but in an increasingly individualized market, it is highly relevant. I later argue that merchants should have to overcome a default presumption of market segmentation, and show that all consumers were part of the same market segment and receiving the same bargain, before they can use "salience" as a defense. Such an approach might keep much of the power of the Restatement, without some of the fears levied by critics that it would deter meritorious plaintiffs' suits.

---

[78] *See, e.g.*, David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133, 138-39 (2010).

[79] *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217-18 (2003).

II. TAILORING THE UNCONSCIONABILITY INQUIRY

Since unconscionability is alive and breathing, the time is ripe to breathe life into its doctrinal formulation. Unconscionability has been long beset by criticisms for its vagueness, which is said to allow excessive judicial discretion, which in turn creates unpredictability, which in turn is said to stifle the market.[80] This Article attempts to make headway on both criticisms by identifying and filling an important gap in our understanding of unconscionability: the question of whether the doctrine is meant to be tailored or not.

Part II.A describes the problem of tailoring — that is, how much a court should particularize its inquiry to the consumer in question in examining a consumer contract for unconscionability, versus making reference to the "ordinary" or reasonable consumer. I provide an example of two recent, contrasting court decisions in payday loan cases to animate the analysis. Part II.B situates the problem of tailoring within the context of scholarly debates over the purpose of unconscionability. I suggest that most scholarly paradigms are based on an outmoded view of consumer contracting as driven by non-customizable boilerplate. As a result, we need to rethink how the unconscionability doctrine operates. Part II.C provides such a rethink, arguing that the doctrine should generally be tailored. I advance three rationales for tailoring: (1) it is consistent with most theoretical justifications for unconscionability; (2) it allows consumer protection policy to take advantage of a unique institutional competence of courts; and (3) it matches contemporary contracting practices, and uses unconscionability to improve markets by giving merchants incentives to offer appropriate contracts. I describe how this regime would both narrow and broaden unconscionability's application, and respond to some potential concerns with this approach.

A. The Problem of Tailoring

This Section first describes the unconscionability test as conventionally applied, and then uses a pair of similar but distinct cases, where two courts struck down similar payday loans with remarkably different analyses, to illustrate "tailored" and "untailored" approaches to unconscionability. Unconscionability is subject to widespread scholarly criticism for its vagueness. As this Section documents, little of that focuses on an important source of unconscionability's ambiguity — the question of whether the inquiry should be tailored. Answering that

[80] *See, e.g.*, Epstein, *supra* note 22, at 305, 315.

question would give courts a better structure for conducting the unconscionability analysis.

Most courts apply a two-pronged test in analyzing unconscionability, comprised of a "procedural" prong and a "substantive" prong. On the procedural prong, the court is supposed to focus on the consumer's bargaining process, and whether the consumer experienced "unfair surprise" or the absence of "meaningful choice." On the substantive prong, the court is supposed to focus on whether the contract is "fundamentally unfair or unreasonably one-sided."[81] The terms have given rise to much confusion because of their vagueness. There was an early, far more rhetorically satisfying alternative that is regrettably consigned to the dustbin of history. In the article coining the terms, Arthur Leff memorably termed the former "bargaining naughtiness" and the latter "evils in the resulting contract,"[82] but his more evocative terms never caught on.

Some scholarly and judicial debate, whose resolution is largely unimportant for this Article, has focused primarily on the relationship between these two prongs. Courts vary on whether they consider the two prongs conjunctive, disjunctive, or situated on a sliding scale, where a finding of minor procedural unconscionability requires more serious substantive unconscionability for a successful defense. As part of that debate, a number of scholars have suggested that procedural unconscionability serves a relatively minor role, as some courts appear ready to find that *any* "contract of adhesion" meets the bar for procedural unconscionability.[83] Since a contract of adhesion is simply a contract where the consumer does not get to dicker individual terms, essentially all consumer contracts would qualify under that standard, rendering the procedural prong meaningless. Another line of debate concerns whether unconscionability is only a defense to the enforceability of a contract, or whether it can be used "offensively" by a party seeking to invalidate a contract. Again, the debate is largely unimportant for this Article, except that the modern trend seems to accept a wider use of unconscionability not just as a defense. That may be another contributing factor to the rise of unconscionability cases documented in this Article.

Regardless of the relative weight or disjunctiveness of the two prongs, any unconscionability analysis requires some evaluation of the contract

---

[81] RESTATEMENT OF CONSUMER CONTRACTS § 5 cmts. 1, 3, 8.

[82] Leff, *supra* note 58, at 487 ("Hereafter, to distinguish the two interests, I shall often refer to bargaining naughtiness as 'procedural unconscionability,' and to evils in the resulting contract as 'substantive unconscionability.'").

[83] *See, e.g.*, McCullough, *supra* note 15, at 781-82.

from the standpoint of the consumer. To answer either whether the consumer lacked meaningful choice or entered into a fundamentally unfair bargain, the court cannot help but have some consumer in mind by which to evaluate whether the contract is too surprising or unfair. But *which* consumer? Is it the specific, subjective individual sitting in front of the court in all of their factual complexity? Or is it a "typical" consumer — a more objective test as to what a reasonable consumer would experience in striking the same hypothetical bargain? Or somewhere in between — a consumer with certain like characteristics, and if so, which parallel characteristics matter? In this Article's terminology, the former approach would be "tailored," the latter "untailored." Of course, the two exist along a spectrum, and as in any law question, the answer is likely somewhere in between; but my initial analysis will focus on tailored and untailored as opposing poles in order to make the tensions clearer.

An example best illustrates the tension. Two courts, the New Mexico Supreme Court and the Delaware Chancery Court,[84] each recently struck down high-interest, short-term loans. In their analysis, their conception of the contours of substantive unconscionability are at odds. Their reasoning speaks past each other, and that clash sets the stage for my analysis:

- In *B & B Investment Group*, the court adopts an untailored approach: it explicitly declines to consider evidence of how a particular borrower might use a loan to evaluate its price. "*Under an objective, not a subjective, reading* . . . , Defendants' signature loans are low-value products," the court writes. It notes four features: the high price of the loan, fees associated with the loan, the lack of positive repayment reporting to credit agencies, and an acceleration-upon-default clause that makes the full amount of the loan (principle and interest) due immediately if a borrower falls behind on payments. The court sums up its decision to not take into account evidence of why borrowers sought these loans or how they compare with other options available to those borrowers: "All of these loan features . . . make it a low-value product regardless of how the borrower uses the principal."[85]

[84] Delaware Chancery is best known as the nation's primary business-law tribunal, but it had jurisdiction over this case because the relief sought — rescission — sounds in equity, and Chancery is an equity court.

[85] State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 671 (N.M. 2014) (emphasis added).

There was, in essence, no argument available to a lender offering a product with this particular interest rate.

- In *James v. National Financial, LLC,* the court indicates that a tailored approach is appropriate, but that the specific evidence the lender would have needed was lacking in this case. A lender could introduce evidence showing a "rational" use of a high-cost loan for a particular borrower, but the court concludes that this lender failed to do so. Instead, the lender put on expert testimony about "hypothetically rational use[s]," which the court noted did not align well with the design of the particular loan, especially the loan length.[86] In other words, such a defense was possible — that a borrower might use a high-cost loan to pay down a higher-cost loan or fee elsewhere — but the lender's expert botched it, perhaps in part because this particular loan structure was not tailored to this particular borrower. "[T]here's the rub," the court notes. "The Disputed Loan was not structured as a short-term loan. It was a twelve-month, interest-only installment loan. . . . *It may be that a consumer with the wherewithal to repay a high-cost loan period after one period could rationally use some high-cost products in a wealth-enhancing way*," but this specific loan was not structured appropriately for such a use.[87] The court repeatedly referred to the failure of the experts to look at the *local* Wilmington market where the loan was written, the specific lender, and the specific terms of this loan. The lender also attempted to argue that *no* price was too excessive for a loan, which understandably irritated the court. Meanwhile, the lender's expert said approximately the last thing the lawyer who hired him might have wanted: in testimony, he admitted that the price "look[ed] kind of shocking" and was higher than what he expected.[88]

It seems, then, that the Delaware court would have considered evidence, had the lender proffered it, that the cost of the loan related to its value to the borrower. New Mexico's ruling seems to leave little room for such evidence: for that court, the interest rates and terms alone, with no reference to context, made the loan objectively indefensible.

Courts, then, are making potentially outcome-determinative decisions about the degree of tailoring to apply, but because that

[86] *See* James v. Nat'l Fin., LLC, 132 A.3d 799, 819-21 (Del. Ch. 2016).

[87] *Id.* at 820-21 (emphasis added).

[88] *Id.* at 816-17.

concept is not explicitly considered by most courts or scholars, the doctrine feels adrift, muddy, and inconsistent. Learned treatises fare no better, as commentators seem largely to have missed this tension. Williston's famous contract treatise is typically vague. On the one hand, he notes that a finding of unconscionability is one of law, not of fact, but also that the circumstances in which the contract negotiated are relevant to the "fact-specific" inquiry. Williston writes: "The determination of whether a given clause or contract is in fact unconscionable is to be made at the time of its making rather than at some subsequent point in time (e.g., at the time for performance) and is a question of law for the court, rather than a question of fact for the jury, to decide."[89] The Restatement (Second) of the Law of Contracts is similarly unhelpful on this question: "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect"[90] and should be made "in the light of all the material facts."[91] There is some slight suggestion that, if tailoring is to happen, the focus will be on the *procedural* aspects of negotiation affecting the interpretation of substantive unconscionability.[92]

That unconscionability is classified as a question of law, not of fact (to the extent the distinction is even coherent), does not help decide the issue of tailoring. The real modern import of the doctrine's status as a question of law is primarily that a judge, not a jury, makes the unconscionability determination. The determination of a judge could be that a given provision was unconscionable as to a particular set of circumstances. For example, rather than any and all add-on clauses being inherently unconscionable or allowable, it is equally plausible that a court would find that certain uses or types of add-on clauses are allowable — just as statutes, like the UCCC, describe the specific types of add-on clauses that are restricted. Laws (whether made by legislatures or by courts) can, obviously, be narrow or broad; written as rules or standards; and applicable widely or applied with constraints.

Likewise, the question of whether to tailor is not addressed by the general consensus that contract law now follows an "objective theory of assent," rather than one focused on the contracting parties' subjective

[89] WILLISTON, *supra* note 39, § 18:12.

[90] *See* RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a (AM. LAW INST. 1981).

[91] *See id.* at cmt. f.

[92] *See id.* at cmt. e ("Other terms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important.").

mindset.[93] But the objective standard still requires a view of "reasonableness," which in turn is often explained as something that is *reasonable from the standpoint of a similarly situated party* — which can be defined either so narrowly or so broadly that the objective inquiry can easily collapse into a subjective (or nearly subjective) one. How close, in other words, is the court's definition of a "similarly situated party" to the actual party? At some level of narrowness, the objective test becomes indistinguishable from a subjective test. In other words, tailoring and not tailoring are a spectrum, not binaries — and any court that engages in a "reasonableness" analysis is taking some view, whether or not it acknowledges or coherently expresses it, on how narrow or broad its view of "similarly situated" is.

B. Articulating a Purpose for Unconscionability

In preparation for this Article's argument that unconscionability should be tailored, this Section sketches some theoretical underpinnings — an account of what unconscionability is supposed to do. My goal here is to make my doctrinal proposal as palatable to a wide range of perspectives on unconscionability and contracting as possible. I proceed in three sections. First, I characterize what I see as the three dominant perspectives on unconscionability. Second, I argue that the debate expressed in these perspectives was excessively shaped by its origins in the 1970s, and thus relies on a view of contracting that is

[93] *See, e.g.*, Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 128-30 (2005); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 354 (1997).

In my view, which is not essential to this Article, this standard recitation of doctrine is quite possibly an oversimplification. To briefly sketch the objection, it is certainly true that the black-letter law focuses on "manifestations of mutual assent." However, many would still concede that at least one key underlying purpose of contract law involves allowing parties to enforce "meetings of the minds," the earlier subjective standard. In other words, the objective test may best be characterized as the only practical way of operationalizing a subjective standard, given that courts cannot engage in mindreading. Indeed, courts appear interested in the parties' subjective mindsets in certain cases — for instance, if parties enter into a contract in jest, even though the documented manifestations do not make the joke clear. *See, e.g.*, Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 128-30 (S.D.N.Y. 1999); Lucy v. Zehmer, 84 S.E.2d 516, 517-18, 500-02 (Va. 1954). This suggests the old, subjective version of contract law is not wrong so much in theory as in practice: in practical reality, the objective evidence viewed in light of reasonable interpretation will be the only reliable, consistent, and available guide to interpreting the parties' subjective intents. In addition, an objective standard serves a useful channeling function by encouraging parties to memorialize their agreements.

increasingly inapt. Finally, I sketch what I believe is a fairly palatable explanation of unconscionability's purpose to animate the tailoring proposal that follows. This theory of unconscionability focuses on courts' unwillingness to be complicit in helping others (merchants, in this Article's context) engage in exploitative or harmful acts.

In doing so, the theory is also consistent with ideas about the expressive functions of law.[94] By enforcing an unconscionable contract, the state signals its implicit approval of the underlying conduct; by not enforcing them, the state signals a particular view of the institution of contracting — one that creates (on average) bargains that increase welfare.

1. Past Debates over Unconscionability

This Subsection briefly reviews scholarly perspectives on unconscionability. These can, in my view, be grouped into roughly three schools: (1) a largely negative perspective from classical law and economics, (2) a more moderate perspective from a newer wave of behaviorally informed law and economics, and (3) a favorable perspective from scholars who reject the law and economics approach in favor of one they say is based primarily on norms of fairness or morality. While none directly answers the question of tailoring, a review of their views is important in understanding the underpinnings of current judicial approaches to unconscionability.

The first school, which arose as part of the growth in economic analysis of contract law in the 1970s, is the most influential.[95] That influence stems not necessarily from being the most widely believed account of unconscionability's purposes, but because the other two schools define themselves largely in response to the classical law and economics approach. These scholars were largely, and highly, critical. They charged that unconscionability was unpredictable; that courts were less competent than markets to adjudicate consumer fairness; and that the core procedural prong of unconscionability, which implied a model of back-and-forth dickering over contract terms, had little

[94] *See* David A. Hoffman & Eric Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 203-209 (2019) (discussing expressive theory in contract law and elsewhere and noting that law "should not rest merely on an 'imperative theory of law' — the commands it issues and citizens' expected responses — but also the *messages* that those rules communicate").

[95] For representative works in this vein, see generally Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977); Epstein, *supra* note 22.

meaning in a world of mass boilerplate. Scholarship in recent decades has taken these critiques to heart.

One variant of this school has focused on the alleged "subjectivity" of the unconscionability doctrine. These scholars do not use "subjective" in its conventional legal sense (i.e., whether a reasonable person is to be interpreted from a "subjective" or an "objective" perspective), but rather to express their concern that judges are arbitrary, inconsistent, and simply fulfilling personal judicial preferences.[96] Many of these scholars would radically limit unconscionability, rendering the question of tailoring irrelevant because the doctrine would include far fewer cases than it currently does,[97] which would radically limit the scope of the unconscionability doctrine.

A second group of scholars has leaned on behavioral evidence to update the early law and economics critique. These scholars tend to share the early school's concerns with unconscionability's prospective unpredictability and tendency to crowd out the market, by substituting ex-post judicial review for the discipline imposed by a competitive market. At the same time, they draw attention to particular types of terms that are relatively unlikely to be policed, either because of market failure or because of cognitive bias. In one of the best-known contributions to this approach, Russell Korobkin noted that boundedly rational buyers "making purchasing decisions . . . take into account

[96] *See, e.g.*, Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 351-52 (2002) (expressing concerns about unconscionability "[i]f the law permits a judge to utilize her own subjective judgment about the reasonableness of the price"); Paul Bennett Marrow, *The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 29 (2001); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 484 (2008); Charles A. Bruch, Comment, *Taking the Pay Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1257, 1263-64 (2001). Not all uses of subjectivity as referring to *judicial* subjectivity are critical. *See, e.g.*, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 47-49 (2012); Schmitz, *supra* note 14, at 95-102 (arguing that the subjectivity of judges is less of a problem than critics charge, because the doctrine's flexibility promotes fairness).

[97] For instance, Paul Bennett Marrow criticizes the unconscionability analysis as problematically subjective, because it is focused "on the impact of a given term solely on the immediate parties to the agreement," thus giving unconscionability findings a *sui generis* quality with little precedential value. He worries that courts are "looking at the impact [of the contract] on the parties," instead of reserving the doctrine for terms that "undermine[] the integrity of the contracting system itself" or a statutory regime. Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187, 188-90 (2005-2006).

only a limited number of product attributes and ignore others."[98] As a result, sellers will have an incentive to make non-salient product attributes unduly unfavorable to the sellers, since buyers won't consider those attributes. Price, by contrast, tends to be salient, meaning that buyers are likely to face a repeated tradeoff — lower prices in exchange for worse hidden attributes, resulting in a world of contracts that are "socially inefficient [and] leave buyers as a class worse off . . . than they would be if their contracts included only efficient terms . . . ."[99] This vein of reasoning has typically led to scholars endorsing an approach that lets the market police terms where possible, and allows courts to step in where markets are likely to fail.[100] That explains the draft Restatement's approach, holding the non-salience of a term to be a core requirement for it to be unconscionable. Others have taken a similar approach.[101]

A third group of scholars has argued that the efficiency focus of law and economics misses the fundamental point of unconscionability, as a last resort "backstop" to ensure fairness.[102] For example, such scholars might hold that unconscionability's "flexibility" is the reason for the doctrine's "survival in the wake of contract law's return to cabined, and sometimes cruel, focus on strict contract enforcement and economic

[98] Korobkin, *supra* note 79, at 1206.

[99] *Id.*

[100] *See, e.g.*, Gilo & Porat, *supra* note 78, at 170-77.

[101] For example, Eric Holmes and Dagmar Thurmann draw on German law in suggesting a new mode of analysis for form contracts. Because the drafters of standard form contracts want predictability, a detailed, case-by-case adjudication system for unconscionability does not make sense. The earliest versions of unconscionability assumed highly dickered contracts and thus focused on the particular bargaining circumstances. "Consideration of the formative circumstances makes the adjudication process complicated and time consuming, causing a certain unavoidable unpredictability of the result. . . . The use of a standard form does not justify setting in motion such a costly and time consuming analysis." As a result, the pair argues, the focus should be on how standard and reasonably expected the terms are — for instance, consent might be defective because a deviation from standard, expected terms is particularly "inconspicuous." *See* Eric Mills Holmes & Dagmar Thurmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 415-16, 427 (1987).

[102] Examples of scholars who have focused on fairness vis-à-vis unconscionability include Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); *see* Lonegrass, *supra* note 96, at 74; Jennifer Nadler, *Unconscionability, Freedom, and the Portrait of a Lady*, 27 YALE J.L. & HUMAN. 213 (2015); Schmitz, *supra* note 14, at 74 (arguing that unconscionability "survives to protect . . . fairness norms"); Robin West, *The Anti-Empathic Turn* (Georgetown Pub. Law & Legal Theory Research Paper No. 11-97, 2011).

efficiency."[103] Such scholars may commend features of unconscionability that are often criticized — such as the "sliding scale" approach to balancing the procedural and substantive tests — on the grounds that these allow courts to "deemphasize[] traditional, formalist markers of assent" and "respond[] to the emerging understanding of the deep deficiencies in consumer assent."[104]

Similar debates have replayed in a recent wave of scholarship about contract law, which has focused on concern with the rise of standardized boilerplate, including the ubiquity of online "click-wrap" contracts. Form contracts, which are not dickered term-by-term (or at all) by consumers, are seen as posing a variety of problems to basic models of contract formation. How, some ask, can there be a true contract when one party, unrepresented by counsel and disincentivized to read because of the unlikelihood of obtaining concessions on terms, is unlikely to have even read the contract drafted by the other, represented side? But, on the flip side, how can modern commercial life function without such form contracts? (Imagine a world where purchasing a banana required the clerk and buyer to dicker terms such as which implied warranties should be included.) The question is generally seen as particularly acute in understanding the procedural prong of the unconscionability test, which is said to consider the balance of bargaining power and the circumstances surrounding the formation of the contract. If a consumer has no ability to dicker it, is that de facto evidence of procedural unconscionability? Or should a court focus on the broader market conditions that might discipline the contract?

Tracking the debate described above, scholars who focus more on fairness tend to be highly critical of boilerplate.[105] Scholars who hew more to the traditional law and economics approach tend to assume that boilerplate will be vetted by the marginal consumer, and that boilerplate should not be viewed with suspicion by courts.[106] They view with concern the fact that judges seem generally happy to find procedural unconscionability on the basis of the contract being one of adhesion — i.e., boilerplate. For such scholars, the absence of literal negotiation by individual consumers should be irrelevant. Marcus Cole, for example, believes that consumers need not read contracts because the marginal

---

[103] Schmitz, *supra* note 14, at 74.

[104] *See* Lonegrass, *supra* note 96, at 5.

[105] *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE 17-18 (2012).

[106] *See, e.g.*, G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts Without Even Reading Them*, 11 J.L. ECON. & POL'Y 413, 414-15 (2015).

consumer will, in effect, negotiate on behalf of the consumers.[107] Because firms will compete over the marginal consumer, he argues, they will compete to terms that appeal to consumers, and optimal pro-consumer terms will emerge through that process of market competition.[108] That view is strongly rejected by scholars more influenced by the other two schools of thought, behaviorally inclined approaches or fairness-based approaches.

2. The Revolution in Consumer Contracting

Although scholars have not identified tailoring as a critical issue for the doctrine, many scholars implicitly presume that courts' inquiry would be untailored and would reflect the average consumer. This Subsection argues that this is because scholarship retains the mark of its origins and is showing its age. Much of the influential critical scholarship on unconscionability was written in an era of mass consumerism that has given way towards an era of increased customization. Richard Epstein argued against unconscionability's use to protect the disadvantaged because "the subject matter of the transactions is for the most part standard consumer goods that are sold in generally competitive market."[109] Alan Schwartz likewise emphasized the "high cost of particularization" in consumer markets in his 1977 critique of unconscionability.[110] "The market seldom responds to the idiosyncratic preferences of individual buyers," he writes. "Thus, seven-cylinder cars or four-door refrigerators are not produced."[111]

This no longer reflects the modern market. Modern technology has changed the costs of customization, making much of Schwartz's critique a relic of a different era. Indeed, four-door refrigerators are now widely available (as are seven-cylinder engines, although to the extent they are not widespread it likely has less to do with failure to satisfy consumer preference, and more to do with seven-cylinder engines being inefficient).[112] In other words, many markets are increasingly producing

107 *See id.*

108 *See id.* at 422-25.

109 Epstein, *supra* note 22, at 305.

110 Schwartz, *supra* note 95, at 1064-65.

111 *Id.* at 1069.

112 Volkswagen has sold five-cylinder cars for a wide market. For an extended debate of the merits and problems of seven-cylinder engines, see ztikmaenn, *Why Does Nobody Make 7 Cylinder Cars?*, REDDIT (Oct. 20, 2013, 1:14 PM), https://www.reddit.com/r/cars/comments/1ourcl/why_does_nobody_make_7_cylinder_car [https://perma.cc/59WP-EVFM]. On four-door refrigerators, see generally Daniel DiClerico, *The Benefits of a True 4-*

heterogeneous products and contracts to meet heterogeneous consumer preferences. The growth in idiosyncratic physical products — four-door refrigerators and odd-cylindered engines — pales in comparison to the growth in idiosyncratic financial and intangible contracts. Bespoke suits have given way to bespoke insurance personalized to idiosyncratic individual risks. Needless to say, the degree of particularization in a market will depend on the market; for instance, online furniture sellers clearly engage in more targeted product development than their brick-and-mortar competitors.

Marketing has also changed, in ways that blur the line between marketing and product. With consumers increasingly shopping for products electronically, advertising is highly tailored and based on meticulously detailed profiles of individual consumers' preferences and circumstances. Algorithms permit merchants to move towards increasingly smaller markets — as small as a single, hyper-targeted consumer. Websites no longer display a single price: rather, the price displayed is based on a complex mix of factors including geography, computer type, and browser history.[113] An Obama-era White House report focused on the use of big data in differential marketing and pricing and the rise of "mass customization."[114] Other scholars have identified ways in which price discrimination is becoming increasingly personalized.[115] This practice raises a host of concerns — although price discrimination is not always problematic, it can be used in problematic ways — but is likely here to stay given the widespread adoption of technology for commerce and the growth in online advertising.

This has important implications for whether we tailor procedural unconscionability. A truly tailored era demands a tailored response. Unconscionability at least partly developed out of the notion that an unconscionable contract lacks the kind of "meeting of the minds" that is essential to contract formation, suggesting that the individualized

Door Refrigerator, CONSUMER REP. (Feb. 24, 2016), https://www.consumerreports.org/refrigerators/4-door-refrigerator-reviews/ [https://perma.cc/9XF4-5RUM].

[113] *E.g.*, Valentino-DeVries et al., *supra* note 10 (reporting results of a *Wall Street Journal* investigation into price differences on the Staples website).

[114] WHITE HOUSE COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, REPORT ON BIG DATA AND DIFFERENTIAL PRICING 5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf.

[115] *See, e.g.*, EZRACHI & STUCKE, *supra* note 11 (identifying and describing potential dangers of the use of algorithms in price discrimination); Benjamin Reed Shiller, *Personalized Price Discrimination Using Big Data* (Brandeis Int'l Bus. Sch. & Econ. Dep't Working Paper No. 108, 2016), http://www.brandeis.edu/economics/RePEc/brd/doc/Brandeis_WP108.pdf.

bargaining circumstances surrounding the *particular* consumer should matter.[116] Especially when merchants target consumers through particularized techniques, there is no reason the judicial inquiry should not also take those into account.

3. Unconscionability's Focus as Blameworthy Contracting

Although descriptions of unconscionability's purpose are mixed, this Article adopts the position that unconscionability is primarily about policing merchant misbehavior, not preventing consumer harm.[117] Put broadly, unconscionability gives courts a way out of enforcement when a merchant sells a consumer a product that it knew was likely unfair to the consumer. This merchant-focused position has the following advantages: first, it is consistent with case law and explains some of its more troubling aspects; second, it explains how unconscionability differs from other approaches to consumer protection, and in doing so insulates unconscionability from several common critiques; and third, it is consistent with one of the most broadly palatable philosophical justifications for unconscionability, espoused by Seana Shiffrin and others.[118] I describe each of these three advantages in turn.

First, this explanation for unconscionability can explain the outcome in most published cases of unconscionability, old and new — with the added virtue of rehabilitating the most troubling aspect of those cases, their apparent paternalism (in the negative sense[119] of the word). In findings of unconscionability, courts frequently employ language that focuses on borrower characteristics — race, gender, age, education —

[116] Alternatively, procedural unconscionability might consider the average consumer on the grounds that the marginal consumer has a key role in preventing market failure, and thus might be indicative of a failed market in need of judicial intervention. In other words, if the average consumer isn't processing information correctly, a market is less likely to be competitive and thus may fail to self-correct. Aside from the fact that no courts, to my knowledge, have adopted such a market-failure view of unconscionability, this raises a host of other issues about when markets will self-correct. *See, e.g.*, Russell, *supra* note 12, at 554-62 (discussing the limits of market self-correction).

[117] I use the terms "merchant" and "consumer," as this Article is focused on unconscionability's use in consumer contracts — not its use in, for instance, business-to-business contracts. (Using "plaintiff" and "defendant" is ambiguous, because the consumer is often, but not always, the defendant/counter-claimant.)

[118] *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 207 n.3 (2000).

[119] Philosophers and lawyers have increasingly defended "positive" types of paternalism. *See, e.g.*, SARAH CONLY, AGAINST AUTONOMY 3 (2013).

without much explanation of why or how they are relevant.[120] One logical, and worrisome, reading of these descriptors is that courts have turned to a dangerous mix of paternalism — in its most autonomy-depriving, "the judge knows better" sense — and stereotype in making unconscionability determinations. Alternatively, and more hopefully, courts could be using such language as short-hand to express their disappointment that sellers are deliberately preying on vulnerable population — seeking out, for instance, consumers who are either easy to mislead or desperate. While, as I suggest later, courts still should be more thoughtful in whether and how they describe parties in order to avoid uncomfortable stereotyping, this is a more palatable use of judicial discretion than, as is commonly charged, courts simply substituting their own views for the preferences of consumers. For instance, *Walker-Thomas* is most troubling if the court is suggesting that Williams's purchase of a stereo or television was frivolous or inappropriate, or that Williams was incapable of making financial decisions (both commonly made assumptions about the borrower which are unsupported by the facts of the case[121]). It is least troubling, and most appealing, if the court is directing ire at Walker-Thomas's particular use of an obscure, unreadable provision designed to mislead unsuspecting consumers — ire almost certainly shared by anyone who has attempted to parse the contractual language at issue for themselves.

Second, the focus of unconscionability on merchant behavior helps distinguish the doctrine from other forms of consumer protection. A common charge levied against unconscionability is one of institutional competence. The critique goes something like this: markets, not courts, are best at discerning consumer preferences. To the extent markets fail and require intervention, it's better to have *ex ante* regulation correct it because it provides predictability and certainty to markets. My proposed focus — using unconscionability against merchants who know, or should have known, that their contracts were unfair or extremely inappropriate for the consumer — allows unconscionability to serve a different, complementary role to regulation. A tailored approach that focuses on the individual consumer-merchant relationship is more appropriately done *ex post* than *ex ante,* both because it is fact sensitive and because regulation has to be somewhat one-size-fits-all.

Adopting my account of unconscionability's purpose also helps distinguish the doctrine from other contract law defenses. To the extent

120 See *infra* Part II.C.1, for a review of some examples.

121 *See* Spence, *supra* note 21, at 92-96 (for more on the factual background and the difficult issues of inferring circumstances and imputing motives).

the real fear is that a consumer is coerced by circumstances into contracting, we have the law of duress, which is appropriately and narrowly cabined to avoid excessive claims of unenforceability. To the extent the real concern is that the consumer isn't capable of contracting, we have a series of defenses around incapacity. To the extent the real concern is that the merchant has engaged in intentionally egregious behavior, we have fraud and duress. Because unconscionability has been poorly explained, scholars and courts have often expressed confusion as to how it relates to these other doctrines. Focusing unconscionability on merchant behavior distinguishes the doctrine.

Finally, this view of unconscionability should be palatable to a wide range of positions, including both libertarian and more interventionist liberal positions. This is because it is consistent with a relatively minimalist theoretical justification for the doctrine, that of philosopher Seana Shiffrin.[122] Although not essential to my policy proposal, hers provides a coherent framework for thinking about the doctrine's purpose. My purpose here is not to argue that it is the only or best way to think about unconscionability; rather, it is particularly useful here because Shiffrin designed her foundation for unconscionability deliberately to be acceptable to a wide range of views, both politically (libertarians with concerns about paternalism and liberals with concerns about accommodation) and philosophically (as to first-order theories about why contracts are enforceable in the first place).[123]

For Shiffrin, unconscionability is primarily about the state's involvement in contracting through the judicial process.[124] (Her article is not specifically about consumer contracts, but as I am applying it in those contexts, I will continue to refer to those asserting unconscionability defenses as "consumers" and those defending against accusations unconscionability as "merchants.") Her approach to avoiding paternalism focuses on the particular role of courts as affirmative aiders of contractual enforcement — aid that, as it is given

[122] *See* Shiffrin, *supra* note 118, at 207-08.

[123] In particular, for the purpose of her argument, she adopts Charles Fried's "will" based theory of promises precisely because it is harder for her case. *Id.* at 209-10. Will theorists are more apt than most to dislike unconscionability on grounds that respect for the autonomy of agents requires us to hold them to their promise.

[124] For a useful rejoinder to Shiffrin (which, even if correct, is still consistent with the theory of tailoring advanced by this Article), see Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1147-53 (2016) (arguing that Shiffrin's focus on the state's motivation is less useful as an explanation for unconscionability than one that focuses on the degree to which the exploitative party — the merchant, in my examples here — loses their "moral standing to complain").

on behalf of society, may be subject to restrictions. For Shiffrin, courts are focused less on either vulnerability or disability of the consumer in contracting; instead, unconscionability channels a court's disapproval of the contract itself and of the merchant's role in creating this contract. Unconscionability's role here is limited to policing the bad acts of merchants; protecting consumers is a side-effect, rather than an end in itself. In many cases the two will overlap: voiding a contract where a merchant has behaved badly may protect a consumer. But unconscionability is constrained in that it could not relieve a consumer struggling from a contract because of, for instance, *ex post* situations or because of *ex ante* factors that would not have been known to a reasonable merchant.

Adopting Shiffrin's theory avoids the most indefensible form of paternalism — the kind that one might colloquially say involves looks down on agents as inferior. Paternalism can mean different things to different people, and this has muddied the debate over whether unconscionability is paternalistic. As Shiffrin notes, it is clear that not all restrictions of autonomy are "paternalistic," so it is perhaps productive to develop a definition based on what we find potentially inappropriate about paternalism. This leads her to derive a "motive-based" characterization of paternalism: paternalism is the result of the putative paternalist's motivation towards the other. It is not paternalistic if one "engag[es] with [another's] capacities and shows respect for [her] power to decide what to aim for."[125] It *is* paternalistic to substitute one's own judgment for another's, and to circumvent the other's will to promote that judgment.

Adopting Shiffrin's justification for unconscionability avoids tying my argument to two other polarized debates. The first set of views are result-oriented. These authors begin with a view of how much latitude judges should have — either wide discretion for interventionist liberals; or a constrained, narrow doctrine for more libertarian scholars — and build a theoretical position from there. For instance, many defenses of unconscionability work backwards from examples of harmed consumers and the need to find a remedy, regardless of the merchant's complicity. The second set of views develop an explanation for unconscionability from fundamental principles of the institution of contracting — adopting, for instance, Patrick Atiyah's reliance

[125] Shiffrin, *supra* note 118, at 213.

position,[126] Charles Fried's promise-based position,[127] or a position frequently taken by libertarians that contracting exists to create wealth-enhancing deals for society.[128] However philosophically sound such an approach might be, it risks alienating those who do not share first principles.

Shiffrin's position is designed to appeal both to egalitarian-liberals and libertarians. Unconscionability is not paternalistic if it is done on non-paternalistic grounds, as nobody has an unqualified right to have the community go out of its way to help you enforce your contract. This should have a particular appeal to libertarians: To say otherwise, she argues, is tantamount to giving promisors power over third parties to compel them to help with the promises. To use Shiffrin's example, it is paternalistic if I hide your cigarettes, but not paternalistic if I decline your request that I walk over to the store and purchase cigarettes for you.[129] For autonomy-focused liberals, Shiffrin suggests the primary concern is the degree to which society must make *accommodation*, and whether one must accommodate an unconscionable contract that one disdains but was nonetheless entered into. To these concerns, Shiffrin suggests that unconscionable contracts are low on the list of things that one ought to accommodate, both because the burdens are not great (the primary areas of accommodation are "those . . . most closely connected to the core of autonomy rights," specifically those involving intimate behaviors of the body or mind) and there are also benefits to not providing state assistance to enforce unconscionable agreements (that they "undercut . . . fair treatment that we have fundamental commitments to maintaining").[130]

C. In Favor of Tailoring Unconscionability

Given the theoretical gaps in unconscionability outlined above, this next Section rethinks the doctrine. I argue that courts can and should tailor, which would allow them take into account the heterogeneity — the idiosyncratic tastes and circumstances — of consumers, rather than leaving the inquiry untailored to a hypothetical "reasonable" consumer.

---

[126] *See generally* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

[127] *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

[128] For a thorough critical review of works in this vein, see generally Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59 (2008).

[129] *See* Shiffrin, *supra* note 118, at 224.

[130] *Id.* at 249.

There are several rationales for tailoring. First, it is consistent with most theoretical justifications for unconscionability. Second, it allows consumer protection policy to take advantage of a unique institutional competence of courts. Third, it matches contemporary contracting practices (modern sellers consider the heterogeneity of individual consumers, so why shouldn't courts?), and uses unconscionability to improve markets by giving merchants incentives to offer appropriate contracts. Tailoring the analysis is more consistent with the general idea of bargains — contract law exists, in part, because it allows bargains where both parties *ex ante* anticipate gains from trade.

My first Subsection justifies tailoring, and describes how it would work — what a tailored inquiry looks like, first on the substantive and then on the procedural side. The second Subsection explains the likely consequences compared to an untailored approach, which is that unconscionability's application would be both more narrow and more broad. The final Subsection responds to some potential concerns with this approach.

Because courts are divided on this issue, as the twin payday loan cases discussed above demonstrated, and have rarely spoken directly to the issue of tailoring, this Article's proposed approach requires no radical changes or revisions to precedent. Whether or not they follow the proposed approach in this Article, courts should be more explicit about the assumptions they are using in applying unconscionability.

1. What Tailoring Would Look Like

Tailoring turns the substantive unconscionability prong into something loosely akin to a "suitability" standard.[131] It asks about the "goodness-of-fit" between product and consumer. If the "fit" hits a certain level of inappropriateness, the procedural prong next inquires into the merchant's role in inducing that bad fit. On the procedural prong, tailoring looks at the nature of how the contract was reached. There may be situations where individual circumstances matter little, and thus tailoring the procedural prong makes little difference. In particular, if a merchant can show that a consumer would have benefitted from the broader market's bargaining efforts — as opposed

[131] Investment law applies a "suitability" standard to broker-dealers. FINRA, RULE 2111 (2014) (requiring a broker-dealer to "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile").

to being segmented into an individual or small contract that would not likely have received market discipline — there is likely to be little on the procedural side of relevance to the individual consumer. Where the marginal consumer is likely to have little effect on the consumer at issue in the case, as for example in a non-salient contract term, the individual bargaining circumstances of the consumer will matter more.

To be sure, tailored and untailored approaches are best seen not as alternatives, but as a spectrum. One way of thinking of tailoring, as suggested in the discussion of subjective vs. objective approaches above, is simply that it limits the scope of "similarly situated consumers" for a reasonable analysis.[132] It will often make sense for courts to group related consumers in a tailoring analysis: consumers who received a similar product, under similar circumstances, for similar purposes.

Recall the first payday loan case described in Part II.A, *B & B Investment Group*, where the court expressly adopts an "objective," untailored reading and finds the loans "low-value" because they are "extremely expensive" and have an acceleration-upon-default clause. It rejects the lower court's tailored reasoning, which "follow[ed] a subjective theory of value, under which the more desperate a person is for money, the more 'value' that person receives from a loan." The court suggests that loan terms do not in any way incorporate or implicate a borrowers' intended use, and thus are not relevant: "It is not the use to which the loan is put that makes its value low or high, but the terms of the loan itself."[133]

That logic does not make sense. Its flaws underscore why the untailored approach fails to comport with the basic idea of a contract. Loan terms, after all, are highly customized based on what the lender knows about a borrower's risk of default — which includes, among other things, the use they are likely to put it to. A mortgage for a second

[132] In an untailored analysis, a similar question of scope arises. What is a "typical" or "reasonable" consumer? For economists, it might be the median or the marginal consumer. But, it is worth noting, a "middling" approach is not the only possible untailored approach. For example, a particularly interventionist approach could consider the "most vulnerable" or "least sophisticated" consumer on the theory that the law should be designed to protect such a consumer. The eggshell plaintiff rule in torts may have an effect along these lines. Although it is technically a damages rule, not a negligence rule, rational potential defendants designing precautions to avoid damages will take into account the extraordinary potential damages they would incur if their unreasonable conduct harms an eggshell plaintiff. However, as that is not typically the approach of the law, I assume a non-tailored approach would involve the court to a typical, reasonable consumer (recognizing that this brings to the fore all the same dilemmas typically found in evaluating "reasonableness" under the law).

[133] State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 671 (N.M. 2014).

home carries a higher interest rate than a primary home; mortgages carry lower interest rates than auto loans even though both are secured; etc. Indeed, the seller often *is* the lender (e.g., student loans, manufactured housing loans, car loans), or works with the lender (every vendor that suggests financing options), in which case the "use to which the loan is put" is *precisely* the way of understanding the value of the loan. Even in an unsecured loan, as in a payday loan, a lender is using evidence-based assumptions about how the borrower will use the loan. (For instance, by definition, payday lenders are aware that the loan is unlikely to be used to purchase an easily financed item.) And in many new models of unsecured lending, such as a lending clubs and peer-to-peer platform, the stated purpose of the loan is a critical factor in the decisions of individual lenders.

The merchant, in other words, is often making judgments about the how good of a "fit" the particular contract is for the particular consumer. Tailoring unconscionability, in essence, means that those judgments can be brought into evidence. In a very rough sense, a tailored unconscionability doctrine resembles the UCC's implied warranty of fitness for a particular purpose, although focused on merchant behavior rather than on consumer expectations.[134]

Another reason to use unconscionability in a tailored form is that it may be necessary to correct market failure. Market forces are most likely to improve salient terms that affect a wide variety of consumers equally. By contrast, markets may be particularly ill-suited at policing the substance of terms for *individual* consumers when consumers are highly heterogeneous. In a heterogeneous pool of consumers, different consumers may be differentially harmed by particular terms. If heterogeneous consumers are pooled into homogenous contract terms, unsophisticated consumers may be cross-subsidizing sophisticated ones; these cross subsidies may have particularly negative distributional impacts if consumer naïvité is correlated with other dimensions.[135]

---

[134] U.C.C. § 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2002) ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.").

[135] For a broader discussion of this, see Russell, *supra* note 12, at 561. For examples of the growing literature on cross-subsidization, see RAN SPIEGLER, BOUNDED RATIONALITY (2014); Mark Armstrong, *Search and Ripoff Externalities*, 47 REV. INDUS. ORG. 273, 293 (2015); Mark Armstrong & John Vickers, *Consumer Protection and Contingent Charges*, 50 J. ECON. LITERATURE 477, 477 (2012); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in*

It is thus hard to know how the *B & B Investment Group* court could claim to "objectively" evaluate the acceleration-upon-default clause without more, and a different sort, of evidence — evidence as to how those particular clauses functioned in the context of the loans that were being issued. An acceleration-upon-default clause, when applied to a borrower who is *able* to repay, is likely to serve as a deterrent against default — and thus lower the overall interest rate of the loan for the borrower.[136] By contrast, an acceleration-upon-default clause, when applied to a borrower who is *unable* to repay, is likely to serve as simply a means to trap a borrower into a lending spiral of repeated refinances and escalating fees. The lender may well know that the borrower will never ultimately repay the loan, but will have reaped so much from service charges that are actually the basis of its business model. It is clear that how the borrower will use the loan may impact ability to repay — in the favorite example of many who oppose payday loan regulation, repairing a car to get to work — as do other characteristics of the borrower that the lender likely investigates (source and stability of income, other debts, etc.).

The procedural prong raises different questions, because there may be plenty of competitive markets where consumers are not typically segmented — or the segmentation may not proceed along lines that would be relevant for the procedural inquiry — and where market competition should mitigate procedural bargaining risks. Moreover, the case law suggests courts have had more problems tailoring a procedural inquiry. If all consumers experience the same bargaining process, it makes less sense to narrow the inquiry into the bargaining experience. Instead, in such cases, it makes sense for unconscionability to instead focus on the efficacy of market forces.[137] Consumers should benefit from a rebuttable presumption that a tailored procedural inquiry is the appropriate starting point; it often will be, and such a presumption is consistent with its remedial and deterrent objectives. But if a merchant can demonstrate that the consumer would have enjoyed the benefits of robust market competition and that the contract was essentially "negotiated" through the market, because of the lack of market segmentation, the inquiry should not be tailored.

Competitive Markets, 121 Q.J. ECON. 505, 507 (2006); Botond Köszegi, *Behavioral Contract Theory*, 52 J. ECON. LITERATURE 1075, 1105-06 (2014).

136 Pawn shops are said to serve as a commitment mechanism for repaying loans quite effectively, and using a salient device — collateral the borrower commits to — that is perhaps more easily understood by consumers than interest rates.

137 *See, e.g.*, Gilo & Porat, *supra* note 78, at 170-76.

Current judicial decisions make no such distinction. Although courts (again) seem to lack a guiding theory, most use language that suggests they tailor — or at least claim to tailor — the procedural analysis. However, they may not do so effectively. In nearly every unconscionability case implicating a consumer contract, courts begin with some pabulum about how the contract was one of adhesion, offered to the consumer without room to bargain or negotiate. The recitation seems as obligatory to courts as it is irrelevant to the analysis. To paraphrase the old joke, "Nothing matters, and what if it did?" — nobody reads boilerplate, and what if they did?[138] As scholars have pointed out, the market serves the function of bargaining the terms of the contract, and in a manner that is likely far more effective and efficient than having consumers dicker each term individually. But by including a dutiful recitation of the contract-of-adhesion formulation in cases, courts suggest that if an individual *did* successfully dicker a contract term, it would limit their ability to bring an unconscionability claim.

Moreover, unconscionability decisions are replete with references to consumers' individual backgrounds — which might suggest courts are seeking evidence relevant to tailoring. But how they use this evidence is generally unhelpful, and paternalistic in the bad sense of this word: typically, traits are listed to suggest that consumers with such traits (lack of college degree, medical ailments, family issues) aren't capable of contracting. *National Financial* lists the many jobs held by plaintiff and hours worked per day to show that she is hard working, refers to her as "undereducated and financially unsophisticated," and references the GED she earned ten years after dropping out of high school.[139] *Johnson v. Cash Store* tells us that plaintiff is a "single mother working as a manager for Jack in the Box" who owed an unusual vet bill for her daughter's cat.[140] *Green v. 119 West 138th Street LLC* has a plaintiff who was "80 years old at the time of his deposition [and] testified that he

[138] Answer: their heads would hurt. The average readability of a "sign-in-wrap" contract — the terms that govern signups for websites — is "comparable to the usual score of articles in academic journals," which does not bode well for those — including most formal statements of black-letter contracts doctrine — who think consumers should read more boilerplate. *See* Uri Benoliel & Samuel L. Becher, *The Duty to Read the Unreadable,* 60 B.C. L. REV. (forthcoming 2019). In addition to suffering headaches, they'd also be misled about their legal rights. *See* Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017) (demonstrating with an experimental study that fine print wrongly makes consumers think they can't challenge unfair deals).

[139] James v. Nat'l Fin., LLC, 132 A.3d 799, 803-04 (Del. Ch. 2016).

[140] Johnson v. Cash Store, 68 P.3d 1099, 1102-03 (Wash. Ct. App. 2003).

was retired and had a ninth grade education."[141] *Drakopoulos v. U.S. Bank National Association* tells us that "the plaintiffs apparently have graduated from high school and can read and understand English," but that the wife "has suffered since the age of two from a seizure disorder and related temporal lobe damage, has an intelligence quotient of sixty-six, third- to fourth-grade equivalent reading and word recognition, and long-term memory and nonverbal reasoning abilities in the borderline range" while the husband "appears to suffer from bipolar disorder."[142]

What is supposed to be done with such facts remains unclear. Needless to say, courts are obviously using them as a rhetorical technique to suggest deep inequality of bargaining power, arguably relevant for the procedural prong. But it's hard to imagine a consumer contract where courts could *not* find inequality of bargaining power based on such reasoning. The inquiry seems unproductive, because it is facile and always produces the same outcome. More troublingly, it also may smack many readers as needlessly and unhelpfully paternalistic, or even condescending.[143] Particularly because the factors are generally discussed in the context of procedural, rather than substantive, unconscionability, they imply — without the kind of searching analysis that a typical incapacity argument would require — that some consumers are too unsophisticated to make their own decisions.

A final problem of the typical procedural analysis is that it has given courts an excuse to engage in sloppy regurgitation of superficial arguments drawn from the growing psychology and economics literature about consumer behavior. The New Mexico court that struck down signature loans relied heavily, but all too superficially, on testimony about the financial literacy and behavioral biases of underbanked individuals:

> Behaviorally and cognitively, unbanked and underbanked New Mexicans exhibit heuristic biases that work to their detriment. . . . They exhibit unrealistic optimism, or fundamental attribution error, meaning that they overestimate their ability to control future circumstances and underestimate their exposure to risk. Thus, these borrowers have unrealistic expectations about their ability to repay these loans.[144]

[141] Green v. 119 W. 138th St. LLC, 142 A.D.3d 805, 807 (N.Y. App. Div. 2016).

[142] Drakopoulos v. U.S. Bank Nat'l Ass'n, 991 N.E.2d 1086, 1089 n.7 (Mass. 2013).

[143] *See* Spence, *supra* note 21, at 90 (discussing the complex intersection of stereotypes and paternalism).

[144] State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 666 (N.M. 2014).

The court identifies little about these particular borrowers to suggest why these particular biases, rather than other or countervailing biases, were operative here. Moreover, it's unclear why the court needed to do any of this, when there was more damning evidence available — for instance, that the lender told borrowers that interest fees were about "$1 per day," which — aside from being confusing, was far off from the $1000 per year in actual fees. If plaintiffs continue to raise such arguments, defendants may increasingly seek to focus on evidence about the heterogeneity of such biases — a quasi-scientific debate that courts may not be well suited to adjudicate.

Instead, the procedural analysis needs to be rethought. Courts should focus on the market in which the contract is signed. If the market is not segmented and terms are thus policed appropriately — meaning the terms are both salient and have equivalent effects across consumer constituencies — the individual bargaining of the consumer matters relatively little. In the event of a competitive homogenous market, the salience of the term may be of primary significance, as the ALI Restatement has proposed.[145] In addition, by not tailoring the procedural prong in such instances, the worst terms can more easily be policed by class actions that will not need to focus on identifying discrete groups of harmed individuals. But in markets where there is more segmentation of terms, market forces will not function as the ALI reporters anticipate, and there is more need for tailoring the analysis to the individual facts.

Treating procedural unconscionability this way also clears a way through some of the thicket of increasingly fraught scholarly debates over boilerplate. Unconscionability goes to the core of the bargaining process — and the bargaining process itself is much more complicated than many stylized portrayals make it out to be. Much ink has been spilled and hands wrung over how to reconcile contract theories of assent to the fact that most consumers do not read contracts.[146] Since modern consumers don't read contracts or dicker them, and since all (or many) consumers in a particular type of transaction receive the same contract, one might assume that all identical consumer contracts should

[145] RESTATEMENT OF CONSUMER CONTRACTS § 5, Council Draft No. 3 (AM. LAW INST. draft, August 2017) (on file with author) (noting that "a term that affects the contracting decisions of a substantial number of consumers is subject to forces of market competition, even if it is not negotiated and even if it appears in the contracts of all businesses in the relevant market," and further policing by courts "is both unnecessary and leads to undesirable results, including a reduction in consumer choice").

[146] *See, e.g.*, Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 555 n.28 (2014) (citing numerous forays into the scholarly debate over the problem of consumers not reading contracts).

treated identically. In other words, an untailored analysis makes sense, because the contracts are not tailored. But this is a misreading of the real world. As Triantis and Choi note in their work on whether a monopolist will ever exploit buyers on non-price terms, sellers can offer multiple contracts: a "market may offer more tailored products that cater to differing preferences" because a "monopolist can increase its profits by discriminating among its buyers, on the basis of price, quality, and contract terms."[147]

Put differently, to assume that "boilerplate" contracts are uniform across consumers in a particular product market ignores too much about how firms *actually* write contracts. Even if a contract is not dickered, in the modern world of commerce, it is often highly tailored — in other words, it is dickered on behalf of the consumer by the firm (whether to the consumers' best interest or not). Companies employ sophisticated algorithms to target and segment customers. Consider, for example, how different consumers searching for the same keywords will receive all kinds of different offers from the same company — at different price levels or featuring different terms. (And price, after all, is not only a term, but a term that the unconscionability analysis focuses on.) "Boilerplate," in other words, is an oversimplification in modern commerce: merchants divide customers into segments, which can be quite narrow and tailored. Customers may choose not to dicker those contracts not simply because of transaction costs or lack of market power, but rather, because firms have already offered them a nearly-dickered contract. Without knowing more about how a particular customer came to be offered a particular contract, it is impossible to say that a contract is truly untailored.

2. Benefits of Tailoring: Improving Markets

The best reason to use unconscionability in a tailored fashion is that it encourages the market to do what it does best: match people to appropriate goods. The effects of *ex post* inquiry could discipline sellers to tailor products more appropriately *ex ante*.[148] Taken seriously, the

---

[147] Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665, 1697 (2012).

[148] Obviously, merchants do not necessarily respond to subtle changes in the common law. However, because unconscionability affects the core enforceability of a contract, merchants may be more responsive here than in other areas, particularly if peer institutions are unable to enforce a contract in a well-publicized lawsuit. (This differentiates unconscionability from other areas of contract law where merchants' behavior does not necessarily seem responsive to law.) For instance, merchants regularly continue to include unenforceable terms, like waivers of gross negligence. But

new test should both narrow and expand unconscionability. It is easy to see how it might narrow unconscionability. A consumer may receive an atypical benefit from a generally "bad" contract — the (perhaps rare) payday borrower who has entered into a rational decision given credit constraints and their anticipated use of the loan — for which tailoring will allow the merchant to defend itself from an unconscionability attack. But it can also broaden unconscionability, bringing into its ambit a scenario where a consumer is atypically unlikely to be harmed by an otherwise conventional-seeming consumer contract. Such financial products are not uncommon: for instance, while retirement savings is generally "pro-consumer," nearly any retirement savings product may be harmful when sold to a consumer who has excessive amounts of high-interest debt, whose interest rates exceed their expected investment returns and that they thus should likely be repaying.

Tailoring unconscionability, in other words, neither inherently favors nor disfavors the consumer. It can serve a useful insulating function for appropriately designed consumer contracts. I have argued elsewhere that one unheralded function of law is to help create, where appropriate, separating equilibria.[149] Many problems with modern consumer markets can be traced to mismatched consumers: lenders who say they cannot differentiate between borrowers who are likely to repay and those who are not, and thus must charge excessively high interest rates to those who are likely to repay. To the extent law can be used to induce separating, consumers will be better matched to their preferences, which for the most part is the goal of markets. Unconscionability is an intriguing tool for enhancing the separating functions of markets because, although it is an *ex post* remedy, it affects *ex ante* incentives of lenders and others offering consumer contracts. Unconscionability can be likened to a form of judicially-enforced performance-based regulation.[150]

In the payday loan context, for each, such an inquiry would bring in evidence that is highly relevant to broader debates over payday loans —

unlike including a core price term that is unconscionable, the inclusion of unenforceable ancillary terms has no cost — it does not render the whole contract unenforceable — and may have a benefit to the seller in scaring away at least some lawsuits. *See* Wilkinson-Ryan, *supra* note 138, at 165-72.

149 *See* Russell, *supra* note 12, at 553. Of course, there are other instances where pooling may be more desirable than separation for policy reasons — an argument commonly made in health insurance contexts, for instance.

150 *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1309 (2015) (proposing a form of regulation where regulators provide market players with testable performance outcomes, and permit innovation in the means of reaching those goals).

examining whether a particular lender in question is indeed predatory. There is considerable debate over the degree of profits payday lenders earn, and over the rationale behind the design of the loans. Defenders typically claim interest rates are high to compensate for risk; opponents claim that these lenders earn their profits on fees, not on trying to have the borrower actually repay the principal. This debate may also mask some degree of heterogeneity among lenders and their approaches. Unconscionability could help uncover that, and thus tie the enforceability or unenforceability of the loan to the particular features that are most undesirable.

On the reverse side, tailoring unconscionability could expand its ambit to help limit the sale of inappropriate products.[151] Consider private student loans as a possible example where tailoring unconscionability could helpfully expand its application.[152] Part of the "deal" in a private loan is the educational package for which the loan is being applied. Schools have very divergent employment outcomes, which students are often unaware of, but which directly affects their likelihood of repaying loans.[153] Arguably certain types of student loans are, given their implied terms with respect to cost and outcome, fundamentally unfair.[154] In a tailored unconscionability regime, that could open the door to challenging mispriced loans that do not consider

[151] Of course, there are limitations with such an approach, especially in markets with complicated supply chains. For example, as two health law scholars have noted in their thorough discussion of possible remedies for high drug prices, unconscionability may be "an attractive model for targeting high pharmaceutical prices in several respects," but be "hard to scale" and difficult in light of the many intermediaries who sit between the consumer and drug manufacturer. Michelle M. Mello & Rebecca E. Wolitz, *Legal Strategies for Reining in "Unconscionable" Prices for Prescription Drugs*, 114 NW. U. L. REV. (forthcoming 2020) (manuscript at 42-43), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424300.

[152] These are offered both by lenders who issue supplemental loans to federally-backed public loans to matriculated students (typically at higher interest rates or less favorable terms than federal loans, and thus used only once a borrower has exhausted their ability to borrow federal loans), and by lenders like SoFi who specialize in refinancing public loans to lower interest rate private loans.

[153] Recent rulemakings by the Department of Education have focused on getting schools to disclose more information about outcomes. *See generally* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014). The Trump administration is rescinding most of the regime. Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392, 31,392 (July 1, 2019) (to be codified at 34 C.F.R. pts 600, 668); Erica L. Green, *DeVos Repeals Obama-Era Rule Cracking Down on For-Profit Colleges*, N.Y. TIMES (June 28, 2019), https://www.nytimes.com/2019/06/28/us/politics/betsy-devos-for-profit-colleges.html.

[154] SANDY BAUM & SAUL SCHWARTZ, URBAN INST., UNAFFORDABLE LOANS: WHEN SHOULD SCHOOLS BECOME INELIGIBLE FOR STUDENT LOAN PROGRAMS? (2018).

the likely outcomes of graduates of a particular program — which in turn would encourage lenders to charge differential rates based on the expected educational outcomes. The higher the cost of the loan, the easier it would be for the student-consumer challenging the loan on unconscionability to demonstrate that the loan price was unreasonably unfair in relationship to the value of the product received.[155] Unconscionability could be similarly useful in responding to concerns over the recent trend of "coding boot camps," which help people make career switches into computer engineering without a degree background. These have been subject to some criticism for overselling students on the availability of engineering jobs and the ability of these programs to prepare students for them.[156] As these camps sell themselves based on promises about the supposed availability of jobs for their students, that could be deemed a product term that should bear some relationship to the price changed for those camps.

Tailoring allows unconscionability an important role in filling a gap in the toolkit of responses to consumer error, alongside regulation. Policymakers and scholars often fail to grapple with the harm that any regulatory approach that helps one group of consumers can cause to a different group. A payday loan may send one consumer into a debt spiral and eventual bankruptcy, and be a needed emergency bridge that avoids foreclosure or eviction or job loss for another. An averaging approach might look at the distribution of such results across the market, but this will always hurt some consumers. If, say, 90% of a particular type of loan is bad, and courts use that as evidence to find

[155] Arguably, private lenders (and the government) ought to encourage differential interest rates that vary based on the quality of the specific school that a graduate is attending — sending a signal of the higher risk of non-payment. One might worry that this would be effectively regressive: if lower-income borrowers are more likely to attend schools with worse employment outcomes, they will pay higher interest rates. Although this may be true, note that the interest rate is tied not to the borrower, but to the quality of the school in terms of alumni employment outcomes. Making it harder to attend schools where the education does not pay off — e.g., certain private, for-profit vocational schools that have been the subject of numerous enforcement actions and lawsuits — is not necessarily regressive. (A separate set of concerns — well beyond the bounds of this Article — would be whether it would be fair or appropriate for law school students to be charged lower interest rates than humanities graduate students, given the greater availability of jobs in law. As a matter of simple risk-return, it is surprising that this is not the case, and SoFi and other refinancing firms are already doing this; it is a separate, and much more complex, question as to whether factors other than simple risk-adjusted returns to education should be considered.)

[156] *See* Audrey Watters, *Why Are Coding Bootcamps Going out of Business?*, HACK EDUC. (July 22, 2017), http://hackeducation.com/2017/07/22/bootcamp-bust [https://perma.cc/2EPE-SJNW].

them substantively unconscionable, that holding will harm the other 10%. If the tradeoff is necessary, improving the fate of the majority may be the best option,[157] but it is worth asking if the tradeoff can be avoided altogether. By tailoring unconscionability, consumer protection law will reap the benefits of a crucial advantage of the judicial process over regulation: courts specialize in fact-specific determinations, while regulations are, by nature, not particularized. It may be hard for policymakers regulating payday loans *ex ante* to create rules that would separate out "good" from "bad" payday loans.[158] But it is easier to imagine a court *ex post* inquiring as to why the borrower entered into the loan — which, if done consistently, would impose *ex ante* discipline on the lenders. As a result, a tailored analysis has the possibility of improving markets' ability to match consumers to the types of products that cause them value while avoiding those that cause them harm.

3. Objections to Tailoring and Rejoinders

Tailoring the unconscionability inquiry, either as to the procedural or substantive prong, has potential downsides. But these downsides are no worse than the current system, and outweighed by the potential gains. The primary concern is one of institutional competence. The inquiry into "goodness of fit" is admittedly a hard analysis to do, and as such, inserts not only judicial expense, but uncertainty that may affect sellers' willingness to engage in bargains.

One problem with this argument, of course, is that it is a critique of *all* law: Judges are rarely subject-matter experts, and judicial expense is a fact of life. Courts routinely — some might argue exclusively — engage in inquiries that are beyond their "institutional competence" in the narrow sense. (Indeed, the one major exception to this principle — the "business judgment rule," which limits courts' ability to second-guess corporate directors' decision-making — has occasioned

[157] There may still be distributional concerns that make majority-focused rules less desirable than it seems at first glance. For instance, certain recent efforts to improve the retirement savings decisions of the average consumer may cause particular harm to a small group, which may be disproportionately composed of those who are most in need of help from the retirement system. Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 65-68 (2015).

[158] The Consumer Financial Protection Bureau's relatively recent payday loan rulemaking attempted to do this to some extent, by focusing in particular on loans that repeatedly roll over — attempting to reduce the most pernicious sign of a loan gone bad or used for predatory purposes. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,874 (July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

significant commentary precisely because it is so unique.) But institutional competence is obviously a spectrum — courts may be more competent in some areas than others. Consumer contracting, because it is by definition an everyday, unspecialized practice, is one where there is no particular reason to question courts' competence.

Moreover, a tailored approach to unconscionability could *improve* the fit between these cases and judicial competence. The existing decisions suggest that courts are, in fact, quite good at reviewing how a contract came to pass. Tailoring the inquiry focuses more narrowly on facts — why and how a particular consumer entered into the contract — which is precisely in the judicial ken. An untailored inquiry asks judges to pass on the "general" merit of a particular contract or product, without reference to its use in the particular context at issue.

A good example is *Quicken Loans v. Brown*, where the court found unconscionability in a mortgage loan from Quicken.[159] Quicken's mortgage unit had already achieved some notoriety with its 2016 Super Bowl ads, which feature the slogan "Push Button Get Mortgage" and imply that if more customers take out mortgages using Quicken's app, the global economy will be saved, illustrating "the power of America itself." Many accused the lender of trivializing the mortgage process.[160]

The thirty-page decision by the state's supreme court in *Quicken Loans* models the kind of careful factual analysis that courts are capable of. For instance, in footnote six, the court quotes directly from its "selling tips" to employees and to its training materials, providing careful evidence of the high-pressure sales tactics used by Quicken that deliberately minimized borrowers' valid concerns about the loan.[161] The appraisal process was carefully reviewed and compared with an appropriate appraisal. The court discusses, in some detail, the particular conversations between the loan agent, Ms. Johnson, and the plaintiff. The loan agent meticulously documented his calls and her efforts to "save" the deal and avoid "kill[ing] it" by "handling [the borrower] with kid gloves because she is very fragile."[162] At one point, Ms. Johnson noted in an email to a coworker that the borrower was "very worried

[159] 737 S.E.2d 640 (W. Va. 2012).

[160] For the sixty-second ad, see Ad Bowl 2016, *Rocket Mortgage Super Bowl Ad 2016 Quicken Loans*, YOUTUBE (Feb. 8, 2016), https://www.youtube.com/watch?v=nXW2BJixXfw. The Consumer Financial Protection Bureau tweeted out a response to the ad suggesting that consumers should not enter into mortgages hastily. Kathryn Vasel, *Quicken's 'Rocket Mortgage' Super Bowl Ad Sparks Backlash*, CNN (Feb. 8, 2016, 9:55 AM), https://money.cnn.com/2016/02/07/media/quicken-loans-super-bowl-mortgage-ad/index.html.

[161] *Quicken Loans*, 737 S.E.2d at 647 n.6.

[162] *Id.* at 649 n.12.

and I told her not to be we can still do this [sic]."[163] This is the kind of analysis of inappropriate sales tactics — a company deliberately steering a consumer to an inappropriate product over the consumer's own objections — that cannot be captured by *ex ante* regulation as easily as it can by *ex post* judicial review.

A second concern about tailoring is whether it may limit one remedial use of the unconscionability doctrine — its use in class actions. If the analysis is highly particularized, courts may have difficulty finding commonality and typicality among plaintiffs sufficient to certify a class. This is already a challenge in unconscionability, and the majority of cases in fact appear to individual, one-off claims. If anything, the greater challenge facing unconscionability challenges is the familiar problem of mandatory individual arbitration clauses. Indeed, the Delaware court in *National Financial* (discussed earlier in this Part) declined to certify a class, finding that the action likely would have met all the requirements for class certification but for the existence of a mandatory arbitration clause.[164] Plaintiffs' lawyers who bring them, then, are presumably doing them less because of financial benefit, and more out of public interest — in order to protect the individual consumer at issue and to send a broader deterrent signal to merchants. *Walker-Thomas*, for example, was brought by the D.C. Bar's Legal Assistance Office, which did not see it as a "test case," but rather as a remedy for a particular client who met their income tests.[165]

Moreover, tailoring could still allow for "grouping" of similarly situated consumers, which could actually make for a more precise, useful, and tractable unconscionability claim. For instance, a plaintiffs' lawyer could fashion a claim for payday borrowers who met a particular set of characteristics — i.e., identifying the type of borrower characteristics that meant the lender should have known they were particularly likely to roll over the loans and ultimately default, rather than to pay off the loans. This could actually be a stronger claim than a generic claim about all borrowers.

Another critique of tailoring unconscionability is that it deprives the court of its ability to "legislate." Because unconscionability is a matter of law, a court can announce that a particular type of provision (such

---

[163] *Id.* at 650 n.20.

[164] Vice Chancellor Laster was highly critical of the relevant jurisprudence on arbitration (noting that he believed "that the jurisprudence in this area misconstrues and expands the FAA") but found that it was nonetheless binding on the court. Motion for Class Certification, James v. Nat'l Fin., LLC, No. 8931-VCL, 2015 WL 2206988 (Del. Ch. Mar. 25, 2015).

[165] Fleming, *supra* note 3, at 1408 n.150.

as the cross-collateralization clause at issue in *Walker-Thomas*) is likely to be voided. The approach proposed by this Article does not prevent courts from doing that, because courts separately have the ability to void a term on grounds that it violates public policy. In fact, turning unconscionability into a factually tailored analysis would help differentiate those two doctrines. The difference between public policy and unconscionability as defenses has long been murky, and they are often conflated. However, most cases voiding clauses on grounds of public policy focus on terms that, no matter how they are used, would be void. In other words, there is no need to examine their use in a particular contractual context; the term is so offensive that it is automatically void as to all.

The continued existence of an independent public policy defense, along with other defenses like fraud, should also reassure those who worry that tailoring unconscionability will limit consumer protection. Indeed, as discussed in the previous Subsection, tailoring unconscionability expands the doctrine as much as it narrows it. For instance, consider the hypothetical fear that, if unconscionability's substantive prong looks into the rationality of the fit between consumer and contract, a court should consider a consumer "rational" to enter into a bargain with a loan shark who otherwise threatens to inflict physical damage on the consumer. Duress, fraud, and the procedural prong of unconscionability (not to mention the fact that this hypothetical scenario involves the commission of a crime) will all easily prevent such a contract from being enforceable.

CONCLUSION

This Article has demonstrated that unconscionability is alive and well. Unconscionability's significance for consumer protection is greater than widely assumed, as it is still used by courts in striking down "rotten deals" and is incorporated into the analysis of the statutory regime that has grown up around consumer protection in the years since *Walker-Thomas*. As courts turn to the doctrine, we need a better theory of when and how courts should do it. This Article has suggested a key question for any unconscionability analysis — whether the doctrine should be tailored — and proposed that a tailored analysis makes sense, especially given the given the individualization of modern contracts. Tailoring's significance to the unconscionability doctrine is clear: a decision as to how much weight to put on the individual consumer lurks behind any claim that a particular consumer deal is either substantively or procedurally unconscionable.

But the problem of tailoring does not end here, either at the boundaries of unconscionability or even of contract law. In the context of common law generally, the question of the level of tailoring is foundational, yet rarely elucidated. It is hard to imagine any standard that uses the "reasonable person" fiction avoiding having a theory, explicit or implicit, of tailoring. Unfortunately, existing theories seem implicit, as judges and scholars seem to have largely neglected the issue. But whenever a court is asked to imagine a "reasonable person in a similar situation," the question is begged as to how wide or narrow the "similar situation" is to be defined. The problem echoes other issues of indeterminacy in the common law, which are often outcome determinative, such as the ways in which criminal law is highly sensitive to the breadth of the time frame in which a defendants' acts are placed.[166] The question of how much to particularize standards is ripe, then, for further analysis in other fields of law.

[166] *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-16 (1981).

APPENDIX: RECENT "ROTTEN DEAL" UNCONSCIONABILITY CASES

Case Name	*State & Year*	*Type of Contract*	*Result & Remedy*	*Summary*
Quicken Loans v. Brown[167]	W. Va., 2012	Mortgage	Declared unconscionable. Lower court had awarded compensation, attorney's fees, and significant punitive damages amounting $2.1 million. State supreme court found the lower court's analysis of punitive damages lacking and remanded for further proceedings.	Court upheld the lower court's review of Quicken's aggressive sales practices of a subprime mortgage to a borrower who raised questions about the appropriateness of the product, and entered into the mortgage believing the lender would help her refinance within a couple months. The court found that the mortgage was "induced by Quicken's unconscionable conduct, that the loan included several unconscionable terms, and that the loan product, in and of itself, was unconscionable."[168]
New Mexico v. B & B Investment Group, Inc.[169]	N.M., 2014	Payday-style loan (signature loan)	Declared unconscionable; lenders ordered to refund all money collected in excess of 15% APR.	A unanimous supreme court declared that the interest rates of certain signature loans were substantively and procedurally unconscionable. Signature loans are similar to payday loans, but are not secured by a paycheck and typically for a higher interest rate and longer term. The interest rates ranged from 1,147.14% to 1,500% and were legal under the state's usury statutes. The supreme court reversed the district court, which found procedural, but not substantive, unconscionability. The district court had declared that the interest rate was "unconscionable as a matter of law[] for these historical anomalous interest rates to be charged in our state."

[167] 737 S.E.2d 640 (W. Va. 2012).

[168] *Id.* at 657.

[169] 329 P.3d 658 (N.M. 2014).

James v. National Financial, LLC[170]	Del., 2016	Payday-style loan (unsecured, one-year loan)	Declared unconscionable; borrower received judgment against lender of roughly $3,000 plus interest and attorneys' fees and costs.	Delaware's Vice Chancellor Laster invalidated a one-year, non-amortizing, unsecured loan for $200, which the borrower took out at a "Loan Till Payday" storefront to pay for food and rent. The terms of the loan, if held for the full year, would have required total repayments of $1,620 at an APR of 838.45%. The lender argued that since most borrowers paid off the loans long before a one year period, those potential repayment rates "mean[t] nothing," but the borrower ran into difficulties following an accident at work and was unable to repay the loans on her intended schedule. Although the court rejected consumers' efforts to turn the case into a class action, the court found that the loan to James was both substantively and procedurally unconscionable, invalidating the loan and awarding additional damages under another statute (the Truth in Lending Act).

[170] 132 A.3d 799 (Del. Ch. 2016).

Citibank v. DeCristoforo[171]	Mass., 2011	Credit card, specifically a penalty APR applied after borrower made several late payments	Declared unconscionable by lower court; interest rate lowered from 55% to 18%. Ultimately vacated by appellate court in an unpublished opinion on procedural grounds — unconscionability had not been adequately briefed by the parties[172] — but only after 5 years of Citi being unable to collect on the loan as proceedings pended.	The trial court relied on unconscionability as it threw obstacle after obstacle in front of Citibank's efforts to collect more than $25,000 of credit card debt held by DeCristoforo. The court denied Citi from collecting at the summary judgment stage, forcing additional hearings on damages. Credit card issuers have long been able to skirt state-by-state usury caps by situating themselves in states like South Dakota, which have no (or high) usury cap.[173] However, the lower court decided that Massachusetts unconscionability law should apply and bar such rates. "With interest rates as high as forty and fifty percent, a significant portion of the debtor's monthly payment goes toward paying interest without touching the underlying debt. . . . Citibank's charges, in excess of eighteen percent, drives too hard a bargain for a court of conscience to assist."[174]

[171] No. 0902536C, 2011 WL 1020497 (Mass. Supp. Jan. 4, 2011).

[172] *See* Citibank (S.D.) v. DeCristoforo, No. 12-P-603, 2013 Mass. App. Unpub. LEXIS 576, at *576 (Mass. App. Ct. May 17, 2013) (reminding the lower court that failure to plead a defense usually waives it, and that the record contains no facts — such as the full text of the underlying contract — that would be necessary to an unconscionability analysis).

[173] This has been clearly permissible since *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

[174] *DeCristoforo*, 2011 WL 1020497 at *14 (internal quotations omitted).

Gulfco of Louisana, Inc. v. Brantley[175]	Ark., 2013	Mortgage, foreclosure proceed-ings	Affirmed a lower court's refusal to foreclose the Brantley's home on unconscionabil-ity grounds.	The court drew particular attention to the borrowers' educational and occupation background, to the feeling that they had "the choice of either accepting more loans or losing their home," to the fact that the borrowers had not read many of the loan documents in detail, and to the fact that many of the loans were issued to pay off prior loans. The court believed the final fact should have indicated to the lender that the borrowers were unlikely to repay the loans. The lower court had found that the repeated pattern of high-risk loans represented an "intolerable pattern of reprehensible and unconscionable conduct on the part of Gulfco that offended its sense of decency and justice."[176]
Drakopoulos v. U.S. Bank Ass'n[177]	Mass., 2013	Mortgage, foreclosure proceed-ings	Summary judgment denied in an unconscionabil-ity case; upheld on appeal to state supreme court; absence of further proceedings suggests lender settled.	Massachusetts Supreme Judicial Court agreed with the lower court that there were sufficient factual issues to preclude a lender that had foreclosed on a mortgage from tossing out an unconscionability challenge at the summary judgment stage. The court noted plaintiffs' employment and medical history (including a diagnosis of bipolar disorder for one plaintiff, and cognitive issues in the other). It found a triable issue on substantive grounds because the mortgage required payments higher than plaintiffs' total monthly income.

[175] 430 S.W.3d 7 (Ark. 2013).

[176] *Id.* at 14.

[177] 991 N.E.2d 1086 (Mass. 2013).

Green v. 119 W. 138th St. LLC[178]	N.Y., 2016	Quitclaim deed from individual land owner (plaintiff) to developer	Appellate division reversed summary judgment against plaintiff and remanded for further fact finding.	Plaintiff signed a quitclaim deed for an unimproved lot over to a developer for $5,000, believing (mistakenly) that he no longer had a strong ownership claim to the lot because of a previous transaction. The lot was worth over $1 million, and plaintiff subsequently sued to have the quitclaim deed discharged on grounds of unconscionability. The New York appellate division reversed summary judgment for defendant, finding that there were material issues of fact. In stark contravention to the conventional wisdom that courts don't apply unconscionability to central price terms, and that courts don't inquire into the adequacy of consideration, the court wrote: "It is clear that plaintiff's quitclaim of its interest in a $1 million property for $5,000 may be viewed as 'unreasonably favorable' to [defendant developer], meeting the substantive element of unconscionability."

[178] 37 N.Y.S.3d 491 (App. Div. 2016).

Hanjy v. Arvest Bank[179]	Ark., 2015	Overdraft fees on a debit card	Affirmative unconscionability challenge (request for declaratory judgment) survived motion to dismiss.	The court permitted plaintiffs to use unconscionability as an affirmative claim in seeking a declaratory judgment (as opposed to simply a defense, which was the traditional use of unconscionability), and allowed plaintiffs to go forward with their claim after the bank filed a motion to dismiss. Plaintiffs had challenged Arvest's overdraft fees on debit cards, arguing that the bank re-sequenced the posting of transactions in a way that maximized the likelihood customers would pay fees, failed to provide accurate balance information, and didn't adequately explain its practices. Notably, the court rejected Arvest's argument that the fact that its practices were routine and permitted by federal regulators cleansed the practice of unconscionability. The court also noted that the adequacy of disclosure was a fact-sensitive matter that relied on how the information had been presented and the manner in which plaintiffs had read or received the contracts.

[179] 94 F. Supp. 3d 1012 (E.D. Ark. 2015).

De La Torre v. Cashcall[180]	Cal., 2011-2018	Payday-style loan (unsecured personal loans)	Class of borrowers certified by court to challenge loans on unconscionability grounds; later question certified by 9th Circuit to California Supreme Court about unconscionability.	In its 2018 opinion, the California Supreme Court affirmed that a high interest rate can render a contract unconscionable, as any price term can be unconscionable, and that the lack of a statutory rate cap on loans under $2500 does not prevent a court from declaring a rate on a loan less than $2500 unconscionable. Earlier, the district court certified a class to argue that interest rates on unsecured personal loans were unconscionable based on how high they were. It certified a class consisting of anyone who had borrowed a $2,600 loan product at interest rates of 90% or higher, finding that plaintiffs had sufficiently shown that this issue could be decided based on "common evidence of substantive unconscionability," such as evidence about the availability of other, comparable loans.

[180] *See* De La Torre v. CashCall, Inc., 422 P.3d 1004, 1007-10 (Cal. 2018). The case has a long procedural history; the most relevant early opinion is *O'Donovan v. CashCall, Inc.*, 278 F.R.D. 479, 501, 504 (N.D. Cal. 2011) (certifying class). De La Torre was substituted as the lead plaintiff for O'Donovan around 2012.