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ARTICLE

UNCONSCIONABILITY AS IT MIGHT HAVE BEEN AND AS IT STILL MIGHT BE: USING PURITANICAL VALUES AND EXISTING CONSUMER PROTECTION STATUTES TO REVIVE A COMMON LAW DOCTRINE

Michael Gibson*

I. INTRODUCTION

Ever since the 1965 landmark decision of *Williams v. Walker-Thomas Furniture Co.*,[1] unconscionability has offended

* Professor Emeritus of Law, Oklahoma City University. I am grateful to Ross Branton for his unending technical assistance, to Timothy Gatton and Le'Shawn Turner for locating unusual sources, and to Paula Dalley and Carla Spivack for their encouragement and suggestions.

1. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). A March 11, 2021 Westlaw search found the decision's Citing References included 540 cases and 1,238 secondary sources. THE RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (AM. L. INST. 1982) uses *Williams*'s 'two-part test ("gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party"), and cmt. e, illus. 5 uses *Williams*'s 'facts. Reporter's Note for cmt. e.*See also* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4-5, at 222 (2010) ("[O]ne of [unconscionability's] preeminent cases"); 8 SAMUEL L. WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18.2, at text accompanying n.6, Westlaw database (last visited Jan. 27, 2022) ("[P]erhaps [the doctrine's] most influential case"); Larry A. DiMatteo and Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in*

conservatives.[2] While *Williams* said courts could invalidate a one-sided term,[3] even one appearing in fourteen documents signed by the consumer,[4] the dissent warned that the court was letting her go back on her solemn word.[5] *Williams*'s willingness to let people escape the consequences of their bad decisions seems to erode the conservative value of personal responsibility.[6] *Williams*'s concern for the consumer's lack of education and

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Action, 33 FLA. ST. U. L. REV. 1067, 1073 n.21 (2006) ("[P]robably the most often-cited definition of unconscionability"); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 59 (1969) ("[V]irtual[] landmark"); Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 971 (2019) ("[M]ost influential modern statement" of unconscionability). *Williams* also receives considerable attention in textbooks. *See* E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 633-41 (Foundation Press, 9th ed. 2019) (Using *Williams* as the first case in materials on unconscionability); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 599-605 (Wolters Kluwer, 7th ed. 2012) (Same); JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS 468-74 (LexisNexis, 7th ed. 2015) (Describing *Williams* as "The Original Unconscionability Analysis"); MICHAEL HUNTER SCHWARTZ & ADRIAN WALTERS, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK 260-64 (Carolina Academic Press, 2nd ed. 2016) (Using *Williams* as the first unconscionability case).

2. This includes both political and religious conservatives, who have united into today's Republican Party. A 2020 poll found that 81% of White evangelical Protestants endorse Donald Trump. *White Evangelicals See Trump as Fighting for Their Beliefs, Though Many Have Mixed Feelings About His Personal Conduct*, PEW RSCH. CTR., (March 12, 2020), https://www.pewresearch.org/religion/2020/03/12/white-evangelicals-see-trump-as-fighting-for-their-beliefs-though-many-have-mixed-feelings-about-his-personal-conduct (last visited April 27, 2022). A 2014 poll found that 38% of Republicans self-identified as evangelical Christians, *Evangelicals Remain Largest Religious Group in GOP Coalition*, PEW RSCH. CTR., (Oct. 23, 2015) https://www.pewresearch.org/ religion/2015/11/03/u-s-public-becoming-less-religious/pf_15-10-27_secondrls_overview_nonesreps640px/ (last visited April 27, 2022). *See also* Amen Gashaw, *In God We Trust: How American Christianity Became Republicanism*, (Jan. 9, 2021), https:/harvard-politics.com/in-god-we-trust-how-american-christianity-became-republicanism ("American Christianity and Republicanism seem . . . inextricably intertwined"); DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT (Oxford U. Press, 2010); ERIC R. CROUSE, THE CROSS AND REAGANOMICS: CONSERVATIVE CHRISTIANS DEFENDING RONALD REAGAN (Lexington Books, 2013).

3. *Williams*, 350 F.2d at 448-49.

4. Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 915 (D.C. 1964).

5. *Williams*, 350 F.2d at 450 (Danaher, J., dissenting) ("[A]ppellant "seems to have known precisely where she stood."); *Cf. Proverbs* 11:3 (King James) ("The integrity of the upright shall guide them: but the perverseness of transgressors shall destroy them.").

6. For the Bible's stress on personal responsibility, *see* 2 *Corinthians* 5:10 (King James) ("For we must all appear before the judgment seat of Christ; that each one may receive the things done in [the] body, according to [what] he [has] done, whether . . . good or bad.") (emphasis omitted); *Romans* 14:12 (King James) ("So then [each] . . . of us shall

her reliance on government aid, as well as her residence in Washington, D.C.,[7] raised conservative fears of identity politics and special treatment for the undeserving. For example, the University of Chicago's Richard Epstein warned against using unconscionability to protect

> those who are poor, unemployed, on welfare, or members of disadvantaged racial or ethnic groups[.] The perils of this course are great. First, it is difficult, if not impossible, to assert that the persons who fall into any or all of these classes are not in general competent to fend for themselves in most market situations . . . . [T]here will no doubt be both opportunity and incentive for many to take advantage of the rights conferred upon them by law to manipulate the system to their own advantage.[8]

Conservative fears have been reinforced by *Williams*'s apparently revolutionary character. Its author—an unelected and openly liberal judge who boasted of his willingness to ignore precedent in order to advance his

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give account of himself to God."); and *Galations* 6:5 (King James) ("For every man shall bear his own burden."). For conservatives, *see Our Conservative Principles*, REPUBLICAN PARTY OF TEX., https://texasgop.org/conservative-principles/ ("Individuals taking personal responsibility for their own actions") (last visited April 21, 2022); Clark Neily, *The Conservative Case Against Qualified Immunity* (Aug. 25, 2021, 7:19 PM), https://www.cato.org/blog/conservative-case-against-qualified-immunity (Personal responsibility is "a bedrock principle of conservative ideology") (last visited April 21, 2022); and MARK D. BREWER & JEFFREY M. STONECASH, POLARIZATION AND THE POLITICS OF PERSONAL RESPONSIBILITY 4-9 (Oxford U. Press, 2015) (Conservatives believe in holding people accountable for their own actions).

7. Arthur Allen Leff observed that some commentators believed the main importance of *Williams* was "quite clearly" the store's sale of an "expensive item to a poor person[,] knowing of her poverty." Arthur Allen Leff, *Unconscionability and the Code–The Emperor's New Clause*, 115 U. PA. L. REV. 485, 555 (1967).

8. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 304 (1975). *See also* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 56-59 (Oxford Univ. Press, 2014) (Describing Ronald Reagan's repeated references to the "'Chicago welfare queen' [with] 'eighty names, thirty addresses, [and] twelve Social Security cards [who] is collecting veteran's benefits on four non-existing deceased husbands.'").

personal agenda[9]—called it "one of the first" of its kind.[10] Therefore, it is easy to read *Williams* as standing alongside what conservatives consider to be the federal courts' assault on law and order,[11] protection of abortion and same-sex marriage,[12] and apparent contempt for the Constitution, our country's Founders,[13] and the popular will as expressed by democratic, majoritarian legislatures.[14]

No wonder conservatives castigate unconscionability.[15] Their criticism has caused courts to restrict the use of the doctrine and to narrow its

9. In a lecture at Harvard Law School, Wright said that when it came to "equal rights for disadvantaged minorities," "I remain an uncompromising activist." J. Skelly Wright, Francis Biddle Lecture, Harvard Law School (Oct. 16, 1979), quoted by William J. Brennan, *In Memoriam: J. Skelly Wright,* 102 HARV. L. REV. 361, 362 (1988). Wright publicly condemned courts for "perpetuat[ing] and even exacerbat[ing] the despair of inner city Blacks." J. Skelly Wright, *The Courts Have Failed the Poor,* N.Y. TIMES MAG. 246, 104 (March 9, 1969). He ordered the school districts of New Orleans and Washington, D.C., to desegregate. Patricia M. Wald, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 363, 363 (1988). And he candidly wrote "I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust." Letter from Judge J. Skelly Wright to Prof. Edward Rabin (Oct. 14, 1982), quoted in Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984).

10. Wright, *supra* note 9, at 26, 104.

11. *See* Cornell W. Clayton and J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396 (2006) (Describing how Richard Nixon blamed rising crime rates on the Warren Court's "liberal activism.").

12. *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v Jackson Women's Health Organization, ___ U.S. ___, 142 S.Ct. 2228 (2022), and Obergefell v. Hodges, 576 U.S. 644 (2015).

13. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 79-80 (2003) (Judicial activists wrongly argue for a "living Constitution" and refuse to be governed by the Founders).

14. *Id.* at 2 (Courts "systematically frustrate the popular will as expressed in laws made by elected representatives); and Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10-13 (1997) (Judges who create common law usurp legislative power); Murray, *supra* note 1, at 19 (1969) (Use of unconscionability to invalidate confession of judgment clause "encroach[es] on the legislative function"); and Eric Talley, *Precedential Cascades: An Appraisal,* 73 S. CAL. L. REV. 87, 118 (1999) (Timing of *Williams* coincided with "arrival of a number of Left-Democrat-appointed and elected judges . . . unconvinced by the holdings of more conservative judges that preceded them.").

15. *See* Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs State Unfair and Deceptive Trade Practices and Consumer Protection Statutes,* 26 HOUST. L. REV. 575, 580 (1989) (*Williams* is example of "knee-jerk liberalism"). *See also* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of*

protections,[16] which has created many problems. Judicial reluctance to use unconscionability—especially judicial insistence that consumers prove both procedural and substantive unconscionability—has helped to turn the online world into "a coercive contracting environment where one-sided legal terms are imposed upon non-drafting parties who literally have no choice but to accept them if they wish soto participate in modern society."[17] Today, businesses routinely use fine print that deprives consumers of their right to a day in court, requires litigation in far-off jurisdictions, and releases those businesses from liability for their own negligence.[18] Fine print non-disclosure and secrecy clauses silence those who have experienced sexual abuse or harassment.[19] In short, conservatives'

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the Poor," 102 GEO. L.J. 1383, 1387-88 (2014) (Enthusiasm for "unconscionability quickly faded" after *Williams* because of belief that "naive, left-liberal, activist judges . . . used it to rewrite private consumer contracts according to their own sense of justice."); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19OHIO ST. J. DISP. RES. 757, 763-64, 821 (2004) (Attributing doctrine's post-*Williams* retreat to revolt against "activist judicial [interpretation]"); Epstein, *supra* note 8, at 294 (Unconscionability is "major conceptual tool[]" in judicial assault on private agreements); Grant Gilmore, *For Arthur Leff*, 91 YALE L.J. 217, 217 (1981) (Most attacks on unconscionability came from "conservative traditionalists of the right"); Cheryl B. Preston, *Cyberinfants*, 39 PEPP. L. REV. 225, 257 (2012) (Unconscionability "applied only rarely by increasingly conservative judges fearful of activism charges"); and Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 B.Y.U. L. REV. 427, 432 (2016) (Courts which believe in the free market "have often used [the doctrine] to raise the bar for invalidating contracts.").

16. 7 CORBIN ON CONTRACTS flatly says, "[m]ost claims of unconscionability fail." § 29.4, at text accompanying n. 24, LexisNexis database (last visited Jan. 14, 2022). *See also* E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS, § 4.29, 4-212 (4th ed. 2020-21 Supp.) (Judges "cautious[ly]" use unconscionability); Cheryl L. Preston and Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 165-66 (2012) (Unconscionability has been "trampled, kicked, and bitten into relative obscurity"); Stempel, *supra* note 15, at 841 (Unconscionability operates "only in the most extreme cases"); and Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 299 (2014) (Unconscionability is a "toothless mechanism").

17. NANCY S. KIM, WRAP CONTRACTS 4 (2013). Kim says that wrap contracts often require consumers to let service providers use content that consumers generate and collect consumers' private data. One of her solutions is to reinvigorate unconscionability. *Id.* at 51-52, 77-78, 116-18, 203-10.

18. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 130-40 (2013) (describing corporate insistence on mandatory arbitration clauses, choice of forum clauses, and terms excluding liability for the corporation's negligence).

19. *See, e.g.*, Bradford J. Kelley & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUS. L. TODAY (Oct. 2018) (describing how

opposition to unconscionability has so weakened the doctrine that in some jurisdictions, it protects neither the illiterate nor those pressured into lopsided deals.[20]

However, conservatives' frustrations and fears are based on a woefully incomplete picture. Part II of this article will show that in the first unconscionability decision in an American court, the Puritans of Massachusetts Bay Colony—a group known for rigid morality, deep Christian faith, and stress on personal responsibility—displayed the same fury toward a merchant who charged excessive prices as Jesus did to the Temple's moneychangers.[21] The Puritan vision of consumer protection said nothing of bargaining power, looked only at the unfairness of the price, and featured remedies that were robust and remarkably effective.[22]

Part III contends that unconscionability is not a recent invention of liberal, activist judges. In the 1700s, English courts developed the doctrine in order to protect sailors and the heirs of wealthy aristocrats.[23] Between 1825 and 1965, the U.S. Supreme Court used it to protect land speculators, businesses, and even the United States.[24] The Restatement of Contracts endorsed the doctrine.[25]

Olympic gymnastics champion faced $100,000 penalty if she disclosed sexual abuse by Dr. Larry Nassar and detailing frequent use of confidentiality terms in settlement agreements for sexual harassment and discrimination claims); Deborah L. Rhode, *#MeToo: What Now? What Next?*, 69 DUKE L.J. 377, 393-94 (2019) (Over half of private-sector, nonunion employees are subject to mandatory arbitration clauses, and defendants like Bill Cosby, Harvey Weinstein, and Larry Nassar have invoked secrecy clauses in settlement agreements). *See also* Baltazar v. Forever 21, Inc., 62 Cal. 4th 1237 (Cal. 2016) (finding mandatory arbitration and secrecy clauses were not unconscionable when employer invoked them based on employee's race and sex discrimination claims).

20. The Fifth Circuit has said that unconscionability will not excuse illiterate consumers from their duty to read, Wash. Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 264-65 (5th Cir. 2004); *Cf.* Kitchen v. Rayburn, 86 U.S. (19 Wall.) 254, 263 (1873) (finding unconscionable a sale of land by illiterate farmer). In Virginia, Galloway v. Galloway, 622 S.E.2d 267, 47 Va. App. 83 (Va. Ct. App. 2005), refused to find unconscionable a divorce settlement which awarded the husband 94% of marital assets, in part because his wife had a pension and some inherited property.

21. *Cf. infra* text accompanying nn.48-54 (Merchant required to pay actual damages and criminal fine and threatened with imprisonment and excommunication) with *Mark* 11:15-17 (King James) (describing how Jesus overturned the moneychanger's tables and condemned them for making the Temple "a den of thieves.").

22. *See infra* text accompanying nn.54-66.

23. *See infra* text accompanying nn.74 to 95.

24. *See infra* text accompanying nn.103-22.

25. *See infra* text accompanying n.123.

Part IV argues that while *Williams*'s author was an unabashed liberal activist, he crippled unconscionability by ignoring the doctrine's long history of protecting the powerful, inventing a difficult-to-satisfy two-part test, and seriously limiting remedies for the victim of an unconscionable contract.[26]

Finally, and most importantly, Part V reveals that since *Williams*, America's state legislatures (the most democratic branch of government and the branch most disrespected by judicial activism) have provided far more protection to far more consumers, with far more powerful remedies, than has *Williams* and its progeny. An empirical study of 3,200 state Unfair and Deceptive Acts and Practices statutes (and their closely-related kin) from twenty of our country's fifty-one state-level jurisdictions[27] finds that:

(A) almost all these statutes protect *all* natural persons, not just the poor, the uneducated, or members of particular races, and they pay little attention to bargaining power;[28]
(B) while courts use unconscionability only as a defense, half of the jurisdictions in the study have made it a cause of action;[29]
(C) while courts require the party invoking unconscionability to prove *both*
procedural and substantive problems, state statutes overwhelmingly invalidate contracts or clauses because of a problem with *either* procedure *or* substance, *not both*; and[30]
(D) while courts shield consumers only by invalidating unconscionable contracts or clauses, most state statutes arm consumers and government agencies with access to actual damages, punitive damages, civil penalties, and even attorney fees.[31]

In other words, some of our earliest Founders and almost all of the twenty legislatures in this study provide more consumers with more protection and more powerful remedies than judges have, even the judges perceived as liberal and activist. The best way to revive unconscionability is for courts to revise the doctrine in light of Puritanical values and existing

26. *See infra* text accompanying nn.169-219.
27. The sample includes the District of Columbia.
28. *See infra* text accompanying nn.239-58, 317-45.
29. *See infra* text accompanying nn.260-64.
30. *See infra* text accompanying nn.265-95.
31. *See infra* text accompanying nn.347-70.

consumer protection statutes.

II. UNCONSCIONABILITY AS IT MIGHT HAVE BEEN: MASSACHUSETTS BAY COLONY PURITANS V. ROBERT KEAYNE (1639)

A. America's First Unconscionability Case

The Puritans believed in personal responsibility. The only decoration in most of their meetinghouses was "the great all-seeing eye of God,"[32] reminding them that the Almighty was always looking over their shoulders, even as their preachers warned them that God "holds you over the Pit of Hell, much as one holds a Spider, or some loathsome Insect, over the Fire [and] abhors you . . . ."[33] They required adulterers to wear clothing that displayed a large scarlet "A";[34] they excommunicated, exiled, or executed religious dissenters;[35] they even fined people for "misspending their time."[36] This stress on personal responsibility is quite consistent with *caveat emptor* and with conservative fears that unconscionability lets people manipulate the legal system to evade contracts they had made themselves.[37] Moreover, Puritans regarded the Bible as "a perfect Rule" for deciding "all controversies,"[38] no matter how unpleasant the consequences.[39]

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32. DAVID HACKETT FISCHER, ALBION'S SEED 123 (1989).

33. Jonathan Edwards, *Sinners in the Hands of an Angry God. A Sermon Preached at Enfield* 15 (July 8, 1741) (Reiner Smolinski, ed.), ELECTRONIC TEXTS IN AMERICAN STUDIES 54, https://digital commons.unl.edu/etas/54 (last visited Feb. 21, 2021).

34. NATHANIEL HAWTHORNE, THE SCARLETT LETTER (The Floating Press, 2008 reprt.) (1850).

35. *See* EMERY BATTIS, SAINTS AND SECTARIES: ANNE HUTCHINSON AND THE ANTINOMIAN CONTROVERSY IN THE MASSACHUSETTS BAY COLONY 209-24, 232-47 (1962) (Excommunication and exile of Anne Hutchison); STACY SCHIFF, THE WITCHES, SALEM 1692, 3-4 (2015) (Execution of five-year-old girl and two dogs for witch-craft).

36. FISCHER, *supra* note 33, citing I Mass. Bay Rec. 109, 112 (Oct. 1, 1633, Mar. 4, 1633/34).

37. *See* EPSTEIN, *supra* note 8, at 294, and *Williams*, 350 F.2d at 450 (Danaher, J., dissenting) (While the store used "sharp practice[s]" and irresponsible business dealings, the buyer "seems to have known precisely where she stood" and should be held to contract).

38. Allen Carden, *The Word of God in Puritan New England: Seventeenth-Century Perspectives on the Nature and Authority of the Bible*, XVIII ANDREWS U. SEMINARY STUDIES 4-5 (1980) (quoting THOMAS SHEPARD, THE SOUND BELIEVER 14 (1736)).

39. *Compare* FISCHER, *supra* note 33, at 118 (Puritan ministers gave three-hour sermons in New England winters despite unheated, uninsulated meetinghouses, "frostbitten fingers, baptisms performed with chunks of ice, and entire congregations with chattering teeth that sounded like a field of cricketts") with BORK, *supra* note 13, at 6, 82 (Judges

Today, "puritanical" means "a rigid morality."[40]

So what happened when in 1639, Bostonians failed to comparison-shop and instead let merchant Robert Keayne charge them "above six-pence in the shilling profit; in some above eight-pence; and, in some small things, above two for one."[41] for nails, "great gold buttons," a horse bridle, and yarn?[42] Gov. John Winthrop knew of no law that limited a merchant's profit,[43] and judges back home in England would not invent unconscionability for another century.[44] Winthrop also admitted Keayne's devoutness.[45] Moreover, Boston's small size (only 1,200 residents)[46] meant other shops were nearby, and Keayne was known for selling "dearer than most other tradesmen" and for "covetous practice."[47]

Despite that, the Puritans held the *merchant* liable for "oppression" and "corrupt practice."[48] He was hit with a £100 fine (one of the largest in the colony's history),[49] which was *doubled* on appeal.[50] Winthrop suggested that Keayne pay "double restitution" unless he "freely confesseth."[51] Some people demanded that Keayne stand "openly on[] a

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serve "liberal cultural aggression" and a "socialist economic vision [that seeks a] world in which no one expects anything less than a comfortable material life").

40. *Puritanical*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 957 (1990).

41. JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630-1649, 306 (Richard S. Dunn et al., eds. 1996). At twelve pennies to the shilling, U. of Nottingham, *Manuscripts and Special Collections*, https://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/weightsandmeasures/money.aspx (last visited June 24, 2021), "six-pence in the shilling profit" indicates a contract price of 50% above the market; "above eight-pence" is 66% above market.

42. BERNARD BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY 41 (1955).

43. WINTHROP, *supra* note 41, at 307.

44. *See* Chesterfield v. Janssen, 2 Ves. Sen. 82, 91, 93, 28 Eng. Rep. 125, 141, 144 (1750) (Opinion of Burnett, J.) ("[U]nconscionable bargain"); and 2 Ves. Sen. at 98, 100, 28 Eng. Rep. at 152, 155-56 (Opinion of Hardwicke, L.C.) ("[U]nconscientious bargains" and "underhand bargains").

45. WINTHROP, *supra* note 41, at 306. Keayne had authored "3 great writing bookes which are intended as an Exposition or Interpretation of the whole Bible" and a fourth on Biblical prophecies. BAILYN, *supra* note 42, at 42.

46. Population Trends in Boston 1640-1990, IBOSTON, iboston.org/mcp.php?pid=pop-Fig (last visited July 7, 2021).

47. WINTHROP, *supra* note 41, at 306; *See also id.* (Keayne had been "formerly dealt with and admonished" by private friends, magistrates, and elders).

48. WINTHROP, *supra* note 41, at 306.

49. FISCHER, *supra* note 33, at 156.

50. WINTHROP, *supra* note 41, at 306; FISCHER, *supra* note 33, at 156.

51. WINTHROP, *supra* note 41, at 307.

market day with a Bridle in his mouth, or at least aboute his necke,"[52] and "[h]e was condemned in the Name of the Church for selling his wares at excessive Rates, to the Dishonor of Gods [sic] name, the Offence of the Generall Cort, and the Publique scandall of the Cuntry."[53] As David Hackett Fischer wrote:

> Keayne was threatened with excommunication until he came weeping before the congregation and 'did with tears acknowledge and bewail his covetous and corrupt heart.' Thereafter, this once proud Puritan merchant was a shattered man. He gave away large sums in an effort to clear his name, began to drink heavily, lost his public office, and wrote an obsessive defense of his conduct in his last will and testament . . . of 158 pages.[54]

B. Some Puritanical Values

The key to understanding the Puritan view of consumer-merchant relations is their stress on personal responsibility for everyone. If even the king was responsible for his actions,[55] so were those who made and sold goods. Gov. Winthrop was blunt: "Some false principles [are] these: 1. That a man might sell as dear as he can, and buy as cheap as he can . . . . 4. That, as a man may take . . . advantage of his own skill or ability, so he

52. FISCHER, *supra* note 32, at 156, and Bernard Bailyn, *The Apologia of Robert Keayne*, 7 WM. & MARY Q. 568, 573 n.32 (1950).

53. BAILYN, *supra* note 52, at 573 (quoting RECORDS OF THE FIRST CHURCH OF BOSTON 12, 14, Manuscript Copy in Massachusetts Historical Society).

54. FISCHER, *supra* note 33, at 156-57 (quoting WINTHROP, *supra* note 41, at 307 ("bewail his covetous and corrupt heart").

55. Ten years after Keayne's conviction, Puritans in England ignored the concept of rule by divine right (which made kings accountable only to God) and held Charles I accountable for his sins by ordering "the fevering of his Head from his Body." CHARLES ET AL., THE TRIAL OF CHARLES THE FIRST, KING OF ENGLAND: BEFORE THE HIGH COURT OF JUSTICE, FOR HIGH-TREASON; BEGUN JANUARY 20, IN THE 24TH YEAR OF HIS REIGN, AND CONTINUED TO THE 27TH; TO WHICH IS ADDED, THE JOURNAL OF THE HIGH-COURT OF JUSTICE, FOR THE TRIAL OF THE KING, AS IT WAS READ IN THE HOUSE OF COMMONS, AND ATTESTED BY MR. PHELPS, CLERK TO THAT COURT; WITH ADDITIONS 50 (1740). https://heinonline.org/HOL/Page?handle=hein.trials/aajv0001&collection=trials (last visited Jan. 6, 2022). As for the Puritans' role, *see* WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE NEW WORLD 260 (1962) ("The Axe Falls . . . . The Puritans had triumphed.").

may [take advantage] of another's ignorance or necessity."[56] In other words, although *caveat emptor* gave consumers a duty to protect themselves, merchants had a weightier duty to serve the community.[57] That duty is shown by the liabilities Keayne faced. Today, if a merchant makes an unconscionable contract, the customer can use unconscionability merely as a defense to invalidate that contract or clause.[58] In contrast, Keayne's customers were allowed to sue him,[59] and as a result he had to pay actual damages,[60] he faced the possibility of punitive damages,[61] and he was criminally fined and threatened with imprisonment in the stocks. Most powerfully, Keayne was accused "in the Name of the Church for selling his wares at excessive Rates, to the Dishonor of Gods [sic] name."[62] He had sinned against the Almighty. He was not just facing contractual expectation or reliance damages.[63] Instead, he was facing excommunication, eternal damnation, and the loss of his immortal soul.[64] Amidst all this,

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56. WINTHROP, *supra* note 41, at 308. *See also Matthew* 25:40 (King James) ("And the King shall answer and say unto them, 'Verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.'").

57. From 1570 to 1640, the Puritans "were more outspoken than any group in their denunciation of usury, economic greed and social injustice." A.G. DICKENS, THE ENGLISH REFORMATION 371 (2nd ed. 1989).

58. *See infra* text accompanying notes 261-63.

59. *See* WINTHROP, *supra* note 41, at 305-06 ("[G]reat complaint" was made against Keayne, who "was charged with many particulars"), and BAILYN, *supra* note 42, at 41. *See also* BAILYN, *supra* note 52, at 575 (Someone advised Keayne not to countersue).

60. Keayne was forced to promise "further satisfaction to any that have just offence against him"). BAILYN, *supra* note 52, at 573, (quoting RECORDS OF THE FIRST CHURCH, *supra* note 53, at 14).

61. In the form of Winthrop's "double restitution." WINTHROP, *supra* note 41, at 307.

62. BAILYN, *supra* note 52, at 573. (quoting the RECORDS OF THE FIRST CHURCH, *supra* note 53, at 12, 14). *Cf.* TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS (1989) (Discussing American personal bankruptcy law in light of Matthew 6:12's command to pray "[our] Father which is in heaven . . . forgive us our debts, as we forgive our debtors").

63. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1982).

64. FISCHER, *supra* note 33, at 156-57. Not until his "his penetentiall acknowledgment" was Keayne "Reconciled to the Church." BAILYN, *supra* note 52, at 573 (quoting RECORDS OF THE FIRST CHURCH, *supra* note 53, at 14).

Souls also were at stake when GameStation added this language to its online ordering form: By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorised minions.

The online form also let customers opt out of this clause and receive a £ 5 note by clicking a box. Only 12% of purchasers did so. The next day (April 2nd), GameStation

there is little evidence that the Puritans worried about the bargaining power of Keayne's customers[65] or their failure to protect themselves.[66]

Today, Americans (especially conservative Americans) remember the Puritans for John Winthrop's vision that "wee shall be as a citty upon a hill, the eies of all people are uppon us."[67] Keayne's sage shows this city's robust vision of how government should hold unethical merchants responsible to consumers. The Puritans—God-fearing, Bible-based patriots[68] and some of our earliest Founders—had shown the world what the doctrine of unconscionability could be.

III. UNCONSCIONABILITY AS TRADITION: HOW "CONSCIENCE" PROTECTED ARISTOCRATS, BUSINESSES, AND SOVEREIGNS (1750-1965)

A. The English Tradition of Equity: Protecting Sailors and Aristocrats

Unconscionability's roots lie in the ancient English doctrine of equity. By the mid-1300s, the Lord Chancellor was handling requests for "extraordinary relief," such as specific performance of contracts,[69] and his

graciously waived all of the options it had received. *7,500 Online Shoppers Unknowingly Sold Their Souls*, Fox News (Jan. 11, 2016, 10:48 AM), https://www.foxnews.com/tech /7500-online-shoppers-unknowingly-sold-their-souls (last visited on May 16, 2022).

65. One person said that Keayne falsely recorded an eight-pence price as ten-pence, but another witness rebutted this claim. BAILYN, *supra* note 52, at 574.

Gov. Winthrop's discussion of basic trade principles said nothing about bargaining problems. *Compare* WINTHROP, *supra* note 41, at 308 ("A man may not sell above the current price, i.e., such a price as is usual in the time and place, and as another (who knows the worth of the commodity) would give for it") *with Williams*, 350 F.2d at 449 (Unconscionability requires terms "unreasonably favorable" to one party "[together with] an absence of meaningful choice on the part of the [other]").

66. *See* WINTHROP, *supra* note 41, at 308.

67. John Winthrop, *A Modell of Christian Charity* 39 (1630), reproduced and quoted in Figure 1, just before the title page of DANIEL T. RODGERS, "AS A CITY ON A HILL": THE STORY OF AMERICA'S MOST FAMOUS LAY SERMON (Princton Univ. Press 2018). Pres. Ronald Reagan said he had spoken of this sermon "all my political life"). Ronald Reagan, *Transcript of Reagan's Farewell Address to American People*, N.Y. TIMES 1 (Jan. 12, 1989), https://www.nytimes.com/1989/01/12/news/transcript-of-reagan-s-farewell-address-to-american- people.html (last visited June 24, 2021). *See also* RODGERS at 233-46 (describing Reagan's extensive use of Winthrop's language).

68. GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM (Yale Univ. Press 2007).

69. ALFRED HENRY MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY 29-30 (1890).

"primary principle of decision" was "*Conscience*."[70] In 1615, he wrote: "But the Chancellors have always corrected such corrupt Consciences . . . . The Office of the Chancellor is to correct Mens [sic] Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be . . . ."[71] However, equity's denial of specific performance did not relieve a defendant of all liability, for "[e]quity must see that a proportionable Satisfaction be made . . . ."[72] If a landowner sold real estate for an unconscionable price, equity would only require the buyer to pay an equitable amount, i.e., "the Value of the Land . . . ."[73]

In 1748, Lord Chancellor Hardwicke declared that equity "constantly sets aside. . . bargains" with heirs awaiting their inheritances.[74] He went on to protect two sailors, newly back on shore, who "for the sake of a little immediate pleasure" sold their shares of the ship's prize money—worth $600—for only $150.[75] Hardwicke held that "every contract with [sailors] must be fair" and awarded the lender only the principal of the loan plus interest.[76]

In *Chesterfield v. Janssen*,[77] the party which claimed unconscionability was the estate of the late John Spencer, who was the third son of the 3rd Earl and Duchess of Sunderland and a grandson of John and Sarah Churchill, the 1st Duke and Duchess of Marlborough[78] (the Churchills' roles in English history are still celebrated,[79] and their home, Blenheim Palace, still

70. A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 397 (Clarendon Press 1975), quoted by DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 1 (2010). *See also* V WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 216 (3rd ed. 1945 and 1966 reprint) (Equity based on idea that litigants should fulfil all duties "which reason and conscience would dictate to a person in his situation. Reason and conscience must decide how and when the injustice caused by the generality of the rules of law was to be cured.").

71. The Earl of Oxford's Case (1615) 1 Chan. Rep. 1, 5-7, 21 Eng. Rep. 485, 486.

72. *Id.*

73. *Id.*

74. Baldwin & Alder v. Rochford, (1748) 1 Wils. K.B. 229, 230, 22 Geo. II 589, 589.

75. *Id.*,22 GEO. II at at 590.

76. *Id.*.

77. Chesterfield v. Janssen, 2 Ves. Sen. 125, 28 Eng. Rep. 82 (1750).

78. CHURCHILL FAMILY TREE: FROM WINSTON TO THE DUKE OF MARLBOROUGH, https://www.historyonthenet.com/churchill-family-tree-winston-duke-marlborough (last visited May 5, 2022).

79. Some celebration comes from one of their descendants, British Prime Minister Winston Churchill. *See* WINSTON S. CHURCHILL, MARLBOROUGH: HIS LIFE AND TIMES (1968). *See also* VIRGINIA COWLES, THE GREAT MARLBOROUGH AND HIS DUCHESS (1983);

has 187 rooms with a roof covering seven acres).[80] In 1738, at the age of thirty, Spencer had an annual income of £7,000 (about 280 times the average wage for an Englishman),[81] "a personal estate in plate, jewels, and furniture, to a great value," and "a well-grounded expectation of a great increase of fortune on the death of his grand-mother," who was seventy-eight.[82] Unfortunately, Spencer piled up debts. To pay them off, he borrowed £5,000, promising to pay twice that amount when the duchess died. When her estate took unexpectedly long to settle, he traded a bond of £20,000 for an extension of the payment date.[83] One judge described Spencer as "not weak in mind, but of good sense and parts";[84] another said he made the bond "with his eyes open";[85] a third found the bond was made "freely and voluntarily."[86] Unfortunately, Spencer died soon afterwards, and his lender sought the full £20,000.

John Spencer was not a sailor. Yet one judge admitted that deciding whether the initial loan was "an unconscionable bargain" would create "great difficulty";[87] another (joined by a third) asked whether that same loan was "contrary to conscience," "unequitable and unconscientious," "against the conscience," or an "underhand bargain."[88] And all of these robed and bewigged judges said that the lender could *not* collect on the bond and was limited to recovering the principal he had provided, with interest.[89] What was going on? Spencer's estate argued:

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and STEPHEN SAUNDERS WEBB, LORD CHURCHILL'S COUP: THE ANGLO-AMERICAN EMPIRE AND THE GLORIOUS REVOLUTION RECONSIDERED (1995).

80. James Reginato, *Magnificent Obsession*, VANITY FAIR (June 2011), vanityfair.com /news/2011/06/blenheim-palace-201106 (last visited May 5, 2022).

81. Gregory Clark, *Average Earnings and Retail Prices, UK, 1209-2017*, Figure 2 (April 28, 2018), https://www.measuringworth.com/datasets/ukearncpi/earnstudyx.pdf (last visited May 5, 2022).

82. *Chesterfield*, 2 Ves. Sen. at 125, 28 Eng. Rep. at 82.

83. *Id.* 28 Eng. Rep. at 82.

84. *Id.* at 101 (Opinion of Lord Chancellor Hardwicke).

85. *Id.* at 94 (Opinion of Burnett, J.).

86. *Id.* at 96 (Opinion of Sir John Strange).

87. *Id.* (Opinion of Burnett, J.).

88. *Id.* at 98, 100 (Opinion of Lord Chancellor Hardwicke, who was joined by Lord C.J. Willes) The court did not have to rule on the unconscionability of the original loan, because Spencer had voluntarily ratified it when, after his grandmother's death, he gave the bond to his creditor.

89. *Id.* at 93-94 (Opinion of Burnett, J.) (Stating that issues is whether the court can "relieve on paying the sum advanced with interest from the time of advancing" and finding that the court could only relieve defendant of the penalty imposed by the contract); *id.* at 96 (Opinion of Sir John Strange); and *id.* at 159 (Opinion of Lord Chancellor Hardwicke) (Estate's only relief is against the penalty of the last bond).

> the ill tendency of heirs contracting with strangers to furnish their wants, is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions, and the bringing people. . . together on the worst principles on which men may contract, avarice on one side, and a craving appetite on the other. . . . At first the cases are, where there is express proof of gross practice or actual imposition: from thence it went to cases, where on the face of the contract it was so gross and unreasonable a contract between the parties, the court, on presuming a man would not enter into it but by imposition, has relieved; of which one case among many is *Nott v. Hill*, 1 Ver. . . . . Where the bargain is so lucrative, and the person under necessity, so that the judgment of the court has been, that necessity alone could induce to make that contract, there has been relief.[90]

What facts might show necessity? Spencer did not dare to reveal his debts to his family for fear of being written out of the will,[91] nor could he seek his father's advice.[92] Expectant heirs had to be "supplied with the means of gratifying their passions" as they waited for their inheritance.[93] And giving creditors specific performance of a contract made by an expectant heir desperate for immediate cash would lead to "the ruin of families."[94] The holding of *Chesterfield* seems to be simple: equity must protect the prodigal son who spends beyond his means, fails to seek good advice, and succumbs to an unconscionable bargain.[95]

Equity extended this protection beyond sailors and expectant heirs, for its courts often remade contracts by striking a bond's penalty clauses or by reducing the price of land sold.[96] Equity protected against "any unfair dealing, any form of imposition, any taking advantage of the ignorance or poverty or distress of another, any weakness of understanding, any mistake,

90. *Id.* at 93-94 (Opinion of Burnett, J.).
91. *Id.* at 93 (Opinion of Burnett, J.).
92. *Id.* at 101 (Opinion of Hardwicke, L.C.).
93. *Id.* at 93 (Opinion of Burnett, J.).
94. *Id.* at 101 (Opinion of L.C. Hardwicke).
95. *Cf. Luke* 15:11-32 (Describing father's forgiveness of wastrel son).
96. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 173, 173 n.4 (1979).

which might suffice to set aside a contract."[97] Indeed, in 1793, Professor Richard Wooddeson said that *caveat emptor* had "exploded" so that "a fair price implie[d] a warranty."[98]

A century later, the rise of formalism, an overworked Lord Chancellor, and a general increase in rigidity of the English legal system had "whittled away" equity's traditional rules.[99] By that time, however, the American colonies had become the United States, and the U.S. Supreme Court had taken over equity's traditional concern for unconscionable deals.

B. The American Tradition: Protecting Businesses and the Sovereign

Between 1825 and 1946, the U.S. Supreme Court said in at least twenty-one decisions that courts should not order specific performance of "unconscionable," "unreasonable," or "inequitable[]" contracts.[100]

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97. *Id.* at 174.

98. *Id.* at 180 (quoting RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 415-16 (1792)). Wooddeson held Oxford's Vinerian Professorship of English Law, whose first occupant was William Blackstone.

99. ATIYAH, *supra* note 96, at 388-94.

100. Precision Instrument Mfg. Co. v. Automotive Maint. Machinery Co., 324 U.S. 806, 814 (1945) ("[I]nequitableness"); Muschany v. U.S., 324 U.S. 49, 57-58 (1945); Fred Fisher Music Co. v. M. Whitmark & Sons, 318 U.S. 643, 656-57 (1943); U.S. v. Bethlehem Steel Corp., 315 U.S. 289, 305 (1942); Haffner v. Dobrinski, 215 U.S. 446, 451 (1910); Sun Printing & Publ'g Ass'n v. Moore, 183 U.S. 642, 661, 662 (1902); The Elfrida, 172 U.S. 186, 196 (1898); Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co., 163 U.S. 564, 603-04 (1896); Dalzell v. Dueber Watch Case Mfg. Co., 149 U.S. 315, 323 (1893); Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236 (1892); Jencks v. Quidnick Co., 135 U.S. 457, 458-59 (1890); Hume v. U.S., 132 U.S. 406, 414-15 (1889); Snell v. Atl. Fire & Marine Ins. Co., 98 U.S. (8 Otto) 85, 88 (1878); Miss. & Mo. R.R. Co. v. Cromwell, 91 U.S. (1 Otto) 643, 645-46 (1875) (Equity's refusal to "carry out an unconscionable bargain . . . . [H]as been so often held . . . that it is unnecessary to spend argument on the subject."); Kitchen v. Rayburn, 86 U.S. (19 Wall.) 254 (1873); French v. Shoemaker, 81 U.S. (14 Wall.) 314, 344 (1871); Scott v. U.S., 79 U.S. (12 Wall.) 443, 445 (1870); Rutland Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339, 356 (1870); Eyre v. Potter, 56 U.S. (15 How.) 42, 60 (1853); Taylor v. Taylor, 49 U.S. (8 How.) 183, 200 (1850) ("[U]nconscionable advantage); Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 276 (1831); King v. Hamilton, 29 U.S. (4 Pet.) 311, 327 (1830); and De Wolf v. Johnson, 23 U.S. (10 Wheat.) 367, 385-86 (1825).

In addition, U.S. v. Alcea Band of Tillamooks, 329 U.S. 40, 41 n.1 (1946) involved the Indian Claims Commission Act, Pub. Law 726, 79th Cong. 2d Sess § 2(3) (Aug. 13, 1946), which authorized the commission to hear claims by tribes against the United States based on contracts with "unconscionable consideration."

Instead, plaintiffs could seek only damages in a court of law,[101] and those damages would be based, "not according to [the contract's] letter, but only []such as [the plaintiff] is equitably entitled to."[102] These were not empty words. In 1830, the Court rejected Buyer's claim for specific performance of a contract for "all [Seller's lands lying on the Miami River, one thousand and thirty-three and one-third acres" for a flat price of $1,896.53, which equaled $1.24 per acre. Seller had refused to perform because the parties later discovered the land actually had an extra 876 acres. The Court said that the contract was "unreasonable or unconscionable," rejected Buyer's request for specific performance, and instead imposed an equitable remedy: for the extra acres, *Buyer* had to pay *Seller* an extra sum equal to the "average price or rate as in the original contract [$1.24] plus interest.[103] Similarly, in *Hume v. United States*, when the government agreed to buy corn shucks at thirty-five times the market value, the Court gave the seller *only* the shucks' market value.[104]

The Court used unconscionability to protect a wide range of defendants. A few are what we would expect: a newly married woman trying to persuade her parents to respect her husband,[105] an illiterate farmer,[106] and a tribe whose lands had been taken by the United States.[107] However, businesses were the most frequent invokers of unconscionability. Most lost (usually for lack of proof),[108] but three succeeded.[109] Even more surprisingly, other successful users of the doctrine were land speculators,[110]

101. *Jencks*, 135 U.S. at 458-59; *Hume*, 132 U.S. at 414-15; *Cromwell*, 91 U.S. (1 Otto) at 645-46; *Scott*, 79 U.S. (12 Wall.) at 445; *King*, 29 U.S. (4 Pet.) at 327; and *Cathcart*, 30 U.S. (5 Pet.) at 276.

102. *Scott*, 79 U.S. (12 Wall.) at 445.

103. *King*, 29 U.S. (4 Pet.) at 321-23, 326-30.

104. *Hume*, 132 U.S. at 414-15.

105. *Taylor*, 49 U.S. (8 How.) at 199-200.

106. *Kitchen*, 86 U.S. (19 Wall.) at 263.

107. *Alcea Band of Tillamooks*, 329 U.S. at 41, 41 n.1 (Tribe invoked statute allowing it to sue for land purchased by U.S. for "unconscionable consideration").

108. *Precision Instrument*, 324 U.S. at 813-14 (Manufacturer); *Sun Printing*, 183 U.S. at 643 (Newspaper that insured yacht); *The Elfrida*, 172 U.S. at 192 (Ship owner); *Union Pacific*, 163 U.S. at 603-04 (Large railroads); *French*, 81 U.S. (14 Wall.) 325, 334-35 (President and owner of 3/4 of railroad's stock); Dean v. Nelson, 77 U.S. (10 Wall.) 158, 159-60 (1869) (Purchaser of "large amount of . . . stock" in gas company invoked unconscionability, but Court did not resolve that issue); and *De Wolf*, 23 U.S. (10 Wheat.) at 377-78 (Land buyer who borrowed $62,000).

109. *Pope Mfg.*, 144 U.S. at 224-25 (Bicycle manufacturer); *Jencks*, 135 U.S. at 458 (Family and family-owned manufacturing company); and *Snell*, 98 U.S. (8 Otto) at 88 (Company seeking to insure 220 bales of cotton).

110. *King*, 29 U.S. (4 Pet.) at 321.

counties,[111] and even the United States of America itself.

Let me say that again: at least four U.S. Supreme Court decisions concern claims by the United States of America that it was the victim of an unconscionable contract. The most important is *Hume v. United States*, in which the plaintiff-seller had used *the government's own form* to bid to furnish a number of items, including corn shucks, to a federal hospital.[112] The government's custom was to purchase shucks "by the hundred weight," but the seller wrote "60 cents" next to the word "pounds."[113] The market price of the seller's shucks was 1¾ cents per pound ($35 a ton), but the seller's change produced a price of $1,200 per ton.[114] The seller delivered the shucks and sought specific performance for $4,032.[115]

Little in the decision indicates that the government lacked bargaining power. The seller was the only bidder,[116] but the presence of a market value indicates that the government had alternative sources. Furthermore, contract law imposes a duty to read,[117] and the government's agents were "negligen[t] or mistake[n]" in overlooking the plaintiff-buyer's use of the word "pound."[118] However, the government's considerable bargaining power[119] and negligence made no difference. The Court refused to enforce "so grossly unconscionable a price" and instead affirmed the Court of Claims' decision to award only the market value of the goods.[120] Similarly, the government's abundance of bargaining power did not make a

111. *Cromwell*, 91 U.S. (1 Otto) at 643-44, and Roberts v. N. Pac. R.R. Co., 158 U.S. 1, 13 (1895) (Doubting whether purchaser who promised to pay county $400 for property worth $200,000 could receive specific performance of the $400 contract price).

112. *Hume*, 132 U.S. at 407 (Statement of the Case).

113. *Id.* at 408.

114. *Id.* at 409-10. This was 35 times the market price. *Id.* at 414 (Opinion of Fuller, C.J.).

115. *Id.* at 407 (Statement of the Case).

116. *Id.*

117. REST. OF CONTRACTS § 70 (Party who accepts document that appears to be offer is bound by its terms, "though ignorant of the terms of the writing or its proper interpretation.").

118. *Id.* at 415 (Opinion of Fuller, C.J.).

119. At the time of the contract, defendant buyer's navy had just received funds to build four steel warships. David Colaqmaria, *The Story of the New Steel Navy*, https://www.steelnavy.org/history/exhibits/show/steelnavy/introduction/story (last visited May 17, 2002). Defendant buyer's army included five regiments of artillery, ten of cavalry, and twenty-five of infantry. U.S. Army Center of Military History, *The U.S. Army in the 1890s*, https://history.army.mil/html/forcestruc/usa-1890.html (last visited May 17, 2022). I have found no records that show the strength of the armed forces that plaintiff seller could field.

120. *Hume*, 132 U.S. at 415.

difference in *Scott v. United States*, in which a private contractor included an arguably unconscionable clause in a contract to transport U.S. troops along the Arkansas River.[121] Nor was bargaining power a problem in two other cases, which the Court resolved by finding the United States had not proven that it had been charged unconscionable prices.[122] English judges had used unconscionability to protect the grandson of the Duke and Duchess of Marlborough, and the U.S. Supreme Court had gone further: a sovereign still could raise (and sometimes win) an unconscionability claim.

The Supreme Court was not alone in allowing many types of parties to use the doctrine and in paying little attention to bargaining power. The 1932 Restatement of Contracts let courts refuse specific performance if the terms were "grossly inadequate or. . . otherwise unfair," or if the deal involved "sharp practice, misrepresentation, or mistake"; it did not even discuss bargaining power.[123] In the late 1950s, the general unconscionability rule of the new Uniform Commercial Code Article 2 (U.C.C.) discussed eleven lower court decisions, of which all but one involved commercial defendants, and none of them discussed bargaining power.[124]

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121. *Scott*, 79 U.S. (12 Wall.) 443. An assistant quartermaster hired Scott "to furnish all the transportation the United States may require from Little Rock . . . to Ft. Smith, Arkansas," which are connected by the Arkansas River. Scott claimed that when the Army sent troops from St. Louis by river to Ft. Smith, and the boats stopped at Little Rock, the contract entitled him to transport everything the rest of the way. *Id.* at 443. The federal government hardly lacked bargaining power: the troops to be transported were occupying Arkansas after the Civil War. The Court warned that unconscionability would let courts of law award Scott as damages "only such as he is equitably entitled to," but it avoided that issue by interpreting the document's text against him. *Id.* at 445. This practice of using interpretation to indirectly police unconscionable deals is described in UCC § 2-302, Cmt. 1.

122. In U.S. v. Bethlehem Steel, 315 U.S. 289 (1942), the government claimed it paid unconscionable prices for ships built during World War I. The Court rejected that claim, since the shipbuilder had charged less than its competitors. *Id.* at 305. The Court did not discuss the government's bargaining power, even though during the war, Congress and the president had nationalized a similar industry (American railroads). Public Statement of Pres. Woodrow Wilson (Dec. 26, 1917), SELECTED ADDRESSES AND PUBLIC PAPERS OF WOODROW WILSON (Albert Bushnell Hart, ed. 1918).

In 1945, the Court denied another government claim of unconscionability, finding insufficient evidence that the U.S. had paid an unconscionable price for land. The Court did not discuss the government's bargaining power. Muschany v. U.S., 324 U.S. 49, 55, 57-58 (1945).

123. RESTATEMENT OF CONTRACTS. § 367 (a), (c) (AM. L. INST. 1932). Only Illustration 2 describes the defendant ("A is an aged, illiterate woman, inexperienced in business"). The seven other illustrations use generic "A"s and "B"s.

124. In UCC § 2-302, Cmt. 1, the ten cases involving commercial defendants are Campbell Soup Co. v. Wentz, 172 F.2d 80, 81 (3rd Cir. 1948) (Commercial farmers); Kan. City Wholesale Grocery Co. v. Weber Packing Corp., 73 P.2d 1272, 1273 (Utah 1937) (Grocery

Of course, judicial willingness to protect businesses did not prevent courts from also protecting individuals who they perceived to be weak. A 1967 informal survey of lower court decisions from the mid-1700s to 1932 revealed courts protecting "the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naïve[,] and the sick," as well as "whole classes of presumptive sillies like sailors and heirs and farmers and women . . . and [t]hose not certifiably crazy, but nonetheless pretty peculiar."[125] The earliest American case in that survey was published only a year after the U.S. Constitution.[126]

By the time Skelly Wright unleashed his liberal activism in 1965, American courts had a tradition—dating back to the mid-1750s—of using unconscionability to refuse requests for specific performance, whether the party resisting that relief was an expectant heir of wealthy parents, an illiterate farmer, a business, or even the United States itself. In addition, once a court of equity refused specific performance, the plaintiff could recover at law only "equitable" damages, rather than those based on the letter of the contract. As early as 1875, the Supreme Court had said that "[t]his has been so often held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."[127]

Little did American courts know that the time for argument was coming. So far, unconscionability claims had involved sums of enough money to justify the cost of an attorney (at least for victims who could afford those costs), and nearly every case had involved one-on-one bargaining.[128] In the twentieth century, however, businesses began using standardized

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wholesaler); Andrews Bros. Ltd. v. Singer & Co., (Cal. 1934) 1 K.B. 17, 17 (Car dealer); New Prague Flouring Mill Co. v. G.A. Spears, 189 N.W. 815 (Iowa 1922) (Owner of restaurant and bakery); Kan. Flour Mills Co. v. Dirks, 164 P. 273, 274 (Kan. 1917) (Milling company); Green v. Arcos, Ltd. (Cal. 1931) 47 T.L.R. 336, 336 (Buyer in international sale of timber); Meyer v. Packard Cleveland Motor Co., 140 N.E. 118, 119 (Ohio 1922) (Contract stated truck buyer's business address); Austin Co. v. J.H. Tillman Co., 209 P. 131, 131 (Or. 1922) (Purchaser of asphalt mixing plant); Bekkevold v. Potts, 216 N.W. 790, 790 (Minn. 1927) (Purchaser of tractor, trailer, and hydraulic hoist); and Robert A. Munroe & Co. v. Meyer (1930) All E.R. Rep. 241, 242, 2 K.B. 312 ("[M]erchants in cattle foods").

The remaining decision says only that defendant bought a car, without further identification. Hardy v. Gen. Motors Acceptance Corp., 144 S.E. 327, 327 (Ga. Ct. App. 1928).

125. LEFF, *supra* note 7, at 531-33.

126. *Id.* at 532, n.198, citing Clitherall v. Ogilvie, 1 Desaussure Ch. 250, 261 (S.C. 1792) ("Young heirs even when at age are under the care of this court.").

127. Miss. & Mo. R.R. Co. v. Cromwell, 91 U.S. 643, 644 (1875).

128. The exception was *Hume*, 132 U.S. 406, which involved competitive bidding.

forms[129] with fine print. Meanwhile, the growth of legal aid programs helped some low-income consumers get legal help.[130] In 1963, those phenomena collided when the Walker-Thomas Furniture Store—of inner-city Washington, D.C.—repossessed a bed, a chest of drawers, a washing machine, and a stereo from Ora Lee Williams, who found help at the District of Columbia Bar Association's Legal Assistance Office.[131]

IV. UNCONSCIONABILITY CRIPPLED (BY A LIBERAL, ACTIVIST JUDGE): *WILLIAMS V. WALKER-THOMAS FURNITURE CO.* (1965)

A. The Liberal Goal

The author of *Williams v. Walker-Thomas Furniture Co.*, U.S. Circuit Judge J. Skelly Wright, was an unabashed liberal. Descended from "potato famine Irish,"[132] he "warm[ed] hope in a climate grown cold."[133] When he urged someone to "Keep the faith," he meant the civil rights struggle,[134] and he sought equal rights for members of disadvantaged groups.[135] While Wright recognized that the Supreme Court had made steps toward that goal,[136] he still warned that the law "systematically work[s] a hardship

129. In 1939, the U.C.C.'s Chief Reporter noted the appearance, beginning in 1917, of academic commentary on what he called the "mass production of bargains" using standard clauses prepared by one side. Karl Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 700, 700 n.3 (1939) (book review).

130. *See* Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in THE TRANSFORMATION OF LEGAL AID 9, 16-18 (Francis Regan et al. eds. 1999) (describing ABA's 1920 creation of Special Committee on Legal Aid, the quadrupling between 1920 and 1965 of the total budget of all U.S. legal aid societies and quintupling of the number of clients served, and the 1965 creation of the federal Office of Economic Opportunity's Legal Services Program with a $42 million budget).

131. *See* Fleming, *supra* note 15, at 1397, 1408.

132. Richard Parker, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 367, 369 (1988). During the Potato Famine, a million Irish died of starvation or diseases caused by malnutrition. JAMES S. DONNELLY, JR., THE GREAT IRISH POTATO FAMINE 169-71 (Sutton Publ'g 2005).

133. Parker, *supra* note 132, at 367.

134. *Id.*

135. William J. Brennan, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 361, 362 (1988).

136. WRIGHT, *supra* note 9, at 26, referring to Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (Sixth Amendment requires states to provide counsel to indigent criminal defendants) and Miranda v. Ariz., 384 U.S. 436, 444-45 (1966) (Fifth Amendment bars use of statements made by defendants before they were informed of their constitutional rights).

. . . on those least able to withstand it," especially Black residents of America's inner cities.[137] As a federal district judge, he had received death threats for ordering Louisiana State University, the New Orleans transit system, and the New Orleans Public School System to integrate;[138] he later spent 120 pages blasting the District of Columbia for keeping its schools segregated.[139] He publicly complained that the law did not protect "ignorant and helpless customers" from "grossly unfair and one-sided" contracts.[140] Privately, he admitted without apology his willingness to ignore precedent that, in his mind, created injustice.[141] In 1965, he found himself hearing the dispute between Walker-Thomas Furniture and Ms. Williams.[142]

B. The Lawsuit

Ms. Williams began buying furniture and household items from Walker-Thomas in 1957.[143] Her lawyer said that she was barely literate,[144] and she lived in a highly segregated area,[145] where she was raising seven children by herself on a monthly government stipend of $218.[146] She signed fourteen form contracts with Walker-Thomas despite its sharp practices,[147] such as using door-to-door salesmen and forms with blank

137. Wright, *supra* note 9, at 26.

138. Bill Monroe, *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 369, 371 (1988).

139. Hobson v. Hansen, 269 F. Supp. 401, 401-518 (D.D.C. 1967), *aff'd sub nom*. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

140. Wright, *supra* note 9, at 102.

141. Letter from J. Skelly Wright to Prof. Edward H. Rabin (Oct. 14, 1982), quoted in Edward H. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984).

142. *Williams*, 350 F.2d 445.

143. *Williams*, 198 A.2d at 915.

144. Fleming, *supra* note 15, at 1392, 1392 n.41 (citing Pierre E. Dostert, *Case Studies in Consumer Fraud*, 25 BUS. LAW. 153, 153 (1969)). Williams herself said she had attended Southern schools for eight years. Fleming, *supra* note 15, at 1392, 1392 n.41 (citing Transcript of Record at 44-45, *Williams*, 198 A.2d 914).

145. Fleming, *supra* note 15, at 1392 n.42 (In 1960, 99.8% of the people in Williams'sWilliams' census tract were African-American). In 1967, Wright would find that "virtually every residence" west of Rock Creek Park was white and that 90% of the District's students were black. *Hobson*, 269 F. Supp. at 410, *aff'd sub nom*; *Smuck*, 408 F.2d 175.

146. *Williams*, 350 F.2d at 448.

147. Both Wright and a lower court said they could "not condemn too strongly" the store's treatment of Williams. *Williams*, 350 F.2d at 448, (quoting *Williams*, 198 A.2d at 916). Wright's first draft said the store sold expensive items to customers, expecting them

terms (including the price), as well as failing to give customers copies of what they had signed.[148] She did not notice (and the salesmen did not point out or explain) the clause that caused the dispute.[149] All contracts but the last were for ordinary household items.[150] Williams eventually paid about $1,056 out of the $1,500 charged,[151] but then bought a $514 stereo.[152] She soon defaulted, and the store invoked a clause that said all payments "shall be credited pro rata on all outstanding leases, bills and accounts due the Company by me at the time each such payment is made."[153] This meant Williams owned nothing until she paid for everything. When she defaulted, the store's records showed she owed $2.34 on a bed and chest of drawers, and from $0.03 to $10.32 on everything else except the stereo.[154] A lower court said that Williams had a duty to read the forms she signed.[155]

Writing for the D.C. Circuit Court of Appeals, Judge Wright began his analysis by repeating three points made by the intermediate appellate court: (1) the store sold Williams an expensive stereo despite knowing her financial difficulties, (2) the store's conduct raised "serious questions of sharp practice[s] and irresponsible business dealings," and (3) Congress should pass statutes to "protect the public from such exploitive contracts."[156] Wright then wrote that the common law in other jurisdictions did not enforce unconscionable bargains, and he quoted the U.S. Supreme

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to default and planning to repossess and resell the items at a profit. Fleming, *supra* note 15, at 1418, (citing Draft Opinion of Judge Skelly Wright, at 6-7 (June 29, 1965)) (Wright Papers, Box 77, Folder 1965 Sept. Term, Manuscript Div., Library of Congress). *See also* Wright, *supra* note 9, at 102.

148. *Williams*, 198 A.2d at 915. She also testified that the salesman often claimed that *he* did not know the price, Fleming, *supra* note 15, at 1395. When pressed about why she did not read the forms, she answered "But how could I read things that I did not have[?]. You are asking me about . . . things that I never had to read." Fleming, *supra* note 15, at 1410-11.

149. Prof. Fleming reproduces Walker-Thomas's standard form, which clumps every substantive term in a single paragraph. *See* Fleming, *supra* note 15, at 1439-40. A lower court said the forms had "a long paragraph in extremely fine print." *Williams*, 198 A.2d at 915. Judge Wright called the clause in question a "rather obscure provision." *Williams*, 350 F.2d at 447.

150. *See* Fleming, *supra* note 15, at 1396, 1396 n.60.

151. Judge Wright says Williams paid $1,400 on charges of $1,800. *Williams*, 350 F.2d at 447 n.1. Prof. Fleming puts the numbers at $1,056 and $1,500. *See* Fleming, *supra* note 15, at 1396 n.61.

152. *Williams*, 350 F.2d at 448.

153. Fleming, *supra* note 15, at 1440.

154. *Id.* at 1396-97.

155. *Williams*, 198 A.2d at 916.

156. *Williams*, 350 F.2d at 448 (quoting *Williams*, 198 A.2d at 916).

Court opinion in *Scott v. United States*, which said that plaintiffs seeking full enforcement of unconscionable contracts should only receive the damages to which they are "equitably entitled."[157] Then, ignoring that opinion, he said that the District of Columbia had no law on the subject, and he used the new U.C.C.'s unconscionability rule[158] by analogy to create common law for the District.[159] Next, he established a two-part test, requiring "an absence of meaningful choice" by one party "together with contract terms which are unreasonably favorable to the other party."[160] The lack of meaningful choice could be shown by "a gross inequality of bargaining power" or the "manner in which the contract was [made]."[161] Wright suggested that courts look at the buyer's "obvious education or lack of it," "a reasonable opportunity to understand the terms," "important terms hidden in a maze of fine print," "deceptive sales practices," and terms "so extreme as to appear unconscionable."[162] Since the trial court had not made any findings on unconscionability, Wright remanded the case.[163]

Two years after *Williams*, Wright called his opinion "shockingly, one of the first to hold that the courts had the power to refuse to enforce such unconscionable contracts."[164] Privately, he hoped that *Williams* would be "very helpful" to President Lyndon Johnson's War on Poverty[165] and would support a "growing area of the law—the law of the poor."[166]

It didn't.

C. Williams Cripples a Doctrine

On its face, *Williams* appears to be a great victory for poor and uneducated consumers. Judge Wright remanded the case so a trial court could

157. *Williams*, 350 F.2d at 448 (quoting Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870)). For a discussion of *Scott* (and of Hume v. United States, 132 U.S. 406 (1889), which Wright also cited, *see Williams*, 350 F.2d at 448 n.3), *see supra* text accompanying notes 112-21.

158. UCC § 2-302. Congress did not adopt the UCC for the District until after Williams made her purchases. *Williams*, 350 F.2d at 448-49.

159. *Williams*, 350 F.2d at 449.

160. *Id.* at 449.

161. *Id.*

162. *Id.* at 449-50.

163. *Id.* at 450.

164. Wright, *supra* note 9, at 104.

165. Fleming, *supra* note 15, at 1385 (quoting Letter from J. Skelly Wright to William E. Shipley (July 12, 1967) J. Skelly Wright's Papers, 1962-87, Box 77, Folder 1965 Sept. Term, Manuscript Div., Library of Congress).

166. *Id.*

make findings of fact, but his obvious sympathy for Williams, his condemnation of the store's conduct, and his call for Congress to adopt corrective legislation[167] leave little doubt as to what he thought the trial court should do. Unfortunately, Wright's opinion badly damaged the doctrine. It ignored a critical limitation on Ms. Williams's bargaining power; it ignored unconscionability's long tradition (including twenty-one decisions of the Supreme Court); it invented a two-part test that was difficult to satisfy; and, unlike the God-fearing Puritans of 1639, its remedy was of little help to Williams and of little deterrence to shady businesses. Quite unintentionally, Wright turned unconscionability into a doctrine that rarely protects anyone.[168]

1. Ignoring the Invisible Limit[169] on Williams's Bargaining Power

The opinion's worst flaw is its silence regarding the biggest limitation on Williams's bargaining power. Today, most Americans can find the items Williams purchased at a half-dozen retailers within a short drive from home. However, in the 1960s, many retailers (especially but not exclusively in Southern cities like Washington) closed their doors to Americans who had dark skin,[170] and Ora Lee Williams was Black.[171] Walker-Thomas Furniture took advantage of this by sending door-to-door salesmen to Williams's neighborhood and offering terms inferior to what middle-class, white stores offered.[172] Despite Wright's deep commitment to

167. *Williams*, 350 F.2d at 448.

168. To be fair, Prof. Fleming says that the *Williams* decision has little of Wright's original thinking. Fleming, *supra* note 15, at 1391. However, he put his name on the opinion.

169. *Cf.* RALPH ELLISON, INVISIBLE MAN (Random House 1952) (describing life of a Black man whose skin color makes him invisible to most Whites).

170. A few years before Williams's' purchases, future Hall of Famer Henry Aaron (who would receive death threats for breaking Babe Ruth's career home run record) and his teammates had to force their way into a whites-only diner next to the District of Columbia's stadium. After they finished eating, they heard their plates being smashed. Aaron wrote "[i]f dogs had eaten off those plates, they'd have washed them." HENRY AARON, I HAD A HAMMER 34 (HarperCollins 1991).

See also Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 243 (1964) (Describing motel that refused to rent rooms to Black Americans), and Speech of Alabama Gov. George Wallace (June 11, 1963), https://www.youtube.com/watch?v=4WbLGlIzW88 (last visited May 17, 2022) (Refusing, despite court order, to let Black students enter University of Alabama).

171. Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 n.208 (1997).

172. Fleming, *supra* note 15, at 1393. Stores in middle-class areas gave revolving credit, letting customers pay off purchases one-by-one, while Walker-Thomas offered only

civil rights, he said nothing about Williams's race or its effect on her bargaining power. His silence divorced his "absence of meaningful choice" test from reality, and it should deprive his opinion of legitimacy.

2. Ignoring Unconscionability's Tradition of Protecting a Wide Range of Parties

Judge Wright's opinion hardly acknowledged that English and American courts—including the Supreme Court—had long used unconscionability to protect parties of all types, from society's weakest to the most powerful, including the sovereign itself. More than two centuries before Wright's opinion, English courts of equity had protected sailors by rewriting the sales of their prize rights to allow lenders to recover only the principal plus interest,[173] and both English and American courts routinely protected "the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naive, and the sick."[174] However, English courts had also protected wealthy aristocrats,[175] and the Supreme Court went further, using unconscionability to protect land speculators,[176] businesses,[177] counties,[178] and even the United States itself.[179] Indeed, the Court heard more than twenty cases in which such parties raised

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installment credit, under which a buyer owned nothing until she paid off everything. *Id*. at 1394-95.

173. *See supra* text accompanying notes 75-76 (discussing Baldwin & Alder v. Rochford (1748) 1 WILS. K.B. 229, 230, 22 Geo. III. 589, 589.

174. Leff, *supra* note 7, at 531-32.

175. *See supra* text accompanying notes 77-95 (discussing Chesterfield v. Jannsen (1750) 2 Ves. Sen. 125, 28 Eng. Rep. 82).

176. King v. Hamilton, 29 U.S. (4 Pet.) 311, 321, 327, 330 (1830) (Rewriting 1805 contract for sale of land in Ohio to reflect market value of extra land that neither side realized was covered by contract's legal discription).

177. Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233 (1892) (Bicycle manufacturer); Jencks v. Quidnick, 135 U.S. 457, 458-59 (1890) (Family that owned one manufacturing company and 4,022 shares in another, quite valuable company); Snell v. Atl. Fire & Marine Ins. Co. of Providence, 98 U.S. (8 Otto) 85, 88, 91 (1878) (Company seeking insurance for cotton bales).

178. Roberts v. N. Pac. R.R. Co., 158 U.S. 1, 13 (1895), and Miss. & Mo. R.R. Co. v. Cromwell, 91 U.S. (1 Otto) 643, 643-44 (1875).

179. *See supra* text accompanying notes 112-21 (Discussing Hume v. U.S., 132 U.S. 406 (1889) (Reducing price of goods purchased by U.S. from sixty cents per pound to market price of 1.75 cents per pound) and Scott v. U.S., 79 U.S. (12 Wall.) 443 (1870) (Boat company could recover only such damages as it was "equitably entitled to")).
Wright actually *quotes* both of these decisions, without mentioning that they protected an entity whose bargaining power far exceeded Ms. Williams's.

unconscionability, and the Court *never* discussed their business experience, their ability to protect themselves in negotiations, their access to attorneys, or their ability to understand the relevant documents.[180] Moreover, the 1932 Restatement of Contracts, which lets courts deny specific performance when the consideration is grossly inadequate or when the contract was induced by "sharp practice, misrepresentation, or mistake," puts no limits on which kinds of defendants may invoke it.[181] And while Wright invoked U.C.C. § 2-302 as "persuasive authority," he did not point out that in ten of the eleven cases cited in its comments, the courts protected businesses from unconscionable terms.[182]

Williams gives only the faintest hint of all this tradition (Wright quotes *Scott* without mentioning that the party invoking unconscionability in that case was the United States, not Scott).[183] Instead, he tells us that "the question here presented is actually one of first impression."[184] Since he had just quoted a Supreme Court decision that prohibited specific performance of "unconscionable bargain[s]," the reader is left to wonder what makes Williams's situation one of first impression. Unfortunately, that question easily merges with another that Wright implicitly had raised: what in the world is someone who is trying to raise seven children on a $218 monthly government stipend doing buying a $514 stereo? *Williams* should have asked if consumers should receive at least as much protection as businesses and sovereigns had long received. Instead, it seemed to ask whether a poor, uneducated (Black) woman deserved to be protected from a bad decision to buy a luxury item.[185] Wright had—and missed—the

180. *See supra* note 100 (Listing cases in which U.S. Supreme Court allowed businesses, counties, and the United States to raise unconscionability as defense). Most lost, but not because of their bargaining power. *See, e.g.*, U.S. v. Bethlehem Steel, 315 U.S. 289, 305 (1942) (Finding price not unconscionable because seller's competitors charged lower price); *Precision Instrument*, 324 U.S. at 813-14 (Manufacturer); *Sun Printing*, 183 U.S. at 643 (Newspaper that insured yacht); *The Elfrida*, 172 U.S. at 192 (Ship owner); *Union Pacific*, 163 U.S. at 603-04 (Large railroads); *French*, 81 U.S. (14 Wall.) 325, 334-35 (President and owner of 3/4 of railroad's stock); *De Wolf*, 23 U.S. (10 Wheat.) at 377-78 (Land buyer who borrowed $62,000).

181. This is true of RESTATEMENT OF CONTRACTS § 367 (a),(c) (AM. L. INST. 1932) and their comments.

182. *See supra* note 124 (Listing cases cited by UCC § 2-302, cmt. 1, and describing the businesses which the courts protected).

183. *Williams*, 350 F.2d at 448. He does the same thing when he cites Hume v. United States, 132 U.S. 406 (1889). *See Williams*, 350 F.2d at 448 n.3.

184. *Id.* at 350 F.2d at 448.

185. *See* Leff *supra* note 7 (Describing Arthur Allen Leff's observation that some commentators believed the main importance of *Williams* was "quite clearly" the store's sale of an "expensive item to a poor person[,] knowing of her poverty").

opportunity to frame *Williams* as a case about unconscionability and standard form contracts imposed by businesses on consumers.

In so doing, Wright failed to build upon a decision that did focus on the problem that standard forms presented for ordinary consumers. *Henningsen v. Bloomfield Motors*[186] tells us little about Mr. Henningsen, other than that he wanted to buy a car for his wife and that he signed, without reading, a purchase order whose back page's seventh paragraph disclaimed all warranties and limited the buyer's remedy to repairing or replacing any defective part.[187] This language was "the least legible and the most difficult to read in the instrument"; reading the six-point type required "a studied and concentrated effort"; and the drafter seemed to deemphasize the clause.[188] The steering wheel came off in Mrs. Henningsen's hands as she was driving, and the car was a total loss,[189] making the promise to replace or repair the defective part useless. The unfairness of the clause (because of the car's destruction and the hardship that enforcement of the repair–replace clause would inflict on Henningsen) would seem to be enough to refuse enforcement of the clause.[190] Instead, the New Jersey Supreme Court spent considerable time explaining the reality of a typical business-to-consumer transaction. The court said consumers "frequently [are] not in a position to shop around for better terms" and standardized forms let business "dictate its law" to consumers.[191] Consumers dealing with most retailers lack "any real choice," suffer an "[e]xtreme inequality of bargaining [power]," and "must often accept what they can get."[192] Indeed, the Court expressly said that in business-to-consumer deals, the duty-to-read rule cannot be strictly applied. Instead, it must be qualified and adjusted in light of "the bargaining position occupied by . . . ordinary consumer[s]." The Court also barred remedy limitation clauses if "unfairly procured," if "not brought to the buyer's attention," or if the consumer "was not made understandingly aware of it."[193] It warned that the same would be true if the person "through whom it comes to the buyer is without authority to alter it."[194] In *Henningsen*, "differences in economic bargaining power" let courts "avoid enforcement of

186. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).
187. *Id.* at 74.
188. *Id.*
189. *Id.* at 75.
190. RESTATEMENT OF CONTRACTS § 367 (a)-(b) (AM. L. INST. 1932).
191. *Henningsen*, 161 A.2d at 86.
192. *Id.* at 87.
193. *Id.* at 88.
194. *Id.* at 87.

unconscionable provisions in long printed standardized contracts."[195]

Wright cited *Henningsen* four times.[196] He could have used it to protect Williams as an ordinary consumer confronting fine print in standard forms (especially because Walker-Thomas Furniture's documents had blank terms).[197] *Henningsen*'s recognition that ordinary business-to-consumer transactions involve an "[e]xtreme inequality of bargaining [power]"[198] could have made Williams's lack of education, the form's blank terms, and the store's knowledge that she could not afford the stereo *additional but not necessary* reasons to deny enforcement of the *pro rata* clause. Wright's failure to explain *Henningsen*'s protection of ordinary consumers and unconscionability's long protection of parties with business experience and access to attorneys lets readers assume that *Williams* really was a case of first impression, in which Williams's poverty, race, large family, and lack of education protected her from a bad deal that she had made.

3. Inventing an Unsupported, Overly Difficult, Two-Part Test

Williams said that unconscionability has "generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party," and that one way to show such an absence is to show "a gross inequality of bargaining power."[199] This recipe suffered three problems.

First, Wright failed to put Williams's facts in context, making his test easy to misread. Wright did not say that the Supreme Court had used unconscionability to protect businesses and the United States itself, which would have suggested that parties with business experience and access to attorneys still could lack meaningful choice. Instead, he described Williams as supporting her seven children on government aid (and implied her lack of education),[200] suggesting that his test required such extreme facts. Suppose Wright had cited *Henningsen* for the proposition that an "extreme

195. *Id.* at 86.

196. *See Williams*, 350 F.2d at 448, n.2 (Common law says that unconscionable contracts are not enforceable), at 449 n.6 (*Henningsen* as source of "absence of meaningful choice" and "terms unreasonably favorable" two-part test), at 449 n.7 (Supporting requirement of "gross disparity in bargaining power"), and at 450 n.12 (Supporting requirement that terms must be "so extreme as to appear unconscionable").

197. *Williams*, 198 A.2d at 915.

198. *Henningsen*, 161 A.2d at 87.

199. *Williams*, 350 F.2d at 449.

200. *Id.* at 448, 449.

inequality of bargaining [power]" existed when an ordinary consumer faced a standard form contract written by a manufacturer?[201] Then his test would have required a consumer presented by a business with a non-negotiable form document, together with contract terms which are unreasonably favorable to the business.

Second, Wright's phrases have little history. Before *Williams*, the Supreme Court had discussed contract unconscionability in more than twenty opinions.[202] *None* of them spoke of an "absence of meaningful choice."[203] *None* referred to "unreasonably favorable" terms.[204] *None* mentioned "gross disparity in bargaining power."[205] Nor do those phrases appear in England's landmark decision on unconscionability,[206] the Restatement of Contracts,[207] or the cases cited in Wright's main authority, U.C.C. § 2-302.[208] Yes, Wright supported his test with four cases, but none of them mention "an absence of meaningful choice."[209] Only one of them, *Henningsen v. Bloomfield Motors, Inc.*, speaks of "gross inquality" and "gross

201. *Henningsen*, 161 A.2d at 87.

202. *See supra* note 100.

203. A May 12, 2022 Westlaw search for advanced: (Unconscionable unconscionability) & "absence of meaningful choice" & DATE (bef 01-01-1965) produced no hits. The same result occurred with "lack of meaningful choice."

204. A May 12, 2022 Westlaw search for advanced: (Unconscionable unconscionability) & "unreasonably favorable terms" & DATE (bef 01-01-1965) produced no hits.

205. A May 12, 2022 Westlaw search for advanced: (Unconscionable unconscionability) & "gross disparity of bargaining power" & DATE (bef 01-01-1965) produced no hits, nor did a similar search for "gross inequality of bargaining power."

206. *See* Chesterfield v. Jannsen, (1750) 2 Ves. Sen. 125, 28 Eng. Rep. 82, discussed *supra* at text accompanying notes 77-95.

207. *See* RESTATEMENT OF CONTRACTS § 359, Cmt. (a), § 367, and § 367, Cmt.. (b) (AM. L. INST. 1932).

208. *Williams*, 350 F.2d at 448-49 (Treating Congressional adoption of § 2-302 for District of Columbia as persuasive authority for treating unconscionability as District's common law). That section's first comment cites Campbell Soup Co. v. Wentz, 172 F.2d 80 (3rd Cir. 1948); Kan. City Wholesale Grocery Co. v. Weber Packing Corp., 73 P.2d 1272 (Utah 1937); Hardy v. Gen. Motors Acceptance Corp., 144 S.E. 327 (Ga. Ct. App. 1928); Andrews Bros. Ltd. v. Singer & Co., (1934 CA) 1 K.B. 17; New Prague Flouring Mill Co. v. G.A. Spears, 189 N.W. 815 (Iowa 1922); Kan. Flour Mills Co. v. Dirks, 164 P. 273 (Kan. 1917); Green v. Arcos, Ltd. (Cal. 1931) 47 T.L.R. 336; Meyer v. Packard Cleveland Motor Co., 140 N.E. 118 (Ohio 1922); Austin Co. v. J.H. Tillman Co., 209 P. 131 (Or. 1922); Bekkevold v. Potts, 216 N.W. 790 (Minn. 1927); and Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312.

209. *Williams*, 350 F.2d at 449 nn. 6-7 cites Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3rd Cir. 1948); Chesterfield v. Janssen, 28 Eng. Rep. 82 (1751); and Hume v. United States, 132 U.S. 406, 413 (1889).

disparity" in bargaining positions,[210] and it found such a disparity when an ordinary consumer confronted a business's standard form.[211]

Third, while Wright created a two-part test—requiring problems with the procedure by which the deal was made *and* the substance of its terms—his four supporting citations speak of both aspects *without requiring both*.[212]

4. *Williams*'s Limited Remedy

Finally, Wright discussed only two remedies: allowing the store to recover "only such as [it] is equitably entitled to"[213] or refusing to enforce the contract.[214] By contrast, the Puritans had required merchant Keayne to

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210. *Henningsen*, 161 A.2d 69, 87 .

211. *Id.* at 84, 85, 87.

212. *Williams*, 350 F.2d at 449 nn. 6-7. *Henningsen's* discussion of unconscionability and public policy, *Henningsen*, 161 A.2d at 85-96, ends by saying the legislature did not authorize carmakers to use their "grossly disproportionate bargaining power to relieve itself from liability" for "the grave danger of injury" presented by a defective car, *id*. at 95, without saying that unconscionability requires both procedural and substantive problems. Campbell Soup Co. v. Wentz, 172 F. 80, 83 (3rd Cir. 1948) states *no* rules at all. After describing the deal's terms, it ends by saying only that "a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation."

One opinion in Chesterfield v. Janssen (1750) 2 Ves. Sen. 125, 141, 28 Eng. Rep. 82, 91 (Opinion of Burnett, J.) spoke of both procedural unconscionability (the defendant's "necessity") and substantive unconscionability ("Where the bargain is so lucrative"), but that "necessity" is merely the expectant heir's fear of disclosing the debts he incurred while "gratifying [his] passions." *Id*. at 93-94. Meanwhile, the Lord Chancellor discussed only procedural problems, saying equity should "prevent . . . surreptitious advantage of the weakness or necessity of another," "imposition and deceit" on the weaker party, and "all such underhand bargains." *Id.* at 100 (Opinion of L.C. Hardwicke).

The final case, Hume v. United States, 132 U.S. 406, 414-15 (1889) found that the price of thirty-five times the market value was "grossly unconscionable," but said nothing about "absence of meaningful choice." Indeed, the party invoking unconscionability was the federal government itself; seller used the government's own form, *id.* at 407 (Statement of the Case); and the *government's* agents had committed "negligence or mistake" in not carefully reading seller's bid. *Id*. at 415 (Opinion of Fuller, C.J.). The Court said nothing about the government's duty to read.

213. *Williams*, 350 F.2d at 448 (quoting Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870)). This would have let Walker-Thomas Furniture Co. collect the unpaid balance on the difference between the stereo's contract price and market price.

214. *Williams*, 350 F.2d at 449. Since Williams already had substantially performed, Wright probably meant the trial court should refuse to enforce the *pro rata* clause.

promise "satisfaction" to the buyers he had abused,[215] hit him with a criminal fine, threatened punitive damages and physical punishment, and dismissed him from his church.[216] And while Wright urged Congress to ban exploitive contracts, he did not warn that many Americans could not afford to invoke such statutes without awards of attorney fees.[217]

In short, Judge Wright required an "absence of meaningful choice" while ignoring how racial discrimination drastically limited Williams's access to stores. He failed to make clear how the Supreme Court (and lower courts) had used unconscionability to protect parties with far more bargaining power than Williams. He also invented an unnecessarily difficult, two-part test with language that the Court had never used. And while his limited remedies were true to precedent, they were far less than those used by God-fearing Puritans 250 years earlier. If *Williams* was a victory for low-income, inner-city Black Americans, it was a bitter victory.

D. The Aftermath

Williams provided limited help to its namesake, who accepted the store's settlement of $200.[218] This was twice as much as the $91.50 value that U.S. marshals had set on her bed, chest, washing machine, and stereo,[219] but it was only *one-fifth* of the $1,056 Williams already had paid for those items.[220] Moreover, in real terms, the $200 settlement was less than *one percent* of the £200 fine imposed on Robert Keayne three centuries earlier,[221] and fell short of one month of her $218 government stipend. As for Walker-Thomas Furniture, the decision had little effect. The store later lost two published federal court decisions because of its sharp

215. Bailyn, *supra* note 52, at 573 (quoting Records of the First Church, *supra* note 52, at 14).

216. *See supra* text accompanying notes 59-64**.**

217. Williams was represented by pro bono attorneys who did 210 hours of legal work. *See* Fleming, *supra* note 15, at 1409.

218. Fleming, *supra* note 15, at 1432 (citing Paul Richard, *Installment-Plan Law Will Shield the Needy*, WASH. POST B1 (March 28, 1966)).

219. Fleming, *supra* note 15, at 1398 (citing Transcript of Record 106, *Williams*, 198 A.2d 914). Even though Williams had bought the stereo for $514 only a few months earlier, the marshals valued it at only $75, *id.*, suggesting that the price had been unconscionable.

220. The amount paid comes from Fleming, *supra* note 15, at 1396. Her extensive research does not indicate that Walker-Thomas returned any of the seized items.

221. In 1640, £200 would pay a skilled tradesman for 2,857 days (about nine years or 108 months) and was equal to £23,590.20 in 1970 pounds. *See Currency Converter 1270-2013*, BRITISH NAT'L ARCHIVES, Nationalarchives.gov.uk/currency-converter/currency-result (last visited July 19, 2021).

practices,[222] and it won a third case only because the consumer failed to allege specific evidence of overcharging.[223] The store kept using "dense, difficult to understand" form contracts, and its only change was to sue defaulting customers for their unpaid balances, rather than repossessing the items sold.[224] In contrast, the Puritans' treatment of Robert Keayne caused him to apologize publicly and spend the rest of his life trying to defend his conduct.[225]

Instead, *Williams* angered conservatives[226] and produced a doctrine that rarely protects anyone.[227] Still, the majority and the dissent had urged Congress to tackle the problem,[228] even as legislatures (federal and state) were creating the Age of Statutes.[229] The next part of this article reveals that state legislatures soon adopted consumer protection statutes that protect far more people than *Williams* and its progeny, cover far more terms and conduct, and dramatically expand the remedies that courts can award. Indeed, modern consumer protection statutes resemble the rules that the Puritans of old used to discourage unscrupulous business practices.

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222. *See* Lewis v. Walker-Thomas Furniture Co., 416 F. Supp. 514, 517-18 (D.D.C. 1976) (Store did not state what the finance charge included or the amount of the unpaid balance), and Blackmond v. Walker-Thomas Furniture Co., 428 F. Supp. 344, 345 (D.D.C. 1977) (Store did not disclose that security interest covered all previously-purchased property).

223. Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111, 114 (D.D.C. 1971).

224. Eben Colby, Comment, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 656 (2002).

225. *See supra* text accompanying note 54.

226. *See* Epstein, *supra* note 8, at 294 (describing *Williams* as part of judicial assault on private agreements) and at 304-05 (arguing that *Williams* lets the "poor, unemployed, on welfare, or members of disadvantaged racial or ethnic groups . . . manipulate the system to their own advantage."). *See also* Fleming, *supra* note 15, at 1387 (Enthusiasm for unconscionability "quickly faded" after *Williams* because of belief that "naive, left-liberal, activist judges . . . used it to rewrite private consumer contracts according to their own sense of justice"), and Stempel, *supra* note 15, at 821 (Attributing doctrine's post-*Williams* retreat to revolt against "activist judicial interpretation").

227. *See supra* text accompanying nn.22-23.

228. *Williams*, 350 F.2d at 448 (Opinion of Wright, J.), 450 (Danaher, J., dissenting).

229. GUIDO CALABRESI, COMMON LAW COURTS FOR THE AGE OF STATUTES (1982), and Scalia, *supra* note 14, at 13.

V. UNCONSCIONABILITY AS IT STILL MIGHT BE: USING EXISTING CONSUMER PROTECTION STATUTES TO REVIVE A COMMON LAW DOCTRINE

A. The Study

1. The Statutes

This study covers the Unfair and Deceptive Acts and Practices (UDAP) statutes of nineteen states and the District of Columbia, along with closely related consumer protection statutes in those same jurisdictions. These UDAP statutes come from a list created by the National Consumer Law Center.[230] However, looking only at them creates a seriously incomplete picture. Many UDAP statutes incorporate *other* statutes, i.e., they say that violating a non-UDAP statute also violates the UDAP provision.[231] Conversely, some *non*-UDAP statutes say that a person who violates them also violates a related UDAP statute.[232] Finally, many non-UDAP consumer protection statutes are located right next to UDAP statutes.[233] Adding these non-UDAP statutes to the study gives a much more thorough view of how legislatures protect consumers, and omitting them would be dishonest.

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230. CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, appendix A, 873-894 (8th ed. 2012).

231. *See, e.g.*, COLO. REV. STAT. § 6-1-105(1) (2021). Sub-section 6-1-105(1)(x) incorporates Title 6. Consumer and Commercial Affairs, Art. 1. Colorado Consumer Protection Act. Part 2. Auto Rental Contracts, §§ 6-2-103 to 205 (2021). Sub-section 6-1-105(1)(v) incorporates Title 6. Consumer and Commercial Affairs. Art. 1. Colorado Consumer Protection Act. Part 7. Special Provisions. §§ 6-1-701 to 727 (2021). Sub-section 6-1-105(1)(aa) incorporates Title 42. Vehicles and Motor Traffic. Art. 11. Motor Vehicle Service Contract Insurance. §§ 41-11-101 to 108 (2021), and § 6-1-105(1)(cc) incorporates Title 6. Consumer and Commercial Affairs. Colorado Consumer Protection Act. Part 3. Prevention of Telemarketing Fraud, §§ 6-1-301 to 305 (2021). Those are just four out of § 6-1-105(1)'s *sixty* sub-subsections.'').

232. *See, e.g.*, KAN. STAT. § 50-616(c) (2021) (Any effort to collect price of unordered property or services, i.e., any violation of Ch. 50. Unfair Trade and Consumer Protection. Art. 6. Consumer Protection, Receipt of Unsolicited Property, is a deceptive act or practice under the Kansas Consumer Protection Act, §§ 50-623-43 (2021)).

233. For example, Indiana's UDAP statutes are Ch. 0.5. Deceptive Consumer Sales, §§ 24-5-0.5-0.1 to 12, in Title 24. Trade Regulation, Art. 5, Consumer Sales. That same Title 24. Art. 5 includes twenty-five other chapters, ranging from Ch. 2. Sales Competition. §§ 24-5-2-1 to 33, to Ch. 26. Identity Theft. § 24-5-26-1 to 3 (2021).

Of these UDAP and non-UDAP statutes, this study recorded only those that:

(a) set standards for invalidating a contract or clause;
(b) stated legislative findings or purposes;
(c) identified who could use or benefit from a statute;
(d) defined key or controversial terms;
(e) created causes of action or statutes of limitation; or
(f) provided remedies (including attorney fees).

This study ignored statutes that created government agencies or said how such agencies should investigate complaints, keep records, or provide consumer education programs.

2. The Unit of Measurement

Statistics require a unit of measurement, but statutes lack a uniform length. Some are single sentences of less than twenty words;[234] on the other hand, one statute in this study has a single *sub*section with sixty sub-subsections.[235] And a statute's length can be misleading. To ban three clauses (such as confessions of judgment, waivers of statutory rights, and remedy limitations), a legislature may use a one-sentence statute with three subsections or three separate one-sentence statutes. Instead of counting statutes, the study counts rules, calling each rule a "statutory provision." Whether a legislature banned three types of clauses in one statute with three subsections, or in three different statutes, the study recorded three statutory provisions.

Statutory provisions come in two types. "Primary" statutory provisions require or ban certain terms or conduct, or they require courts to look at various characteristics of the person seeking protection. They are the heart of this study. "Supporting" statutory provisions help implement primary statutory provisions. They include legislative findings, definitions,

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[234] E.g., ME. REV. STAT. § 10-1210-A (2021) ("A seller that violates this chapter commits an unfair and deceptive act and a violation of Title 5, section 207."), and KAN. STAT. § 50-687 (2021) ("A lessor shall provide the consumer a written receipt for each payment made by cash or money order.").

235. COLO. REV. STAT. § 6-1-105(1)(a) to (hhh) (2021).

scope provisions, remedies, who can invoke a primary statutory provision, and statutes of limitations.

3. The Jurisdictions

The study examined the UDAP statutes and other closely related consumer protection statutes for twenty jurisdictions (39%) out of America's fifty-one state-level jurisdictions. They are:

Alabama	Delaware	Indiana
Alaska	District of Columbia	Iowa
Arizona	Florida	Kansas
Arkansas	Georgia	Kentucky
California	Hawaii	Louisiana
Colorado	Idaho	Maine
Connecticut	Illinois	

B. The Findings

1. While Unconscionability May Seem to Provide Special Protection to Certain Groups, Consumer Protection Statutes Protect *All* Natural Persons

Ora Lee Williams had much in common with many individuals who had previously been protected by traditional unconscionability: she had little education,[236] she bought necessities, and she made a bad decision.[237] But she also was different. As a Black single mother raising seven children on welfare who nonetheless bought an expensive luxury,[238] she unintentionally aroused White fears of irresponsible "welfare queens" misusing taxpayer dollars,[239] and Judge Wright's candid desire to help inner-city

236. Fleming, *supra* note 15, at 1392, 1392 n.41 (citing Pierre E. Dostert, *Case Studies in Consumer Fraud*, 25 BUS. LAW. 153, 153 (1969)).

237. *Cf. Williams*, 350 F.2d at 447-48, with Leff, *supra* note 7, at 532-33 (Listing pre-1932 cases protecting "the ignorant, the necessitous, . . . [and] the improvident").

238. *Williams*, 350 F.2d at 448 and Morant, *supra* note 171, at 926 n.208.

239. *See* LÓPEZ, supra note 8, at 56-59 (2014) (Describing Ronald Reagan's repeated references to "Chicago welfare queen with eighty names, thirty addresses, [and] twelve Social Security cards [who] is collecting veteran's benefits on four non-existing deceased husbands"). *See also* Amy L. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269,

Black residents exacerbated those fears.[240] Williams's status and Wright's candor combined to give unconscionability a bad name.[241]

By contrast, consumer protection statutes protect *all* consumers, including middle-class Whites. Begin with statutes of general application, i.e., UDAP statutes. In the study's twenty jurisdictions, not one UDAP provision refers to poverty or race, and only four provisions make a person's "ignorance," "illiteracy" or inability to understand the language relevant to deciding if a contract is unconscionable.[242] Meanwhile, not a single UDAP definition of "consumer" requires membership in a disadvantaged group. Eleven ask how the buyer intends to use the item or service.[243] Six UDAP acts don't define "consumer."[244] One covers non-natural persons, such as partnerships and corporations,[245] and one act does not use the word "consumer."[246]

As for statutes of limited application, some create causes of action for people with certain physical characteristics, such as the elderly,[247] people

306 (1994) (*Williams* played into "raced tropes linking poverty, . . . single parenthood, and lack of capacity with [B]lack women").

240. *See supra* text accompanying notes 135-42.

241. Epstein, *supra* note 8, at 304-05 (Unconscionability lets "[the] poor, unemployed, on welfare, or members of disadvantaged racial or ethnic groups . . . manipulate the system").

242. ARK. CODE § 4-88-102(8) (2021); D.C. CODE 28-3904(r) (2021); IDAHO CODE § 48-603c(2)(a) (2021); KAN. STAT. § 50-627(1) (2021).

243. Seven speak of persons buying, renting, etc., for "personal, family, or household use." *See* ALA. CODE § 8-19-3(2) (2021); CAL. CIV. CODE § 1761(d) (2021); D.C. CODE § 28-3901(a)(2-3) (2021); GA. CODE § 10-1-392(6 & 10) (2021); 815 ILL. COMP. STAT. § 505 /1(e) (2021) (Buying, etc., "for his use or that of a member [in] his household"); IOWA CODE § 714H.2(3 & 4) (2021); and LA. REV. STAT. § 51:1402(3) (2021) ("Consumer transaction" means buying, renting, etc. for "personal, family, or household use."). Four add uses. *See* CONN. GEN. STAT. § 42-110q(a)(3) (2021) (Adding "commercial purposes"); HAW. REV. STAT. § 480-1 (2021) (Adding "personal investments"); IND. CODE § 24-5-0.5-2(a)(1) (2021) (Adding "charitable" and "agricultural" purposes); and KAN. STAT. § 50-624(b) (2021) (Adding "sole proprietor, or family partnership" and "business or agricultural purposes.").

244. *See* ALASKA STAT. §§ 45.50.471 to .561 (2021); ARIZ. REV. STAT. §§ 44-1521 to 1534 (2021); COLO. REV. STAT. § 6-1-102 (2021); DEL. CODE tit. 6, § 2511 (2021); IDAHO CODE § 48-602 (2021); KY. REV. STAT. § 367.110 (2021).

245. *See* FLA. STAT. § 501.203(7) (2021) ("Consumer" includes a"business; firm; association; joint venture; partnership; . . . corporation; and any commercial entity").

246. ME. REV. STAT. §§ 10-1211 to 1216 (2021). For example, § 10-1212(2) refers to the "complainant," and § 10-1213 speaks of a "person likely to be damaged by a deceptive trade practice."

247. *E.g.*, CAL. CIV. CODE § 1770(a)(23) (2021) (Prohibiting home solicitations of senior citizens that involve loans secured by home mortgages); COLO. REV. STAT. § 6-1-729(2-

using "assistive technology" (such as wheelchairs or readers for the blind),[248] and people with hearing difficulties.[249] Others cover transactions normally made only by persons facing imminent financial disaster.[250] A few protect people who speak English poorly or not at all,[251] and people seeking immigration-related services.[252] I found only one—extremely limited—provision that expressly considers race, and it also refers to income.[253] Meanwhile, many statutes of limited application cover transactions normally made by people of some affluence.[254] The vast majority of consumer protection statutes protect *all* consumers, from Ora Lee Williams to Chief Justice John Roberts.[255]

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3) (Requiring referral agency for assisted living facilities to document agency's connections with those facilities and terms of referral agreement); and GA. CODE § 10-1-393(b)(26) (Unlicensed person can't advertise or solicit residents or referrals for assisted living).

248. *E.g.*, GA. CODE §§ 10-1-870 to 875 (2021) ("Assistive Technology Warranties") and §§ 10-1-890 to 895 (2021) ("Motorized Wheelchair Warranties"); IND. CODE §§ 24-5-20-1 to 14 (2021) ("Assistive Device Warranties"); and KAN. STAT. §§ 50-696 to 6,102 (2021) ("Assistive Devices for Major Life Activities").

249. *E.g.*, ALASKA STAT. §§ 08.55.010 to .140 (2021) ("Hearing Aid Dealers"); D.C. CODE §§ 28-4004 to 4007 (2021) ("Hearing Aid Dealers and Consumers").

250. *E.g.*, Colorado Foreclosure Protection Act, COLO. REV. STAT. §§ 6-1-1101 to 1120 (2021) (Homeowners facing foreclosure); and DEL. CODE tit. 6, §§ 2401A to 2439A (2021) (Debt-management service contracts).

251. *See* CAL. BUS. & PROF. CODE § 17538.9(b)(7) (2021) (If advertising, card, or packaging uses language other than English, disclosures must be made in that other language), and D.C. CODE § 28-5303(b) (2021) (Immigrant services provider must give client contract written in English and every other language that provider used in negotiations).

252. *See* COLO. REV. STAT. § 6-1-727(3) (2021) (Unlawful and deceptive trade practice for unlicensed person to practice immigration law, seek or receive advance payment, or represent self as "*notario publico*," immigration consultant, etc.); and D.C. CODE §§ 28-5302 to 5304 (2021) ("Immigration service provider[s]" shall not provide legal representation, misrepresent ability to provide legal help or to get favors from government, or receive advance payments).

253. FLA. STAT. § 501.2079(1)(e) (2021) ("[D]iscrimination" means denying cable or video access to anyone because of race or income in the local area).

254. Examples include gym and spa memberships, *e.g.*, ARK. CODE §§ 4-94-101 to 108 (2021), and COLO. REV. STAT. §§ 6-1-704 to 705 (2021); time share purchases, CONN. GEN. STAT. §§ 42-103cc to 103ddd (2021); land bought for retirement or recreation, KY. REV. STAT. §§ 367.470 to .486 (2021); and residential solar panels, IDAHO CODE §§ 48-1801 to 1809 (2021). Since many UDAP statutes say a "consumer" is someone buying for "personal, household, or family" use, those statutes cover buyers of luxury cars and yachts.

255. *See* Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print,* ABA J. (Oct. 20, 2010, 12:17 PM), http://www.aba journal.com/news /journal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_ computer_ fine_print (last visited Apr. 6, 2015).

Four UDAP statutes actually protect *more* than just consumers. They cover natural persons buying, renting, etc., for "agricultural," "business," or "commercial purposes," as well as commercial entities.[256] Rather than providing special protections to disadvantaged groups, these statutes help entities who do not seem to need protection.

2. Courts Treat Unconscionability as a Defense, While Many Legislatures Have Made It a Cause of Action

Courts,[257] the Restatement (Second) of Contracts,[258] and U.C.C.[259] use unconscionability as a defense. However, ten of the twenty legislatures in this study have adopted statutes that make unconscionability a cause of action.[260] This expands the doctrine's protection by compensating

256. CONN. GEN. STAT. § 42-110q(a)(3) (2021) ("Consumer goods" include those purchased for "commercial purpose[s]"); FLA. STAT. § 501.203(7) (2021) ("Consumer" includes "business; firm; association; joint venture;. . . partnership; corporation; [and] any commercial entity"); IND. CODE § 24-5-0.5-2(a)(1) ("Consumer" includes those buying for "agricultural [purposes]"); KAN. STAT. § 50-624(b) (2021) (Consumer transactions include individual, husband and wife, sole proprietor or family partnership buying for "business or agricultural purposes").

257. Sanders v. Colonial Bank of Ala., 551 So.2d 1045, 1045 (Ala. 1989); OTO, L.C.C. v. Kho, 447 P.3d 680, 689 (Cal. 2019), *cert. denied*, ___ U.S. ___, 141 S.Ct. 85 (Memo) (2020); Hirsch v. Woermer, 195 A.3d 1182, 1188 (Conn. App. Ct. 2018) (Special defense), *cert. denied by* Hirsch v. Woermer, 195 A.3d 384 (Conn. 2018) (Table) ''; Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111, 113 (D.C. Ct. App. 1971); Northside Bank of Miami v. La Melle, 380 So.2d 1322, 1323 (Fla. 3rd Dist. Ct. App. 1980) (Affirmative defense); Fed. Land Bank of Omaha v. Steinlage, 409 N.W.2d 173, 174 (Iowa 1987); Strausberg v. Laurel Healthcare Providers, LLC, 304 P.3d 409, 418-19 (N.M. 2013) (Affirmative defense); Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 369 (N.C. 2008) (Affirmative defense).

258. RESTATEMENT (SECOND) OF CONTRACTS § 208 (Court "may refuse to enforce" unconscionable contract).

259. UCC § 2-302, cmt. 2 (Court "may refuse to enforce the contract as a whole if it is permeated by the unconscionability . . . .").

260. These are ALA. CODE § 8-19-5(27) (2021) (In "any trade or commerce," unlawful and deceptive acts or practices include "any other unconscionable, false, misleading, or deceptive act or practice . . . ."); ARK. CODE § 4-88-107(a)(8) (2021) ("Deceptive and unconscionable trade practices made unlawful" include "Knowingly taking advantage of a consumer who is reasonably unable to protect his or her interest because of . . . infirmity; [i]gnorance; [i]lliteracy; [i]nability to understand language . . . or [a] similar factor"); CAL. CIV. CODE § 1770(a)(19) (2021) (Unfair or deceptive acts or practices include "Inserting an unconscionable provision in the contract."); COLO. REV. STAT. § 6-1-105(1)(kkk) (2021) (Deceptive trade practices include knowingly or recklessly engaging in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice); D.C. CODE § 28-3904(r) (2021) (Violation of chapter to make or enforce unconscionable terms

consumers injured by an unconscionable clause or contract,[261] such as Williams's lost use of her repossessed goods.[262] It protects consumers whose partial payments of an unconscionable price exceed the goods' market value[263] or who incur costs by partially performing other contractual

or provisions); FLA. STAT. § 501.204(1) (2021) (Unlawful to use "Unfair methods of [contracting], [or] unconscionable acts or practices . . . in . . . any trade or commerce."); IDAHO CODE § 48-603(18) (2021) (Unlawful to engage "in any unconscionable method, act, or practice in the conduct of trade or commerce . . . ."); IND. CODE § 24-5-0.5-1(b)(1), (2) (2021) (Deceptive Consumer Sales Act is intended to "simpl[y], clarify, and modernize the law governing deceptive and unconscionable [trade] practices" and to protect consumers from those practices) and IND. CODE § 24-5-0.5-10(b) (2021) (Supplier's "unconscionable" act is deceptive act banned by statute); KAN. STAT. § 50-627(a) (2021) (Consumer Protection Act prohibits suppliers from committing "any unconscionable act or practice in connection with a consumer transaction . . . ."); and KY. REV. STAT. § 367.170 (2021) (Barring "Unfair, false, misleading, or deceptive acts" in "any trade or commerce," and then saying that "unfair shall be construed to mean unconscionable.").

261. *See* ALA. CODE. § 8-19-10(a)(1-3) (2021) (Allowing actual damages or $100, whichever is greater, for violations of § 8-19-5(27)); ARK. CODE § 4-88-113(a & f) (2021) (Awarding restitution and actual damages for violation of § 4-88-107(a)); CAL. CIV. CODE § 1770(a) (2021) (Awarding actual damages for violation of § 1770(a)(19)); COLO. REV. STAT. § 6-1-113(2) (2021) (Actual damages or $500); D.C. CODE § 28-3905(k)(2)(A) (2021) (Awarding actual damages or $1,500, whichever is greater); FLA. STAT. § 501.211(2) (2021) (Awarding actual damages for violation of § 501.204(1)); IDAHO CODE § 48-608(1) (2021) (Allowing restitution and actual damages or up to $1,000 for violation of § 48-603(18)); IND. CODE § 24-5-0.5-4(a & d) (2021) (Actual damages or restitution for violation of § 24-5-0.5-10(b)); KAN. STAT. § 50-634(b) (2021) (Actual damages for violation of § 50-627(a)); and KY. REV. STAT. § 367.200 (2021) (Restitution for violation of § 367.170), § 360.210 (2021) (Out-of-pocket losses), and § 367.220(1) (2021) (Actual damages).

262. Fleming, *supra* note 15, at 1432. Today, the District of Columbia's § 28-3905(k)(2)(A) (2021) would let Williams collect actual damages or $1,500, whichever is greater.

263. In Toker v. Westerman, 274 A.2d 78, 79-81 (N.J. Dist. Ct. 1970), the consumers had paid $655.85, more than the market value ($350-400) of a refrigerator priced at $1,229.76. Because unconscionability is only a defense, the court could only find that the reasonable value of the refrigerator was exactly $655.85. This relieved the consumers from future payments but let the seller keep about $250 in overpayments.

duties[264] (as well as costs of unbargained-for reliance).[265] It protects distributorships and franchisees who have to buy enough of the manufacturer's goods to maintain an inventory or use cups, sacks, etc. bearing the franchisor's logo. When a manufacturer or franchisor terminates the contract without buying back these unsold materials, the distributor or franchisee often can resell them only at a loss.[266] A cause of action also deters future misconduct. Many statutes let courts impose punitive damages and/or civil penalties,[267] just as the Puritans fined Robert Keayne,[268] and many let courts award attorney fees,[269] giving consumers access to

264. In Stoll v. Chong Lor Xiong, two Laotian refugees (with three years of schooling) agreed to pay $2,000 an acre for a chicken farm. Stoll v. Chong Lor Xiong, 2010 OK CIV APP 110, ¶¶ 4, 6, 241 P.3d 301, 302. At the last minute, seller added a clause, without explanation, that required buyers (a) to provide him all the droppings that the chickens produced for the next *thirty* years and (b) to build a 43' by 80' shed to store the droppings. *Id*. at ¶ 12, 304. The seller testified that thirty years of droppings were worth $3,325.12 per acre as fertilizer, doubling the purchase price. *Id*. at ¶ 18, 305. The court found the clause unconscionable. *Id.* at ¶ 19, 306. *If* the buyers already had delivered droppings or had no use for the 3,400 sq. ft. building, unconscionability as a cause of action would have let them recover the droppings' value and the cost of construction.

265. In Barco Auto Leasing Corp. v. PSI Cosmetics, Inc., 478 N.Y.S. 2d 505, 507-08, 512-13 (N.Y. Civ. Ct. 1984), a small business rented a car for its salesman to drive to a meeting with a potential client. The car broke down, the sales rep missed the meeting and lost the contract, and the small business sued the rental company, which invoked a fine print disclaimer of *all* warranties. The court refused to allow a suit for repair costs or for the lost contract.

266. *See* Cowin Equipment Co. v. Gen. Motors Corp., 734 F.2d 1581, 1582, 1583 (11th Cir. 1984) (Rejecting buyer's claim for equipment resold at a loss and rejecting idea that unconscionability's "shield can equitably be beaten into a sword of restitution"); W.L. May Co. v. Philco-Ford Corp., 543 P.2d 283, 285-86, 287 n.2 (Or. 1975) (Distributorship failed to show unconscionability, so court need not decide if § 2-302 allows action for damages).

267. ALA. CODE. § 8-19-10(a)(2) (2021) (Court may award up to three times actual damages for violations of § 8-19-5(27)), and § 8-19-11(b) (2021) (Civil penalty up to $2,000 for knowing violation of § 8-19-5(27)); ARK. CODE ANN. § 4-88-113(a)(3) (2021) (Civil penalty up to $10,000); CAL. CIV. CODE § 1780(a)(4) (2021) (Punitive damages for violation of § 1770(a)(19)); D.C. CODE § 28-3905(k)(2)(C) (2021) (Punitive damages) and 3909(b)(1-2) (Civil penalty up to $1,000 per violation of § 28-3904(r)); FLA. STAT. § 501.2077 (2021) (Civil penalty for violation of § 501.204(1)); IDAHO CODE § 48-606(1)(e) (Civil penalty up to $5,000); IND. CODE § 24-5-0.5-4(a) (2021) (Treble damages for willful violation of § 24-5-0.5-10(b) and civil penalties for violations of § 24-5-0.5(g)-(h)); KAN. STAT. § 50-636(a) (2021) (Up to $10,000 in punitive damages or civil penalty per violation).

268. WINTHROP, *supra* note 5, at 306-07.

269. ALA. CODE. § 8-19-10(a)(3) (2021) (Attorney fees for violations of § 8-19-5(27)) and § 8-19-11(b) (2021); ARK. CODE § 4-88-113(f) (2021) (Attorney fees for violating § 4-88-107(a) (2021)); CAL. CIV. CODE § 1780(e) (2021) (Attorney fees for violating § 1770(a)(19)); COLO. REV. STAT. § 6-1-113(2)(b) (2021) (Attorney fees for violating § 6-1-

justice.[270] These punitive damages and attorney fees give unconscionability real teeth.

3. Courts Require Procedural *and* Substantive Problems, but Legislatures Overwhelmingly Require a Problem With *Either*, Not Both

This area presents a tremendous difference between courts and legislatures: the former requires both procedural and substantive unconscionability, while the latter does not.

The judiciary's two-part test comes from *Williams*, which requires **"**an absence of meaningful choice on the part of one of the parties *together* with contract terms which are unreasonably favorable to the other party."[271] The first element involves "gross inequality of bargaining power" or the "manner in which the contract was entered";[272] the second—terms "unreasonably favorable to the other party"—requires a "one-sided bargain" that is "so extreme" as to be "commercially unreasonable."[273] Professor Leff dubbed these elements as "procedural" and "substantive" unconscionability.[274] Despite U.C.C. § 2-302(1)'s failure to state *any* elements[275] and the equivocation of the Restatement (Second) of Contracts,[276]

105(kkk)); D.C. CODE §§ 28-3905(k)(2)(B) (2021) (Attorney fees for private actions) and 3909(b)(4) (Attorney fees for state); FLA. STAT. § 501.2105 (2021) (Attorney fees for prevailing party in action under § 501.204(1)); IDAHO CODE §§ 48-608(5) (2021) (Attorney fees for private actions) and 606(1)(f) and -607 (Attorney fees for lawsuits by state); IND. CODE § 24-5-0.5-4(a) (2021) (Attorney fees to prevailing party in suit on § 24-5-0.5-10(b)); KAN. STAT. § 50-634(e) (2021) (Attorney fees for prevailing party (except attorney general) for violating § 50-627(a)); KY. REV. STAT. § 367.220(3) (Attorney fees to prevailing party).

270. Ora Lee Williams depended on the kindness and professionalism of volunteer lawyers from the D.C. Bar Association's Legal Assistance Office. Fleming, *supra* note 15, at 1408.

271. *Williams*, 350 F.2d at 449 (emphasis added). As discussed earlier, Judge Wright supported this rule with citations to four cases, but while they discussed procedural and substantive unconscionability, none of them required both as elements. *See supra* note 213.

272. *Williams*, 350 F.2d at 449.

273. *Id.* at 450.

274. Leff, *supra* note 7, at 487. His language is now "fashionable." FARNSWORTH & WOLFE, *supra* note 16, § 4.29, at 4-207.

275. The text of § 2-302(1) uses "unconscionable" four times without hinting at its meaning. Comment 1 speaks of clauses "so one-sided as to be unconscionable" and preventing "oppression and unfair surprise," but it does not say if those are elements or factors. Comment 1 also cites, with little explanation, ten cases from which courts are supposed to extract meaning.

276. RESTATEMENT (SECOND) OF CONTRACTS § 208's text is as empty of definitions as § 2-302(1). Comment c ("Overall imbalance" of terms) and d ("Weakness in the bargaining

law review articles say *Williams*'s two-part test dominates the doctrine.[277] Treatises are less sure.[278] This hesitation may not be significant. Two of

process") parallel *Williams*'s *Williams'* concern with procedure and substance, but the latter comment jumbles the two tests and uses the word "may" five times in three sentences.

277. Frank P. Darr, *Unconscionability and Price Fairness*, 31 HOUS. L. REV. 1819, 1820 (1994) (Courts "generally" require both elements); DiMatteo and Rich, *supra* note 1, at 1073 ("[G]reat majority of courts" use two-part test); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 477 (1995) (*Williams*'s *'*test is "probably the most often-cited definition of unconscionability); Russell, *supra* note 1, at 972 (Procedural and substantive unconscionability are "standard black-letter law test"); Stempel, *supra* note 15, at 841 ("Many, and perhaps most courts" require both elements).

278. One treatise says *Williams*'s *'*test is "probably" the "most durable" definition of "unconscionable." FARNSWORTH & WOLFE, *supra* note 16, § 4.29, at 4-207.

A second says that "some" cases require both procedural and substantive unconscionability. CORBIN, *supra* note 16, § 29.1, at text accompanying n.5 (citing Marin Storage & Trucking, Inc. v. Benco Contracting and Eng'g, 89 Cal. App. 4th 1042, 1052-53, 107 Cal. Rptr. 2d 645, 653-54 (2001), Hubscher & Son, Inc. v. Storey, 578 N.W.2d 701, 703 (Mich. App. 1998), and the citations in Prince, *supra* note 277, at 472 n.66); CORBIN § 29.4 ("[S]ome courts have said that both elements *must* ordinarily be present" (citing Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988)). However, the treatise also refers to cases in which a sufficiently outrageous term alone was enough. CORBIN, § 29.4, n.8 (citing Gillman, 534 N.E.2d at 828, and Maxwell v. Fid. Fin. Services, Inc., 907 P.2d 51, 57 (Ariz. 1995) (Perhaps majority of courts require both procedural and substantive unconscionability, but "[o]ther courts" have only required one or the other)).

WHITE & SUMMERS say "most courts seem to require a certain quantum" of both procedural and substantive problems, WHITE & SUMMERS, *supra* note 1, § 5-7, at 234, but they also say that courts have not said if prominence or requiring the consumer to initial a substantively unconscionable contract term can save it. *Id.* at 234-35.

A fourth treatise avoids saying that *Williams*'s' two-part test is the majority rule. *See* WILLISTON & LORD, *supra* note 1, § 18.9, text accompanying note 1 ("Perhaps most courts today consider two aspects as central"); § 18:10, text accompanying note 2 ("It has been said" that unconscionability uses a two-part test); § 18.10, text accompanying note 3 ("It has often been suggested" that procedural and substantive abuse are required); § 18:10, text accompanying note 7 ("Many courts, perhaps a majority," require both procedural and substantive unconscionability, quoting Maxwell v. Fid. Fin. Services, Inc., 907 P.2d 51, 57 (Ariz. 1995)); and § 18.10 (Procedural unconscionability must culminate in harsh or unreasonable terms "in the view of perhaps most jurisdictions."). However, the treatise discusses many cases that use the two-part test, *see, e.g.*, § 18:9 n.1 (citing *Williams*, 350 F.2d at 449); § 18.10 n.2 (citing Desiderio v. Nat'l Ass'n. of Securities Dealers, Inc., 191 F.3d 198, 207 (2d Cir. 1999) (Quoting *Williams*'s *'* two-part test)); Telecom Int'l Am., Ltd. v. AT&T Corp., 280 F.3d 175, 194 (2d Cir. 2001) (Unconscionability requires absence of meaningful choice and unreasonably favorable terms); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 782-83 (9th Cir. 2002) (California law requires procedural and substantive unconscionability, though they "need not both be present in the same degree"); Scovill v. WSYX/ABC, 425 F.3d 1012, 1017 (6th Cir. 2005) (Ohio law requires substantive and procedural unconscionability); United Companies Lending Corp. v. Sargeant, 20 F.

the competing approaches are versions of the classic procedural–substantive requirements.[279] Only a handful of states use factor-based tests,[280] or allow *either* procedural or substantive unconscionability to suffice.[281] As for legislation, of the 3,272 primary statutory provisions in this study:

● only 11% (356) require a problem with *both* the procedure by which the contract was made *and* the substance of the contract's terms;

● 66% (2,166) require a problem with only the *procedure* by which the contract was made, i.e., either lack of bargaining power or the use of sharp practices; and

● 20% (653) require a problem with only the *substance* of the contract's terms.[282]

In other words, 2,819 of 3,272 statutory provisions (86%) require the party attacking a contract or clause to prove *either* a procedural *or* substantive problem, but *not both*. In sixteen of twenty jurisdictions, more

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Supp. 2d 192, 206 (D. Mass. 1998) (Massachusetts law requires courts to give "particular attention" to presence of unfair surprise and oppressiveness to allegedly disadvantaged party").

279. The sliding scale approach requires both elements, but strong evidence of one can make up for weak evidence of the other. *E.g.*, Baltazar v. Forever 21, Inc., 367 P.3d 6, 12-13 (Cal. 2016); Elite Logistics Corp. v. Hanjin Shipping Co., 589 F. App'x 817, 818 (9th Cir. 2014); and Hampden Coal, LLC v. Varney, 810 S.E.2d 286, 295 (W. Va. 2018).
A few courts allow extremely unfair terms create a presumption of procedural problems. *E.g.*, Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908-10 (N.M. 2009); Brower v. Gateway 2000, Inc., 246 A.D. 246, 254, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998); and Maxwell v. Fid. Fin. Services, Inc., 907 P.2d 51, 59 (Ariz. 1995).

280. CORBIN, *supra* note 16, § 29.4, text accompanying n.20(citing Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 906-07 (Kan. 1976) (Listing ten factors); Davis v. M.L.G. Corp. 712 P.2d 985, 991 (Colo. 1986) (Listing seven factors); Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 646 (10th Cir. 1991) (Listing three factors); and Vann v. First Cmty. Credit Corp., 834 So.2d 751, 753 (Ala. 2002) (Listing four factors)).

281. *See* Wash. Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 264 (5th Cir. 2004) (Mississippi law says contract can be either procedurally or substantively unconscionable); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 263 (Ill. 2006) (citing Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006) (Unconscionability may be based on either procedural or substantive unconscionability); and Corbova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009) (No requirement of both procedurally and substantive problems).

282. Appendix A, Elements–All Jurisdictions. Of the remaining primary statutory provisions, only 0.15% (5) use factors, and 2.9% (92) do not fit in any category.

than 80% of the primary statutory provisions took this approach.[283]

In short, courts require two elements; legislatures require one. This tremendously reduces the burdens placed on the party invoking unconscionability. It effectuates a legislative ban on waivers of statutory rights[284] even if the clause is in average-sized type or if the consumer has a college degree. This is important in light of extensive literature showing that mandatory disclosure requirements do not work.[285] Similarly, a consumer who succumbs to a bait-and-switch scheme can escape liability even if the more expensive item is sold at its market value. Using this one-element approach is the best way that courts could revive unconscionability.

4. Courts and Legislatures Use Different Language to Describe Impermissible Contracts and Clauses

a. The word "unconscionable"

It's simple. Courts say "unconscionable." Legislatures don't. Only 139 (4.2%) of the 3,272 primary statutory provisions in this study use the

283. *Id.* The four exceptions are Connecticut (79%), Delaware (56%), the District of Columbia (76%), and Georgia (71%). *Id.* To be clear, not a single provision used the words "procedural" or "substantive." *See infra* Table 1, Legislative Use of Unconscionability Phrases, text accompanying n.232. Instead, the study looked at the facts each provision discussed. A statute that banned confusing fine print and said nothing about unfair terms was counted as "PROC. Trickery"; a law requiring a sales agent to speak in a customer's native language (without addressing unfairness) became "PROC. Bargaining Power." A statute that banned a term but said nothing about the buyer's characteristics or the way the deal was made fell under "SUBST." Provisions that required procedural *and* substantive problems were "BOTH."

284. *See, e.g.*, GA. CODE § 10-1-797 (2021) (Invalidating waivers of statutory rights).

285. Two scholars go so far as to say that mandatory disclosure rules "regularly fail[] in practice, [and that] failure is inevitable." Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011). *See also id.* at 667-72 (describing empirical studies of such failures); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747 (2014) (Idea that few people read small print, warning labels, or "Terms and Conditions" links "is no longer controversial" and "disclosures do not affect consumer behavior."); and Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY 283, 286, 289 (Jane K. Winn ed., 2006) (describing a survey in which only 4% of law students said they read standard on-line form terms).

term.[286] Eleven uses were in statutes of general application; the rest were in statutes that applied to specific types of contracts.

Begin with the eleven statutes (in ten states) that make unconscionability a cause of action in all trade and commerce.[287] Seven do not define the term,[288] leaving courts free to provide their own definitions. Three of them use factors,[289] allowing courts to invalidate a contract for problems with either procedure or substance, not both. Only one statute requires proof of both procedural and substantive problems.[290]

What about statutes of limited application that use the word "unconscionable"? These include provisions that prohibit specific conduct (such as a non-lawyer preparing a trust document)[291] or cover specific types of contracts (such as hiring a credit repair service).[292] Of 139 such primary statutory provisions, 120 (86%) did not require *both* procedural and

286. This excludes non-substantive uses, such as statements of legislative intent, *e.g.*, COLO. REV. STAT. § 6-1-1102 (2021) (General assembly finds too many homeowners in financial distress are vulnerable to unconscionable practices), and statutes that used "unconscionable" in providing remedies, *e.g.*, COLO. REV. STAT. § 5-10-801 (2021) (State official shall investigate and prosecute complaints of unconscionability).

287. *See supra* text accompanying note 259.

288. ALA. CODE. § 8-19-5(27) (2021) (Unlawful and deceptive acts or practices include "any other unconscionable, false, misleading, or deceptive act or practice."); ARK. CODE § 4-88-107(a)(10) (2021) (Unlawful trade practice to engage in "any other unconscionable, false, or deceptive act"); CAL. CIV. CODE § 1770(a)(19) (2021) (Unfair or deceptive acts or practices include "Inserting an unconscionable provision in the contract."); COLO. REV. STAT. § 6-1-105(1)(kkk) (2021) (Deceptive trade practices include knowingly or recklessly engaging in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice); FLA. STAT. § 501.204(1) (2021) (Unlawful to use "unconscionable acts or practices . . . ."); IDAHO CODE § 48-603(18) (2021) (Unfair and deceptive acts include any unconscionable method, act, or practice); KY. REV. STAT. § 367.170 (2021) (Barring unfair, misleading or deceptive acts or practices in any trade or commerce and declaring that "unfair shall be construed to mean unconscionable.").

289. *See* D.C. CODE § 28-3904(r) (2021) (Court should consider "the following, and other factors:" seller's knowledge consumer could not pay in full or would not receive substantial benefits, gross disparity between contract and market price, requiring purchase of credit insurance, or taking knowing advantage of consumer's inability to protect self because of age, infirmity, ignorance, or inability to speak English); IDAHO CODE § 48-603c(2) (2021) (To determine unconscionability, court should consider if seller knowingly took advantage of consumer's infirmity, ignorance, etc., contract price grossly exceeded market price, seller knowingly induced consumer to enter excessively one-sided deal, or seller's conduct "would outrage or offend the public conscience"); and KAN. STAT. § 50-627 (2021) (Court "shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following" seven factors).

290. IND. CODE § 24-5-0.5-10(b) (2021).

291. *See* ARK. CODE § 4-88-107(a)(9) (2021).

292. *See* ARK. CODE § 4-91-202(b-f, h) (2021).

substantive problems. For example, Arkansas bars the use of bait-and-switch tactics or displaying a false telephone number on a residential caller identification system, without requiring evidence that the terms of any resulting agreement were unfair.[293]

In short, the few statutes that use the word "unconscionable" do *not* require two elements.

b. Phrases commonly associated with unconscionability

Judges writing about unconscionability use phrases like "absence of meaningful choice," "bargaining power," "gross inequality," "oppression," "procedural unconscionability," and "substantive unconscionability."[294] The 3,272 primary statutory provisions in this study used those words only thirty-seven times. Here's the breakdown:

293. *See* ARK. CODE §§ 4-88-107(a)(5) and (11) (2021), respectively.

294. *See Williams*, 350 F.2d at 449 (discussing "meaningful choice," "bargaining power," and "gross inequality"); UCC § 2-302, cmt. 1 (referring to "oppression" and "unfair surprise"); and Leff, *supra* note 7, at 487 (Courts require both "procedural unconscionability" and "substantive unconscionability").

TABLE 1: LEGISLATIVE USE OF UNCONSCIONABILITY PHRASES

***n* = 3,272**

PHRASE	**USES**
"Procedural unconscionability"	= 0
"Bargaining power," "takes advantage of," "inability to understand," etc.	= 10
[Absence of] "Meaningful choice"	= 4
"Reasonable opportunity to understand"	= 2
"Substantive unconscionability"	= 0
"Excessive," "one-sided," "gross disparity" in value /consideration, "one-sided," "unfair"[295]	= 17
"Reasonable opportunity to present evidence" re commercial setting	= 5

Since legislatures don't use the language of unconscionability, what do they use?

c. The legislative focus on definite, objective, and specific words

Judicial phrases surrounding unconscionability are abstract and subjective. Legislatures use definite, objective, and specific words, as shown by this Alabama statute:

ALABAMA CODE § 8-19-5. UNLAWFUL TRADE PRACTICES[296]
The following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:
1. Passing off goods or services as those of another, provided that this section shall not prohibit the private labeling of goods or services.

295. I did not include the phrase "unfair and deceptive acts and practices."
296. For reasons of space, I omitted § 8-19-5(11-27) (2021).

2. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.
3. Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by another, provided that this section shall not prohibit the private labeling of goods or services.
4. Using deceptive representations or designations of geographic origin in connection with goods or services.
5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.
6. Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, secondhand, or altered to the point of decreasing their value or rendering the goods unfit for the ordinary purpose for which they were purchased, provided that this subdivision shall not apply to new goods which have been reconditioned, reclaimed, or repaired and such fact is disclosed to the purchaser.
7. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
8. Disparaging the goods, services, or business of another by false or misleading representation of fact.
9. Advertising goods or services with intent not to sell them as advertised.
10. Advertising goods or services with intent not to supply reasonably expectable public demand unless the advertisement discloses a limitation of quantity.

Except for "reasonably expectable public demand," every word in those provisions can be used in a jury instruction without further definition. The adjectives are definite ("deteriorated," "false," and "deceptive"), not vague ("gross," "one-sided," or "substantial"). There are no balancing tests or factors (which always involve subjectivity). The overwhelming majority of the statutory provisions in the study follow this approach.

d. The significance of these differences

These differences between judicial and legislative language prevent direct comparisons between unconscionability decisions and consumer protection statutes. One can't say that *x*% of courts require a "gross" disparity in values exchanged while *y*% of statutory provisions require merely a "moderate" disparity, or that case law requires an "absence" of

meaningful choice while statutes require only a "substantial reduction." One can say only what percentage of legislatures require problems of some sort with procedure, with substance, or both.

The legislative approach makes it far easier for lawyers to assess and prove a client's case. They need not guess at what constitutes "an absence of meaningful choice" or "gross disparity in bargaining power." Instead, they only have to decide if they can satisfy phrases like Alabama's "[p]assing off goods or services as those of another" and "[c]ausing confusion or misunderstanding" as to the source or sponsorship of goods or services. This use of general phrases is not the judiciary's fault: when melding cases with a wide variety of facts, courts must generalize. But the legislative approach makes bringing and winning cases easier for consumers.

5. Some Courts Use Factors to Determine Unconscionability; Legislatures Don't

a. The use of factors to invalidate contracts or clauses

The courts of six states in this study use factors to determine if a contract or clause is unconscionable,[297] as do three states outside of it.[298] Only five primary statutory provisions out of 3,272 (0.15%) do so. Three are

297. *See* Vann v. First Cmty. Credit Corp., 834 So.2d 751, 753 (Ala. 2002) (Courts use four factors); Vockner v. Erickson, 712 P.2d 379, 382-83 (Alaska 1986) (affirming trial court's use of "numerous factors"); Davis v. M.L.G. Corp., 712 P.2d 985, 991 (Colo. 1986) (Seven factors) and Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 646 (10th Cir. 1991) (quoting Davis v. M.L.G. Corp.); NEC Technologies, Inc. v. Nelson, 478 S.E.2d 769, 771-72 (Ga. 1996) (providing "non-inclusive list of some factors courts have considered" re procedural unconscionability); Homeland Energy Solutions, LLC v. Retterath, 938 N.W.2d 664, 704 (Iowa 2020) (Court must consider "factors of 'assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness'"); Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 906-07 (Kan. 1976) (Listing ten factors), and John Deere Leasing Co. v. Blubaugh, 636 F.Supp. 1569, 1572-74 (D. Kan. 1986) (quoting *Wille*).
The U.S. Fourth Circuit Court of Appeals has discussed six factors, without attributing them to a particular state. *See* Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989) ("The factors determining 'unconscionability' are various") (quoting Kaplan v. RCA Corp.), 783 F.2d 463, 467 (4th Cir. 1986).

298. *See* Tedesco v. Home Savings Bancorp., Inc., 2017 MT 304, ¶ 33, 407 P.3d 289, 298 (Courts use five listed factors); Coady v. Cross Country Bank, Inc., 729 N.W.2d 732, 741 (Wis. 2007) (Courts should consider at least nine factors to determine presence of procedural unconscionability); and Kindred Healthcare Operating, Inc., v. Boyd, 2017 WY 122, ¶ 31, 403 P.3d 1014, 1023 (Presence of procedural unconscionability depends on six factors).

statutes of general application.[299] Two others apply to quite limited situations.[300] Two limited statutory provisions use "factors" without displacing the traditional two-element test.[301] In general, legislatures don't like factors.

b. Legislative use of factors to impose liability on those who injure the elderly or disabled

However, eight legislatures *do* use factors for a purpose unknown to

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299. D.C. CODE § 28-3904(r) (2021) tells courts to consider (1) lender's knowledge of "no reasonable probability" the borrower would repay in full, (2) the consumer's inability to "receive substantial benefits" from the transaction, (3) "gross disparity" between contract and market prices, (4) in credit sales, insurance charges that would make the sale, "considered as a whole, unconscionable," and (5) taking "knowing[] . . . advantage" of consumer's inability to protect self because of "age, . . . infirmities, ignorance, . . . inability to understand . . . language, . . . or similar factors."
IDAHO CODE § 48-603c(2) (2021) bars unconscionable terms or conduct "in any trade or commerce" based on whether (a) violator took advantage of consumer's inability to protect self "because of physical infirmity, ignorance, illiteracy, inability to" under contract language, "or similar factor," (b) the price "grossly exceeded" price at which similar goods /services were available to similar persons, (c) transaction was "excessively one-sided," and (d) seller's conduct "would outrage or offend the public conscience, as determined by the court."
Finally, KAN. STAT. § 50-627 (2021) requires courts to consider if (1) the supplier took advantage of "consumer's physical infirmity, ignorance, illiteracy, inability to understand the language, . . .or similar factor," (2) the price was "grossly [excessive]," (3) the consumer could not "material benefit" from the deal, (4) there was "no reasonable probability" that consumer could pay in full, (5) the terms were "excessively one sided," (6) supplier made a "misleading statement of opinion" on which consumer was likely to rely, and (7) supplier tried to exclude or modify its implied warranties or the consumer's remedies in a way prohibited by § 50-639. Meanwhile, Kansas courts use ten "factors or elements." *Wille*, 549 P.2d at 906-07, and *John Deere Leasing Co.*, 636 F. Supp. at 1572-74.

300. KAN. STAT. § 50-625(c) (2021) (Consumer's competence, presence of deception or coercion, nature and extent of legal advice received by consumer, and the value of the consideration "are relevant" when evaluating waiver of rights in settlement agreement); and KAN. STAT. § 50-6,106(a) & (b)(1) (2021) (Unconscionable to profiteer from disaster, and court shall consider "all relevant circumstances including, but not limited to," whether price "grossly exceed[s]" price charged the business day before disaster, "grossly exceeded" market value in trade areas, or was justified by extra costs caused by disaster).

301. CAL. CIV. CODE § 1770(a)(24)(B)(iii) (2021) uses factors to determine the reasonability of a fee for helping a consumer apply for government benefits; and CONN. REV. STAT. § 42-235(d)(1) (2021) uses factors to express the judicial two-element test (To determine if sale of goods during a severe weather emergency is unconscionable, a court shall consider if the price was "unconscionably excessive," if supplier used "unfair leverage or unconscionable means," or "a combination of both factors").

the common law: holding sellers monetarily liable, via a civil penalty, for violating a consumer protection statute in a transaction involving an elderly or disabled person.[302] California also allows elderly or disabled consumers to recover punitive damages.[303] All of these statutes tell courts to consider the elderly or disabled person's vulnerability because of infirmities and illiteracy. However, they also look at things that courts do not. Six statutes say the victim's economic injury (such as the loss of retirement funds or a home), the imposition of encumbrances on homes or wages, and the loss of a job should affect the size of a civil penalty.[304] Six say judges should consider the stronger party's disregard for the victim's rights (whatever that may mean).[305] And six require judges to consider the victim's "emotional damages" or "mental or emotional anguish," a concept rare in contracts.[306] Again, these statutes do *not* use factors to find a deal unconscionable; they use factors to provide additional remedies that protect the elderly and the disabled.

6. Legislatures Have Reduced the Role of Bargaining Power and Have Paid Little Attention to the Evidence That Courts Use to Find Bargaining Problems

a. Unconscionability, the poor, and the uneducated

302. *See* ARK. CODE § 4-88-202 & 203 (2021) (Elderly or disabled); CAL. CIV. CODE § 1780(b)(1) (2021) (Senior citizens or disabled persons) and CAL. BUS. & PROF. CODE § 17206.1(c) (2021) (Elderly or disabled people); DEL. CODE tit. 6, §§ 2581 & 2582 (2021) (Elder person or person with disability); GA. CODE § 10-1-851 (2021) (Elder or disabled person); 815 ILL. COMP. STAT. § 505/7(c) (2021) (Person 65 or older); IOWA CODE § 714.16A(1) (2021) (Older person); KAN. STAT. §§ 50-677 & 678 (2021) (Elderly or disabled persons); and LA. STAT. § 51:1407(D) (2021) (Elder or disabled persons).

303. CAL. CIVIL CODE § 1780(b)(1) (2021).

304. ARK. CODE §§ 4-88-203 & 204 (2021); CAL. CIV. CODE § 1780(b)(1) and § 17206.1(c) (2021); DEL. CODE tit. 6, §§ 2581 & 2582 (2021); GA. CODE § 10-1-852 (2021); KAN. STAT. §§ 50-677 & 678 (2021); and LA. STAT. § 51-1407(C)-(D) (2021).

305. *See* ARK. CODE §4-88-203 & 204 (2021); DEL. CODE tit. 6, §§ 2581 & 2582 (2021); GA. CODE § 10-1-852 (2021); 815 ILL. COMP. STAT. § 505/7c (2021); IOWA CODE § 714.16A(2) (2021); and KAN. STAT. § 50-676(a)-(b) & 677 (2021).

306. *Cf.* FARNSWORTH & WOLFE, *supra* note 16, § 12.18, 12-194 to 195 (Courts "generally" deny recovery for emotional disturbance or mental distress, unless "serious emotional disturbance was a particularly likely result" of the breach), with ARK. CODE § 4-88-203(4)(A) (2021) (Courts should consider substantial emotional damage); CAL. CIVIL CODE § 1780(b)(1)(A) (2021) (Same) and § 17206.1(c)(3) (Same); DEL. CODE tit. 6, § 2582(4)(a) (2021) ("[M]ental or emotional anguish"); GA. CODE § 10-1-852(3) & (4)(a) (2021) (Substantial emotional damage or "mental or emotional anguish"); KAN. STAT. § 50-678(c) & (d)(1) (2021) (Same); and LA. STAT. § 51:1407(D)(3) & (4)(a) (2021) (Same).

Unconscionability has long been associated with the poor, the uneducated, and other people perceived to be unable to protect themselves.[307] Judge Wright's description of Ora Lee Williams as a single mother raising seven children on welfare[308] is difficult to forget, especially for those with stereotyped images of the District of Columbia's low-income population.[309] Today, courts look at the personal characteristics of the person claiming unconscionability.[310]

b. Legislative lack of interest in bargaining power

In contrast, consumer protection statutes pay little heed to disparities

307. *See* Leff, *supra* note 7, at 532-33 (citing cases from the mid-1700s until 1932); RESTATEMENT OF CONTRACTS § 367, Illus. 2 (AM. L. INST. 1932) (Courts should deny specific performance of land purchase by a real estate dealer who "takes advantage" of an "aged, illiterate woman, inexperienced in business") and RESTATEMENT (SECOND) OF CONTRACTS, Illus. 1 (Same re "aged, illiterate farmer").

308. *Williams*, 350 F.2d at 448, 449.

309. One of many Black women who broke those stereotypes was Madame C.J. Walker. Born to former slaves, orphaned at age seven, and widowed by a lynch mob, she did washing to put her only child through college. In 1905, she started a hair supply business with $1.50 in capital, developed an international sales system, taught business skills to 6,000 ex-field hands, and became a millionaire in eight years. VIRGINIA G. DRACHMAN, ENTERPRISING WOMEN: 250 YEARS OF AMERICAN BUSINESS 79-87 (2002). She has been described as a "genius" and named as the founder of the "Most Underrated Self-Help Movement" of the century. *Overrated and Underrated*, AM. HERITAGE MAG. 62 (May-June 1998). She built a thirty-four-room mansion in Westchester County, N.Y., amid Rockefellers, Astors, and Vanderbilts, and she funded college scholarships for black women. DRACHMAN, at 83, 85. *See also* TYRONE MCKINLEY FREEMAN, MADAM C.J. WALKER'S GOSPEL OF GIVING: BLACK WOMEN'S PHILANTHROPY DURING JIM CROW (2020).

310. *See* CORBIN, *supra* note 16, § 29.4, at text accompanying note 27 (Superior bargaining power requires evidence of "weaker party's ignorance, feebleness, lack of sophistication . . . or general naivete"); Weaver v. Am. Oil Co., 276 N.E.2d 144, 145, 147 (Ind. 1971) (invalidating clause when weaker party had 1.5 years of high school, experience only as skilled and unskilled worker, and a poor education); Stoll v. Chong Lor Xiong, 2010 OK CIV APP 110, ¶¶ 1-5, 19-20, 241 P.3d 301, 302, 306 (invalidating clause when buyers were Laotian refugees who could barely speak English and who had less than four years of schooling). *See also* RESTATEMENT (SECOND) OF CONTRACTS, § 208, cmt. d, "Weakness in the bargaining process," which refers to the stronger party's knowledge of the weaker party's "physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement." Its illustration involves a consumer who is "literate only in Spanish" and is about lose his job. The Reporter's Notes for cmt. d contrast three cases involving "disproportionate levels of education [and] language difficulty," a tenant unrepresented by counsel, and "poor, uneducated and inexperienced" buyers, with five cases involving experienced businessmen or "large and knowledgeable companies."

in bargaining power. When they do, they focus on situations in which consumers face imminent financial disaster.

The large majority of primary statutory provisions in this study either cover all consumers or do not in any way limit their coverage, as this table shows:

TABLE 2: PROTECTED GROUPS[311]
(*n* = 3,272)

Consumers[312]	1,976 (60%)
Unlimited[313]	762 (23%)
Limited (Other)	458 (14%)
Limited (the Disabled)	47 (1%)
Unclear	16 (0.5%)
Limited (Elderly or Elderly and Disabled)	15 (0.5%)
TOTAL	3,276[314]

Eighty-four percent (2,738) of this study's primary statutory provisions cover all consumers or appear to have unlimited scope. They don't ask about a person's education, poverty, ignorance, illiteracy, access to an attorney, or race. Instead, legislative definitions of "consumer" focus on the transaction's purpose ("personal, family, or household use").[315] In particular, only four UDAP primary statutory provisions tell courts to look at traditional indicia of weak bargaining power.[316]

311. Appendix B, Protected Groups-All Jurisdictions.

312. This includes provisions that expressly apply only to consumers and those for deals in which businesses are not likely to be purchasers, such as dance lessons and gym memberships.

313. *See, e.g.*, ALASKA STAT. § 45.50.471(b)(1) (2021) (Unlawful, unfair, and deceptive acts or practices include "[F]raudulently conveying or transferring goods or services by representing them to be those of another"); and § 45.50.471(b)(23) (2021) (Unlawful, unfair and deceptive acts and practices include failing to give "customer" a price estimate that may be exceeded only for good cause and with customer's permission).

314. The inconsistency with *n* = 3,272 is because four statutory provisions (three in Hawaii and one in Kansas) protect groups in more than one category.

315. *See supra* text accompanying note 242.

316. *See* ARK. CODE § 4-88-107(a)(8) (2021) (Seller can't "[k]nowingly tak[e] advantage of a consumer who is reasonably unable to protect his or her interests because of (A) physical infirmity; (B) ignorance; (C) illiteracy; (D) inability to understand the language of the agreement; or (E) a similar factor."); D.C. CODE § 28-3904(r)(5) (2021) (Unconscionability factors include taking "knowing[] tak[ing] advantage of the inability of the consumer . . . to protect [self] . . . [because] of age, physical or mental infirmities, ignorance, . . . inability to understand [contract language], or similar factors"; IDAHO CODE §

A few statutes limit their scope to two groups often perceived as being unable to protect themselves: the elderly and the disabled. Forty-seven primary statutory provisions provide causes of action to purchasers of wheelchairs, hearing aids, and similar equipment.[317] Eleven states protect the disabled and the elderly with twelve *supplemental* statutory provisions, i.e., provisions that do *not* create a cause of action. Instead, they allow punitive damages or civil penalties when a violation of another consumer protection statute injures the elderly or the disabled.[318] These twelve remedy enhancement provisions cover violations of 37% of the provisions in this study (1,222 of 3,272).[319] However, this important extra protection is less linked to actual bargaining power than it is to the lobbying power of AARP (formerly the American Association of Retired Persons). *None* of these remedy enhancement provisions require proof of actual mental impairment (such as from dementia or Alzheimer's). Instead, they look only at the consumer's age, protecting people as young as sixty.[320] In doing

48-603c(2) (2021) (Unconscionability factors include taking advantage of consumer's inability to protect self because of physical infirmity, ignorance, illiteracy, inability to under contract language, etc.); KAN. STAT. § 50-627 (2021) (Unconscionability factors include taking advantage of consumer's physical infirmity, ignorance, illiteracy, inability to understand the language, "or similar factor").

317. *E.g.*, ALASKA STAT. §§ 08.55.010 to .200 (2021) ("Hearing Aid Dealers"); D.C. CODE §§ 28-4001 to 4007 (2021) ("Hearing Aid Dealers and Consumers"); GA. CODE §§ 10-1-870 to 875 (2021) ("Assistive Technology Warranties") and §§ 10-1-890 to 894 (2021) ("Motorized Wheelchair Warranties"); KAN. STAT. §§ 50-696 to 6,102 (2021) ("Assistive Devices for Major Life Activities").

318. Seven states authorize only civil penalties. *See* ARK. CODE § 4-88-202 (2021) (Up to $10,000); COLO. REV. STAT. § 6-1-112(1)(c) (2021) (Up to $10,000); DEL. CODE tit. 6, § 2583 (2021) (Treble damages); FLA. STAT. § 501.2077(2) (2021) (Up to $15,000); GA. CODE § 10-1-851 (2021) (Up to $10,000); 815 ILL. COMP. STAT. § 505/7(c) (2021) (Up to $10,000), and IOWA CODE § 714.16A(1)(a) 2021) (Up to $5,000).

Two allow only punitive damages. *See* IDAHO CODE § 48-608(2)(a) (Up to $15,000 or treble actual damages); IND. CODE § 24-5-0.5-4(c) (2021) (Treble actual damages).

Two states allow both civil penalties and punitive damages. CAL. BUS. & PROF. CODE § 17206(a) (2021) (up to $2,500 in civil penalties) and CAL CIV CODE § 1780(b)(1) (2021) (Up to $5,000 in punitive damages); HAW. REV. STAT. § 480-13.5 (2021) (Up to $10,000 in civil penalties) and § 480-13(b)(1) (Up to $5,000 in punitive damages).

319. Appendix B, Protected Groups–All Jurisdictions.

320. Starting coverage at age 60 are ARK. CODE §§ 4-88-201(a) & 202 (2021); COLO. REV. STAT. 6-1-102(4.4), 112(1) (c) (2021); FLA. STAT. § 501.2077(1)(e) (2021); GA. CODE §§ 10-1-850(2) & 851; and IND. CODE § 24-5-0.5-2(11) (2021). Hawaii and Idaho begin at age 62. HAW. REV. STAT. § 480-13.5 (2021), and IDAHO CODE § 48-608(2)(c)(2) (2021). Four states wait until 65. CAL. CIV. CODE §§ 1761(f) and 1780(b)(1); CAL. BUS. & PROF. CODE §§ 17206(a); DEL. CODE tit. § 2583(b) (2021); 815 ILL. COMP. STAT. § 505/7(c) (2021); and IOWA CODE §§ 714.16A(1), (3) (2021).

so, they provide special protection to our last two presidents and four members of the U.S. Supreme Court.[321]

What types of bargaining power problems do trouble legislatures? Of the 592 primary statutory provisions that look at bargaining power,[322] the largest group (291) involve consumers facing imminent financial disaster, such as those using foreclosure consultants, credit counselors, and debt management services.[323] One hundred and three protect consumers harassed by telemarketers, unsolicited emails, and door-to-door sellers.[324] The smaller groups are:

-the disabled (39 provisions);[325]
-immigrants (28 provisions);[326]
-people in areas hit by natural disasters (21 provisions);[327] and
-consumers who *might* lack business experience (10 provisions).[328]

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321. Both Donald Trump and Joe Biden were over seventy when elected president. Justices Samuel Alito, Clarence Thomas, John Roberts, and Sonia Sotomayor are all at least sixty-six.

322. Appendix C, Bargaining Power-Relevant Facts.

323. *E.g.*, ARIZ. REV. STAT. § 44-1378 to 1378.08 (2021) (Foreclosure consultants); COLO. REV. STAT. §§ 6-1-1101 to 1121 (2021) (Foreclosure consultants and equity purchasers); COLO. REV. STAT. §§ 38-40-101 to 105 (2021) (Mortgage brokers); DEL. CODE tit. 6, §§ 2401 to 2423 (2021) (Credit service organizations), DEL. CODE tit. 6, §§ 2401A to 2439A (2021) (Debt-management services); DEL. CODE tit. 6, §§ 2400B to 2429B (2021) (Foreclosure consultants); and DEL. CODE tit. 6, §§ 2400C to 2409C (2021) (Mortgage modification services).

324. *E.g.*, ARK. CODE §§ 4-88-601 to 607 (2021) (Unsolicited email), §§ 4-89-101 to 110 (2021) (Door-to-door sales), and §§ 4-99-201 to 203 (2021) (Telephone solicitations); ALASKA STAT. § 45.02.350 (2021) (Door-to-door sales); ARIZ. REV. STAT. §§ 44-1276 (2021) (Telephone solicitations) and §§ 44-1372 to 1372.05 (2021) (Unsolicited email); CAL. BUS. & PROF. CODE §§ 17511 to 17514 (2021) (Telephone solicitations), §§ 17529 to 17529.9 (Unsolicited e-mail), and §§ 17590 to 17595 (2021) (Unsolicited telephone calls; CONN. GEN. STAT. §§ 42-134a to 143 (2021) (Door-to-door sales).

325. *See supra* text acompanying notes 247 to 248 and 316.

326. *E.g.*, D.C. CODE §§ 28-5301 to 5304 (2021) (Immigrant services providers) and 815 ILL. COMP. STATS. § 505/2AA (2021) (Immigration assistance services).

327. *E.g.*, ARK. CODE § 4-88-303(a)-(b) (2021); and GA. CODE § 10-1-438 (2021).

328. Most of these require sellers to tell consumers to seek legal advice, to get all promises in writing, or to make sure the document has no blank spaces. *See* ARK. CODE § 4-104-203 (2021) (University that allows credit card solicitation at athletic events must provide seminar during freshman orientation on using credit); HAW. REV. STAT. § 481J-3(d) (2021) (Car dealer's warranty disclaimer valid only if front page of contract says in all caps that dealer "MUST KEEP OUR PROMISES, EVEN IF WE SELL 'AS IS'. TO PROTECT YOURSELF, ASK US TO PUT ALL PROMISES IN WRITING."); HAW. REV. STAT. § 481L-2(2) (2021) (Retail car lease shall tell buyer in all caps to "SEEK INDEPENDENT PROFESSIONAL ADVICE IF YOU HAVE ANY QUESTIONS CONCERNING THIS TRANSACTION" and to "GET ALL PROMISES IN WRITING"); HAW. REV. STAT. §

Unfortunately, despite extensive empirical evidence of racial disparities in buying and financing new cars[329] and the huge difficulties faced by people with minimum wage jobs,[330] I found only one statute (of narrow scope) that requires courts to look at race or income.[331]

The legislative lack of interest in a consumer's actual bargaining power may reflect the difficulty of describing or determining actual bargaining power, the broad voter support needed to adopt consumer protection statutes, the recognition that businesses rarely let consumers bargain on fine print, and the lobbying power of consumer protection organizations.[332] Whatever the reason, litigators who invoke these statutes rarely have to worry whether their clients' education, business experience, or access to attorneys, etc., will cause a court to rule against them.

7. While Unconscionability Shields Consumers From Liability, Most Consumer Protection Statutes Arm Consumers With Monetary Relief

a. The problem

Pity Clinton and Cora Jones. They agreed to pay a door-to-door sales

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481M-14(b) (2021) (Lease-purchase agreements shall tell consumer in all caps to not sign agreement without reading it in full or if it has blank spaces); HAW. REV. STAT. § 481P-2(a)(7) (2021) (Telephone solicitor must state on "express verifiable authorization" that consumer is not obligated to pay unless consumer signs confirmation and returns it to seller); 815 ILL. COMP. STAT. § 177/15(c) (2021) (Tax refund anticipation loan form must say that borrower can file tax return electronically and have refund directly deposited to bank account without charge); IND. CODE §§ 24-5-16.5-9(2) (2021) (Retail auto lease must state in bold caps that consumer should "REVIEW THESE MATTERS CAREFULLY AND SEEK INDEPENDENT PROFESSIONAL ADVICE IF YOU HAVE ANY QUESTIONS"). In addition, ARIZ. REV. STAT. § 44-1231.01(6) bars selling "Indian arts or crafts" by "tak[ing] advantage of . . . [buyer's] lack of knowledge, ability, experience, or capacity").

329. *See* Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation*, 8 VAND. U. L. & ECON. 21, 30-33 (2012) (Study of new car loans by five different manufacturers to 366,492 Black consumers and 2,915,058 White customers showed average markups of $557 to $970 for Blacks and only $227 to $475 for Whites); and Ian Ayres & Peter Siegelman, *Gender and Race Discrimination in Retail Car Negotiations*, *in* PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 19-44 (Univ. of Chi. Press ed., 2001).

330. *See* BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (Describing author's personal experiences as waitress, maid, and cleaner).

331. FLA. STAT. § 501.2079 (2021) bars cable and video companies from denying access to individuals or "local area" communities because of their race or income.

332. *See, e.g.*, National Consumer Law Center, the National Association of Consumer Advocates, the Consumer Federation of America, and the National Consumers League.

representative $900 ($1,439.69 after adding interest and insurance) for a freezer with a market value of $300.[333] Traditional unconscionability case law said the seller was entitled only to equitable damages, i.e., "the actual market value" of the goods delivered.[334] That, plus about $100 interest,[335] equaled $400, but the Joneses had paid $619.88.[336] Instead of refunding the $219.88 excess, the court could only reform the price to "the amounts already paid . . . ."[337] and let the seller keep its ill-gotten gains.

It could have been worse. The Joneses might have paid the *full* price, only to later learn about unconscionability.[338] They may have incurred other costs by partially performing.[339] They may have relied to their detriment by taking actions that the contract did not require.[340] Or they may

333. Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 264-65 (N.Y Sup. Ct. 1969). The court gives two different total prices: $1,234.80 (on page 265) and $1,439.69 (on p 266). However, page 265 says the buyers had paid $619.88, leaving a balance due of $819.81. Those two figures total $1,439.69.

334. Hume v. United States, 132 U.S. 406, 413, 414, 415 (1889).

335. *Jones*, 298 N.Y.S.2d at 266-67. The court noted that the market value "presumably include[d] a reasonable profit margin . . . ." *Id.* at 266.

336. *Id.* at 265.

337. *Id.* at 266.

338. *See* Eva v. Midwest Nat'l Mortg. Bank, Inc., 143 F. Supp. 2d 862, 870 (N.D. Ohio 2001) (Plaintiffs sought refund of allegedly unconscionable fees charged by bank on loans banks knew or should have known plaintiffs could not repay); Arthur v. Microsoft Corp., 676 N.W.2d 29, 32, 38-39 (Neb. 2004) (Buyers of personal computer claimed license fee was unconscionable and sought difference between fee's monopoly price and competitive value); Vom Lehn v. Astor Art Galleries, Ltd., 380 N.Y.S.2d 532, 534-38 (Sup. Ct. N.Y. 1976) (Buyers of jade art paid $49,000 of $67,000 price for jade art worth only $14,575). *See also* Nygard v. Sioux Valley Hosp.'s & Health Sys., 2007 SD 34, ¶ 1, 731 N.W.2d 184, 188 (Uninsured patient sought damages for being charged full price of hospital care instead of price paid by insured patients); and Zemp v. Rowland, 572 P.2d 637, 638 (Or. App. 1977) (Tenant sought recovery of lease's 'nonrefundable' fee).
See also Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1025 (2015) (Victim who overpays under unconscionable term cannot get refund) and Prince, *supra* note 278, at 485-86 (Pointing out illogic of barring party who overpays in cash from using unconscionability to recover overpayment, while buyer who pays on credit can stop payments and use the doctrine to block seller's lawsuit for remaining balance).

339. *See* Stoll v. Chong Lor Xiong, 2010 OK CIV APP 110, 241 P.3d 301 (Under contract with unconscionable price for sale of chicken farm, buyers had built 43' x 80' shed to store chicken litter and had delivered some litter (to be used as fertilizer) to seller.

340. A student once told me that when he arrived at school, he signed a one-year apartment lease. After final exams the next spring, he found a better and cheaper apartment, signed a lease on it, made a down payment, and gave 30 days notice to his first landlord, only to be shown the original lease's fine print that required *sixty* days' notice and included an automatic renewal clause. The second landlord let him out of the second lease, but kept

have discovered that their bank had deducted (without notice) allegedly unconscionable service charges from their accounts.[341] Invalidating the contract or clause as unconscionable will shield these consumers from having to perform, but it will not fully protect them from injury.

b. Unconscionability as only a shield

Judges agree: unconscionability is only a shield from liability. In 1831, Chief Justice John Marshall said that if a seller sought specific performance of an excessive price, a court of equity could "interfere actively by setting aside a contract," "withhold its aid" by denying the plaintiff's request for specific performance, or let the seller seek a remedy at law.[342] He said nothing of refunds, and the Court has agreed with itself repeatedly.[343] The logic is simple. Remedies go to parties who prove a cause of action, and unconscionability is a defense. Consequently, U.C.C. §2-302(1) lets courts refuse to enforce the contract, enforce the contract without the unconscionable clause, or limit the application of that clause.[344] Neither text

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the down payment. The student was stuck for a year in the first, more expensive, not-as-good apartment.

See also Cowin Equip. Co. v. Gen. Motors Corp., 734 F.2d 1581, 1581-82 (11th Cir. 1984) (Dealer who made non-cancelable purchases from manufacturer and had to resell that inventory at a loss sought interest on financing loans, the cost of insurance and storage, and resale losses); Newman v. Roland Machinery Co., No. 2:08-cv-185, 2009 WL 3258319, at *1-4 (W.D. Mich. 2009) (Buyer used home as security on loan to buy $160,000 wood processor with allegedly unconscionable warranty disclaimer, only to have processor fail, causing buyer to lose contract to supply wood to lumber company and to lose home to foreclosure).

341. *See In re* Checking Acct. Overdraft Litig., 694 F. Supp. 2d 1302, 1307-10 (S.D. Fla. 2010) (Plaintiffs sought refund of allegedly unconscionable overdraft fees which banks had removed from their checking accounts); Best v U.S. Nat'l Bank of Or., 714 P.2d 1049, 1050-51 (Or. App. 1986) (Same), *aff'd,* 303 Or. 557 (1987).

342. Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 276-77, 282 (1831).

343. *See* Haffner v. Dobrinski, 215 U.S. 446, 450 (1910) (Citing *Cathcart*, 30 U.S. (5 Pet.) 264, at 276) (Court may decline to grant specific performance and turn case over to court of law); Hume v. U.S., 132 U.S. 406, 413 (1889) (If contract is unconscionable but not void, court of law may award damages in equitable amount to party seeking to enforce contract); Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236 (1892) (Equity may declare contract invalid, refuse to aid its enforcement, or let party seeking specific performance go to a court of law); Miss. & Mo. R.R.. Co. v. Cromwell, 91 U.S. (1 Otto) 643, 645-46 (1875) (Rule that equity will not lend its aid to carry out an unconscionable bargain, but will leave plaintiff to his remedy at law, has been "so often . . . [used] that it is unnecessary to spend argument on the subject.").

344. UCC § 2-302, cmt. 2 uses the same language, although it also lets court strike down a clause which is "contrary to the essential purpose of the agreement."

nor comments suggest any other remedy. The Restatement (Second) of Contracts uses almost the same rule.[345] Treatises oppose monetary relief to unconscionability victims,[346] as do courts.[347] Only three cases disagree.[348] This refusal to compensate victims of unconscionable deals does not just hurt those litigants. It encourages unscrupulous businesses to

345. RESTATEMENT (SECOND) OF CONTRACTS, § 208, cmt. b (§ "2-302 states the rule of this Section . . . ."). Cmt. g, "Remedies," adds that if the court denies specific performance, it ordinarily should award *the offending party* "at least the reasonable value of [its] performance . . . ."

346. *See* CORBIN, *supra* note 16, § 29.3, text accompanying n.34 ("Unconscionability does not create a cause of action for damages"); FARNSWORTH & WOLFE, *supra* note 16, § 4.29, at 4-227 (Courts don't hear damage suits based on unconscionability); 1 WILLIAM D. HAWKLAND & FREDERICK H. MILLER, UNIFORM COMMERCIAL CODE SERIES § 2-302:5 (2019) ("[M]ost courts" say § 2-302 does not allow award of damages); and WILLISTON & LORD, *supra* note 1, § 18:17, at text accompanying notes 1-2 (and cases cited). *But see* WHITE & SUMMERS, *supra* note 1, § 5-8, at 238-40 (Since unconscionability is "analogous to fraud," punitive damages and restitution may be appropriate).

347. Cowin Equip. Co., v. Gen. Motors Corp., 734 F.2d 1581, 1582-83 (11th Cir. 1984) (§ 2-302 fails to provide for damages, and buyer failed to cite any unconscionability cases that awarded damages); Newman v. Roland Machinery Co., No. 2:08-cv-185, 2009 WL 3258319, at *10-11 (W.D. Mich. 2009) (When logging equipment purchased with unconscionable clause stopped working, buyer could not recover value of lost logging contracts or of home used as security for financing loan and lost to foreclosure); Arthur v. Microsoft Corp., 676 N.W.2d 29, 38-39 (Neb. 2004) (Unconscionability is not basis for award of money damages to injured consumer); Vom Lehn v. Astor Art Galleries, Ltd. 380 N.Y.S.2d 532, 534-38 (N.Y. Sup. Ct. 1976) (§ 2-302 "makes no provision for damages"); Best v. U.S. Nat'l Bank of Or., 714 P.2d 1049, 1054-56 (Or. App. 1986), aff'd, 303 Or. 557 (1987) (Bank customers cannot sue to recover bank charges made against their account under unconscionable clause); Carey v. Lincoln Loan Co., 125 P.3d 814, 829 (Or. App. 2005); (Unconscionability cannot be used as a basis for a claim for damages); Nygard v. Sioux Valley Hosp.'s & Health Sys., 2007 SD 34, ¶¶ 27-30, 731 N.W.2d 184, 188, 195 (Denying request for damages because of unconscionable contract).

348. Beh, *supra* note 337, at 1084, discusses two cases: *In re* Checking Overdraft Litig., 694 F. Supp. 2d 1302, 1318-19 (S.D. Fla. 2010) (Unlike normal unconscionability case, in which business sues consumer for nonpayment, when bank used allegedly unconscionable clause to debit consumer's account for service fee, bank need not sue consumer, and only way to raise unconscionability is by action for restitution) and Eva v. Midwest Nat'l Mortg. Bank, Inc., 143 F. Supp. 2d 862, 870, 894-96 (N.D. Ohio 2001) (If consumer can't raise unconscionability as cause of action, consumer can only invoke doctrine by breaching contract and waiting for business to sue it, exposing consumer's home to foreclosure).

The third involves a Puerto Rican who spoke no English and worked as a migrant farm laborer in New Jersey under a contract which furnished him housing for only as long as he was employed and gave a right to a hearing only *after* his eviction. He was fired and evicted, leaving him stranded in New Jersey with no way to return home. Vasquez v. Glassboro Serv. Ass'n, Inc., 415 A.2d 1156, 1159 (N.J. 1980). The court imposed a provision giving him "a reasonable time to find alternative housing." *Id.* at 1158, 65-66.

continue using their sharp practices against other consumers.[349] This weakens unconscionability "immeasurably" and makes it "worthless against dominant parties who have already obtained their ill-gotten [gains]."[350]

c. Legislatures arm consumers and governments with swords.

Legislatures take an entirely different approach, regularly authorizing actual and punitive damages to consumers, civil penalties and fines to public agencies, and attorney fees (so consumers can hire a professional to use those swords). Here are the statistics:

TABLE 3: RELIEF AVAILABLE UNDER CONSUMER PROTECTION STATUTES[351]
(n = 3,272)

Type of Relief Authorized Provs.	# of Stat. Provs.	% of Stat. Provs.
Contract/Clause Unlawful/Void	1,720	53%
Injunctions		
To protect Private Party[352]	1,728	53%
For Public (Attorney General)	1,966	60%
Restitution	1,400	43%
Actual Damages	2,384	73%
Punitive Damages	1,611	49%
License Revocation	661	20%
Civil Penalties	2,314	71%
Criminal	672	21%
Attorneys Fees		
For Private Party	2,388	73%
For Public (Attorney General)	1,986	61%
Other/Unclear	294	9%

349. CARTER & SHELDON, *supra* note 218, at 16. *Williams v. Walker-Thomas Furniture Co.* is a good example. Despite Judge Wright's opinion, the store continued to use the pro rata clause. Colby, *supra* note 225, at 656.

350. Beh, *supra* note 337, at 1023. *See also* Prince, *supra* note 276, at 548 (prohibiting suits by unconscionability victims "does not effectively administer" unconscionability's goals).

351. Appendix D, Relief–All Jurisdictions.

352. "Contract/Clause Unlawful/Void" and "Injunctions For Private Party" overlap, although the latter also includes prohibitions against future misconduct. The separate listings reflect the language of the statutes.

Of the eleven types of relief available,[353] the average primary statutory provision authorizes 5.9.[354] By contrast, common law unconscionability provides only two (invalidating the contract/clause or limiting the application of the clause). Two-thirds of statutory provisions allow for actual damages and/or civil penalties; almost half allow punitive damages; and two-thirds provide for attorney fees, while unconscionability provides *no* such relief. This contrast is huge. The statutes encourage victims to hit unscrupulous businesses where it hurts (their balance sheets). The attorney fee provisions help consumers to find attorneys, a crucial fact when 40% of Americans say they would struggle to pay emergency bills of $500 to $1,000.[355] The Puritans would have approved, even though legislatures do not let judges throw modern Robert Keaynes in the stocks with horse bridles around their necks.[356]

d. The obstacles to aligning judicial and statutory relief

Several obstacles limit the ability of judges to follow their legislative colleagues. First, judges are quite reluctant to create new causes of

353. Appendix D counts injunctions for private parties and injunctions for public parties as separate remedies. It does the same for private and public attorney fees.

354. Alaska ranks first, authorizing an average of 8.6 remedies per provision. The next four are Kansas and Illinois (7.7), Florida (7.1), and Delaware (6.4). Five of the seven lowest are from the South: Georgia (5.1), Arkansas (4.3); Alabama (4.2); Kentucky (3.8); and Louisiana (2.8). The lowest non-Southern states are Arizona and Maine (4.3).

355. *See* Quentin Fottrell, *Nearly 25% of Americans Have No Emergency Savings*, MARKETWATCH (June 9, 2020, 1:49 PM), marketwatch.com/story/nearly-25-of-americans-have-no-emergency-savings-and-lost-income-due-to-coronavirus-is-piling-on-even-more-debt-2020-06-03) (last visited Feb. 12, 2020) (38% of Americans could not find $500 in cash "without selling something or taking out a loan," and 25% have no emergency savings); Megan Leonhardt, *41% of Americans Would be Able to Cover a $1,000 Emergency with Savings*, CNBC (Jan. 22, 2020, 10:19 AM), cnbc.com/2020/01/21/41-percent-of-americans-would-be-able-to-cover-1000-dollar-emergency-with-savings.html (last visited Feb. 12, 2020) (37% of Americans would have to use a credit card, take out a loan, or ask family for financial help to handle $1,000 emergency bill, noting that average credit card annual interest rate is 17.3%); Soo Youn, *40% of Americans Don't Have $400 in the Bank For Emergency Expenses: Federal Reserve*, ABC NEWS (May 24, 2019, 12:25 PM), abcnews.go.com/US?10-americans-struggle-cover-400-emergency-expense-federal/story?id-63253846 (last visited Feb. 12, 2020) (Federal Reserve says about 40% of Americans could not pay $400 emergency bill with cash, savings, or a credit-card charge that they could quickly pay off).

356. *See supra* text accompanying notes 51-54.

action.[357]

Second, judicial awards of punitive damages conflict with the compensatory purpose of contract remedies,[358] which is to put the victim where she would have been had the contract been fully performed,[359] "[n]o matter how reprehensible the breach . . . ."[360] In addition, the U.C.C. expressly bans "special" and "penal" damages regarding sales or leases of goods "except as specifically provided" by statute.[361] However, even the chief reporter of the Restatement (Second) of Contracts cites service cases awarding punitive damages for contract breaches that were "in some respect tortious,"[362] and unconscionable land and service contracts seem to fit that label. By definition, they are "against the conscience," and many involve deliberate or predatory conduct. Attorney fees are a bigger problem. Although 73% of the primary statutory provisions in this study allow attorney fees for private victims,[363] courts award attorney fees in contract actions only when authorized by statute, by the disputed contract itself, or by narrow equitable exceptions.[364] Additionally some consumer protection

357. In Contracts, the only twentieth-century example was the California Supreme Court's unsuccessful effort to expand bad faith breach of insurance contracts to contracts in general. FARNSWORTH & WOLFE, *supra* note 16, § 12.08, at 12-73 to 12-78 (Comparing Seaman's Direct Buying Serv. v. Standard Oil Co. of Cal., 686 P.2d 1158, 1166-67 (Cal. 1984) with Freeman & Mills Inc. v. Belcher Oil Co., 900 P.2d 669, 670-80 (Cal. 1995) (overruling *Seaman's* in light of "nearly unanimous criticism" of that case)).

358. RESTATEMENT (SECOND) OF CONTRACTS, §355, cmt. a.; FARNSWORTH & WOLFE, *supra* note 16, § 12.08, at 12-62.2.

359. RESTATEMENT (SECOND) OF CONTRACTS, § 344; FARNSWORTH & WOLFE, *supra* note 16, § 12.08, at 12-62.2.

360. FARNSWORTH & WOLFE, *supra* note 16, § 12.08, at 12-68.

361. UCC § 1-305(a).

362. FARNSWORTH & WOLFE, *supra* note 16, §12.08, at 12-70 to 12-73 (citing (among others) Fort Smith & W. Ry. V. Ford, 126 P. 745, 747 (Okla. 1912)) (Punitive damages appropriate for railroad's "willfull disregard of plaintiff's rights" by failing to stop at passenger's station); Excel Handbag Co. v. Edison Bros. Stores, 630 F.2d 379, 384 (5th Cir. 1980) (Buyer's wrongful taking of goods and refusal to pay for them in order to force seller to give up legal rights was a tort that justified punitive damages); Watkins v. Lundell, 169 F.3d 540, 544-45 (8th Cir. 1999) (Actions that wilfully and wantonly disregarded other party's rights justified punitive damages); Hibschman Pontiac v. Batchelor, 362 N.E.2d 845, 848 (Ind. 1977) (upholding $7,500 of $15,000 punitive damage award when dealer repeatedly failed to repair defects in new car); and Welborn v. Dixon, 49 S.E. 232, 234 (S.C. 1904) (Breach of contract plus fraud justifies punitive damages).

363. Table 3: Relief Available Under Consumer Protection Statutes.

364. Matter of Ndyaija, 238 A.3d 1047, 1068 (N.H. 2020); Harder v. Foster, 464 P.3d 382, 387 (Kan. App. 2020); Sisney v. Smalley, 690 P.2d 1048, 1049 (Okla. 1984); Manning v. Bellafiore, 139 A.3d 505, 516 (R.I. 2016); New v. Dumitrache, 604 S.W.3d 1, 21 (Tenn. 2020); Belling v. Wash. State Emp. Sec. Dept., 427 P.3d 611, 613-14, ¶¶ 7-8 (Wash. 2018).

statutes award attorney fees to "the prevailing party,"[365] which could be the business, and that risk discourages many consumers from bringing suit. Although allowing attorney fees would make a huge difference for consumers, and although many statutes authorize them, few courts will be able to award them on their own.

8. Consumer Protection Statutes are Displacing Unconscionability And Cramping the Doctrine's Development

This study shows that consumer protection statutes protect more people, are easier to satisfy, and provide more remedies (such as actual and punitive damages) than unconscionability. This should make them much more attractive to attorneys representing consumers. It also means that courts often can use a statute to invalidate a contract or clause without addressing unconscionability. For example, today Walker-Thomas Furniture's *pro rata* clause automatically would violate one statute,[366] inadvertently preventing a District of Columbia court from holding that such a clause is so unfair that it is invalid even if it was in large type and the buyer had business experience. Another example involves an Oklahoma consumer who told a sales representative that she wanted to buy only a new mobile home and who did not notice a clause allowing the dealer to repair damage that occurred during transit.[367] Only after the mobile home was installed did she discover the structural damage caused when five blown tires on the trailer let the mobile home drag along a highway for 600 ft.[368] Here was a chance for a court to say that when such a clause covers structural damages, it is unconscionable no matter how conspicuous it is or how educated the buyer is. Instead, Oklahoma's Court of Civil Appeals said that the trial court "apparently did not find" that the deal was unconscionable.[369] No matter. The court used the Oklahoma Consumer Protection Act's ban on representations that a reconditioned product is "new"[370] and on any other "practice which could *reasonably be expected* to mislead a

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The equitable exceptions are when (a) a party's litigation efforts benefit others, (b) a litigant willfully disobeys a court order, and (c) a party acts, during litigation, in bad faith, vexatiously, wantonly, or oppressively. Chambers v. NASCO, 501 U.S. 32, 45-46 (1991).

365. *E.g.*, IND. CODE § 24-5-0.5-4(a) (2021); KAN. STAT. § 50-634(e) (2021).

366. D.C. CODE § 28-3805 (2021).

367. Robinson v. Sunshine Homes, Inc., 2012 OK CIV APP 87, ¶¶ 4-5, 291 P.3d 628, 631.

368. *Id.* at ¶¶ 1-2, 630-31, ¶¶ 7-10, 631-32.

369. *Id.* at ¶ 59, 639.

370. *Id.* at ¶ 19, 633 (citing OKLA. STAT. tit. 15 § 753(6) (2001)).

[buyer] to her detriment" (emphasis added)[371] to justify an award of $249,858.85 in actual damages (on a contract price of $85,000!) and enough in costs and attorney fees for a total award of $408,984.32.[372] The statutes made unconscionability superfluous.

More generally, a study of every public enforcement case completed by the Federal Consumer Financial Protection Bureau between 2010 and 2016 found that the Bureau had used federal statutes and its own regulations to provide $11.5 *billion* in monetary awards and debt relief to consumers, and to impose $584 million in civil penalties.[373] The Bureau itself estimated that during those six years, it had reimbursed or provided debt relief for one out of every ten Americans.[374] Those numbers, which cover only consumer financing problems, are staggering compared to the number of published unconscionability decisions. Who knows how many of those cases concerned clauses so unfair, or conduct so reprehensible, that a court might have adopted a one-element test, just as legislatures often have done?

V. CONCLUDING THOUGHTS

First, modern legislatures, like the Puritans of old, have a vision about business-to-consumer relationships that courts have not been able to see. The Puritans regarded excessive prices (even without evidence of bargaining power problems) as an offense against ordinary consumers and the Almighty, which is why Robert Keayne found himself standing in front of his fellow parishioners, bewailing "his covetous and corrupt heart," facing punitive damages, and suffering criminal fines.[375] The Puritans also deterred future misconduct by merchants, and (at least in Keayne's case)

371. *Id.* at ¶ 25, 634 (citing OKLA. STAT. tit. 15 § 752(13) (2001)).

372. *Id.* at ¶¶ 12-14, 632, ¶¶ 49-50, 637, ¶ 60, 639.

373. Christopher L. Peterson, *Choosing Corporations Over Consumers: The Financial Choice Act of 2017 and the CFPB*, 71 CONSUMER FIN. Q. REP. 169, 182, Table 1 (2017). *See also* C. Ryan Barber, *CFPB Director Richard Cordray Will Step Down Before End of November*, NAT'L L.J. (Nov. 15, 2017, 7:37 AM), https://www.thinkadvisor.com/ 2017/11 /15/cfpb-director-richard-cordray-will-step-down-before-end-of-november/ (last visited Nov. 15, 2017) (Providing similar numbers); and Ken Sweet, *Under Trump, a Voice for the Consumer Goes Silent*, THE OKLAHOMAN 6C (April 11, 2018) ($3.97 billion in cash back and $7.93 billion in lower loan balances and debt relief).

374. Sweet, *supra* note 372; Barber, *supra* note 372 ("[N]early 30 million consumers" and "over 1.3 million complaints").

375. WINTHROP, *supra* note 41, at 307.

their efforts succeeded.[376] This Puritan vision of robust protection is remarkably similar to that of modern legislatures (although they have shied away from issues such as mandatory arbitration clauses).[377] Legislatures have protected *all* consumers (rather than just groups perceived to lack bargaining power), given consumers the right to sue, cut the judiciary's two-part test in half, and provided monetary remedies (and attorney fees) to injured consumers.

In contrast, the judiciary, however liberal and activist it may be, has been blind to this vision. "Most claims of unconscionability fail."[378] Courts treat unconscionability as only a defense, not a cause of action. They require a difficult-to-satisfy two-part test. They ignore the fact that almost all modern manufacturers of consumer products use standard, non-negotable forms with similar one-sided terms. They provide limited remedies. This narrow view dates back to the late 1800s. English courts in the 1700s used unconscionability to protect an aristocrat who made a bad deal with his creditors.[379] The U.S. Supreme Court could use the doctrine to protect the United States from its own "negligence and mistake,"[380] As late as 1932 courts on both sides of the Atlantic protected a host of "improvident sillies" who made bad bargains.[381] However, when meatpackers began selling tainted meat to uneducated workers crammed into filthy tenements[382] or medicines laced with opium, cocaine, and morphine to mothers,[383] unconscionability and the courts were nowhere to be bound.

In part this was because unconscionability could only invalidate the already-performed sale of tainted meat or medicine; in part it was because few consumers could afford attorneys. And, in part, it was because American contract law encountered the Industrial Revolution during what many have called our country's worst Supreme Court, led by Chief Justice

376. *See* FISCHER, *supra* note 33, at 155-56 (describing Keayne as a "shattered man" who "gave away large sums . . . to clear his name, began to drink heavily, lost his public office, and wrote [a 158 page] obsessive defense of his conduct").

377. My study did not find any statutes that addressed the validity of mandatory arbitration clauses in business-to-consumer contracts.

378. CORBIN, *supra* note 16, at text accompanying § 29.4, n.24.

379. *See supra* text accompanying notes 77-96.

380. *See supra* text accompanying notes 118-20.

381. Leff, *supra* note 7, at 532-33.

382. *See* UPTON SINCLAIR, THE JUNGLE (1906) (Describing meat-packing industry).

383. *See* GLENDA ELIZABETH GILMORE & THOMAS J. SUGRUE, THESE UNITED STATES: A NATION IN THE MAKING, 1890 TO THE PRESENT 76 (2015).

Melville Fuller.[384] That Court combined explicit racism,[385] sexism,[386] selective use of "highly creative interpretations of the Constitution,"[387] and a desire to protect the interests of the "propertied classes"[388] to produce a jurisprudence that was "excessively mechanistic and divorced from changing economic and social realities."[389] When the New York legislature saw bakers dying of consumption and tuberculosis caused by sixty (or more) hour work-weeks in dust-filled, filthy cellars,[390] the Supreme Court did not ask if such employment terms were unconscionable; instead, it worried that statutes which banned such work-weeks would violate a worker's freedom to work *longer* hours.[391] When Congress saw the horrors of nine-year-olds working in underground coal mines and fourteen-year-old miners working six-day weeks,[392] the Court did not examine the bargaining power of children in rural West Virginia. Instead it warned that upholding a statutory ban on child labor would mean that "all freedom of commerce

384. *See* OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 3 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 8, Stanley N. Katz gen. ed., 1993).

385. *See* Plessey v. Ferguson, 163 U.S. 527 (1896) (Upholding state authority to exclude Blacks and Creoles from 'white-only' public street cars), and *The Chinese Exclusion Cases*, FISS, *supra* note 383, at 298-322 (Discussing cases such as Fong Yue Ting v. U.S., 149 U.S. 698 (1893) and The Chinese Exclusion Cases, 130 U.S. 581 (1889), which allowed Congress to exclude all Chinese from entering the country or becoming U.S. citizens).

386. Muller v. Oregon, 208 U.S. 412 (1908) (Finding Oregon's disenfranchisement of women justified by "the inherent difference between the two sexes, and . . . the different functions in life which they perform."). In 1873, a pre-Fuller Court said Illinois could prevent women from practicing law. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

387. Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2310 (1995) (book review).

388. FISS, *supra* note 383, at 3-4.

389. *Id.* at 6 (citing Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) and Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909)).

390. PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 6-13 (1990). FISS, *supra* note 383, after 204 (Providing photograph of *Lochner's* bakery).

391. Lochner v. New York, 198 U.S. 45, 52-53 (1905). *Cf.* Leff, *supra* note 7, at 558 ("This is not to suggest, for a moment, anything as stupid as that some 'freedom-of-contract' concept ought to prevent . . . the statutory interdiction of an eleven-hour day.").

392. Congress banned such employment in the Keating-Owen Child Labor Act of 1916, Act of Sept. 1, 1916, 39 Stat. 675. ch. 432, § 1. For photos of child miners, *see* Erin Kelly, *31 Child Labor Photos That Expose the Ugly History of American Coal*, ATI (Jan. 17, 2018), https://allthatsinteresting.com/child-miners (last visited Feb. 8, 2022), which provides a link to photos by Lewis Hine.

will be at an end."[393] As for tainted meat and poisoned medicine, Congress, not the courts, protected consumers.[394] And when Judge Wright and his colleagues crippled unconscionability with a strict, two-part test that provided limited remedies and ignored U.S. Supreme Court decisions that had used unconscionability to protect businesses and the United States government, it was legislatures (both state and federal) that stepped forward on behalf of consumers. Judges who follow *Williams* have not heard what legislatures, repeatedly and almost unanimously have said about business-to-consumer relationships.

Second, contracts students need more consumer protection statutes and less unconscionability. The doctrine makes for challenging classroom discussion, but the statutes are far more important for lawyers who represent consumers or businesses. Consumer protection statutes also introduce students to the basic rules of statutory interpretation, an important lesson for students conditioned by online search engines to look for and read only key words.[395]

Third, Judge Wright's goal of providing special protection for low-income Black Americans was self-defeating. Unconscionability associated with the poor, the uneducated, and racial minorities has gone nowhere. Consumer protection statutes, nearly all of which apply to *all* consumers—i.e., all voters—are hale, hearty, and robust. Pulling those statutes into judicial thinking will provide far more help to disadvantaged groups than *Williams* did.

Fourth, courts should junk *Williams*'s requirement of "an absence of meaningful choice" and its discussion of bargaining power. Judge Wright flatly ignored reality, applying those ideas without asking how many stores would let Ms. Williams through their doors. Furthermore, as *Henningsen* said, the reality is that consumers (of any race) who encounter fine print in form contracts have no bargaining power, whatever their ability to read. If courts want to continue using *Williams*'s bargaining power rules, they should require retailers to show how often they let their salesclerks negotiate over fine print, how often they have agreed to delete such fine print, and how many of their competitors do *not* use similar clauses.

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393. Hammer v. Dagenhart, 247 U.S. 251, 276 (1918)), *overruled by* U.S. v. Darby, 310 U.S. 100, 115-16 (1941).

394. *See* Pure Food and Drug Act, Ch. 3195, 34 Stat. 768 (June 30, 1906), and the Federal Meat Inspection Act, Ch. 2907, 34 Stat. 1260 (Mar. 4, 1907).

395. *See* John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PENN. L. REV. 1373, 1374 (1992) (Advising law students and lawyers to "Read the statute" and "Read the *entire* statute.").

Finally, it is time for courts to remake unconscionability in the image of consumer protection statutes. There is no reason why judge-made and legislator-made approaches to the same problem should differ so widely in the people they protect, the tests they use, and the remedies they provide. If the God-fearing Puritans of 1639 and modern state legislatures could let average consumers file suit over unconscionable deals, protect those average consumers from unfair terms (regardless of bargaining power), and provide highly effective ways to prevent future commercial misconduct, then twenty-first century courts can do the same.

APPENDIX A

ELEMENTS-ALL JURISDICTIONS

STAT PROV *	JURIS.	BOTH ELEMENTS REQUIRED					ONE ELEMENT REQUIRED								NON-ELEMENT TESTS		
		BOTH BP & Tr	BOTH Brg Pwr	BOTH Trickery	BOTH All	BOTH All %	SUBST.	SUBST. %	PROC. BP & Tr.	PROC. Brg Pwr	PROC. Trickery	PROC. Either	PROC. All	PROC. %	SUBST + PROC.	SUBST + PROC. %	SLIDING SCALE	FACT-ORS	UN-CLEAR
60	AB	0	1	3	4	7%	13	22%	0	1	41	0	42	70%	55	92%	0	0	0
208	ALK	0	0	7	7	3%	55	26%	1	6	137	0	144	69%	199	96%	0	0	2
92	AZ	0	2	1	3	3%	22	25%	0	0	63	2	65	71%	87	96%	0	0	2
153	AR	0	6	2	8	5%	23	15%	18	9	89	0	116	76%	139	91%	0	0	6
178	CA	1	3	13	17	9%	14	8%	8	9	126	4	147	82%	161	90%	0	0	1
224	CO	6	8	5	19	9%	42	19%	13	2	140	3	158	71%	200	89%	0	0	5
182	CT	0	4	28	32	18%	60	33%	1	9	73	0	83	46%	143	79%	0	0	7
193	DE	8	62	2	72	38%	4	2%	73	5	27	0	105	54%	109	56%	0	0	12
176	DC	3	11	14	28	17%	38	22%	25	4	77	0	106	58%	144	76%	0	1	3
115	FL	3	7	6	16	12%	8	7%	7	6	75	0	88	77%	96	83.5	0	0	3
132	GA	2	15	20	37	29%	7	5%	15	3	69	0	87	65%	94	71%	0	0	1
196	HA	2	3	2	7	4%	36	18%	17	9	117	0	143	73%	179	91%	0	0	10
133	ID	1	5	8	14	7%	18	14%	0	4	91	0	95	71%	113	85%	0	1	5
286	IL	3	5	10	18	6%	64	22%	27	7	162	0	196	69%	260	91%	0	0	8
181	IN	1	0	21	22	14%	38	21%	0	14	104	1	119	63%	157	84%	0	0	2
153	IA	2	11	3	16	11%	13	9%	33	1	86	0	120	79%	133	87%	0	0	4
145	KS	0	7	7	14	10%	17	12%	6	15	88	1	110	76%	127	88%	0	3	1
193	KY	0	7	3	10	5%	68	35%	0	16	87	0	103	54%	171	89%	0	0	12
117	LA	1	2	0	3	3%	56	48%	0	12	43	0	55	47%	111	95%	0	0	3
155	ME	1	3	5	9	6%	57	37%	0	14	70	0	84	54%	141	91%	0	0	5
3272		34	162	160	356	11%	653	20%	244	146	1765	11	2166	66%	2819	86%	0	5	92

* Col. A = Col. F + Col. H + Col. N + Col. R + Col. S + Col. T = 3,272 statutory provisions

* Col. A also = Col. F + Col. P + Col. R + Col. S + Col. T = 3,272 statutory provisions.

Unconsc/Appendices/APP A--Elements--All Jurisdictions

APPENDIX B

PROTECTED GROUPS-ALL JURISDICTIONS

STAT PROV	JURISDICTION	UNLIMITED	CONSUMERS ONLY	LIMITED Elderly	LIMITED Eld & Dis	LIMITED Disabled	LIMITED Other	FACTORS	[Remedy Enhancmt]*	UNCLEAR	TOTALS
60	Alabama	0	60	0	0	0	0	0	[0]	0	60
208	Alaska	132	75	0	0	0	1	0	[0]	0	208
92	Arizona	39	45	0	0	4	3	0	[0]	1	92
153	Arkansas	17	120	0	0	1	14	1	[22]	0	153
178	California	42	115	2	0	0	18	0	[168]	1	178
224	Colorado	8	175	5	0	1	30	0	[169]	5	224
182	Connecticut	24	158	0	0	0	0	0	[0]	0	182
193	Delaware	22	20	1	0	0	149	0	[38]	1	193
176	Distr. of Columbia	8	142	0	0	0	25	0	[0]	1	176
115	Florida	38	57	0	0	0	19	1	[56]	0	115
132	Georgia	36	48	3	1	7	37	0	[109]	0	132
196	Hawaii**	58	128	1	0	7	5	0	[112]	0	199
133	Idaho	48	74	0	1	5	5	0	[68]	0	133
286	Illinois	71	160	0	0	0	55	0	[146]	0	286
181	Indiana	60	101	0	0	10	9	0	[131]	1	181
153	Iowa	11	96	0	0	0	46	0	[109]	0	153
145	Kansas***	27	111	0	1	5	1	0	[0]	1	146
193	Kentucky	22	150	0	0	0	21	0	[0]	0	193
117	Louisiana	43	57	0	0	4	12	0	[0]	1	117
155	Maine	56	84	0	0	3	8	0	[0]	4	155
3272	TOTALS	762	1976	12	3	47	458	2	[1222]	16	3276****
	%	23%	60%	0%	0%	1%	14%	0%	[40%]	0%	98%*****

* "[Remedy Enhancement]" tallies statutory provisions that protect all consumers but add/enhance the monetary liability of violators who injure the elderly and/or the disabled. Because they do not create special causes of action for the elderly or disabled, I did not count them.

**HAW. REV. STAT. 481B-2(a), -2(b), and (3) each protect the disabled and consumers buying from the disabled.

*** KANS. STAT. 50-677 protects the elderly & disabled (Col. E, LIMITED: Elderly & Disabled) AND military members (Col. H, LIMITED: Other).

**** This column does not equal Col. A (# of statutory provisions), because 4 statutory provisions in Hawaii and Kansas each protect two groups.

***** This column does not equal 100% due to rounding.

Unconsc/Appendixes/B--Protected Groups-All Jurisdictions

APPENDIX C

BARGAINING POWER-RELEVANT FACTS

JURISD	STAT PROV. BARG PWR*	EVIDENCE OF BARGAINING POWER PROBLEMS														
		"Disparity"	Lack of Educat'n	Lack of Exper.	Elderly	Disabled	Elderly & Disabled	Emer-gency	Immi-grant	Weak English	No Ne-gotiat'n	No Alt.**	Serious $ Pressure	Other	Factors	Total
AB	0															0
AL	7											2		5		7
AZ	6			1		4									1	6
AR	34			1		1		2				12	10	7	1	34
CA	20						1	1		1		5	3	9		20
CO	28	3							1	2		1	19	2		28
CT	6							5							1	6
DE	149					1	1					5	142			149
D.C.	43							1	12				28	2		43
FL	22							3					13	6		22
GA	38				3	7	1	5					19	3		38
HA	32			5	1	7						12		7		32
ID	10					5	1	1						3		10
IL	44			2					15	4			16	7		44
IN	24	1		2		10						8		3		24
IA	47											10	37			47
KS	26						1	1				23			1	26
KY	23							2				15	3	3		23
LA	15					4						10	1			15
ME	18			2				2				11		3		18
	592	4	0	13	4	39	5	23	28	7	0	114	291	60	4	592

* These include all statutes which *require* the consumer to show problems with bargaining power and all statutes in which bargaining power *might* be relevant, as in those statutes which require the consumer to prove a problem with either bargaining power or seller's trickery.

** Most of these involved door-to-door sales, unsolicited telephone calls, and unsolicited faxes.

Unconsc/Appendices/Bargaining Power--Relevant Facts

APPENDIX D

RELIEF-ALL JURISDICTIONS

STAT PROV	JURISDICTION	CLAUSE/ CONTRACT VOID	INJUNCTION PRIVATE	INJUNCTION PUBLIC	RESTITUTION	ACTUAL DAMAGES	PUNITIVE DAMAGES	LICENSE REVOCATION	FINES/ CIVIL PENS.	JAIL/ PRISON	ATTORNEY FEES PRIVATE	ATTORNEY FEES PUBLIC	UNCLEAR OR OTHER	TOTALS	AVERAGE
60	Alabama	18	33	40	4	42	41	0	4	11	41	35	6	275	4.6
208	Alaska	203	185	185	187	194	174	30	181	28	204	204	5	1780	8.6
92	Arizona	60	0	38	17	55	16	45	47	12	44	51	13	398	4.3
153	Arkansas	108	0	70	61	100	29	58	75	84	46	77	20	728	4.3
178	California	99	168	99	130	100	97	2	177	141	56	5	3	1077	6.1
224	Colorado	3	0	214	1	214	7	12	217	44	222	221	1	1156	5.2
182	Connecticut	51	105	106	103	154	103	27	63	26	147	97	33	1015	5.6
193	Delaware	58	80	142	76	159	93	72	166	56	161	155	5	1223	6.4
176	D.C.	115	90	5	18	137	133	20	123	21	168	119	0	949	5.4
115	Florida	36	88	77	71	100	21	15	95	67	97	73	80	820	7.1
132	Georgia	72	109	7	98	102	104	4	67	19	112	0	10	699	5.1
196	Hawaii	45	176	70	54	140	138	10	142	0	146	142	11	1074	5.4
133	Idaho	75	39	96	32	102	97	93	89	0	79	78	6	786	6
286	Illinois	245	216	258	212	144	168	25	261	38	258	275	8	2108	7.4
181	Indiana	141	118	129	134	157	153	0	146	19	150	134	5	1286	7.1
153	Iowa	58	83	108	54	117	63	0	103	37	107	88	30	848	5.5
145	Kansas	127	93	123	5	130	129	125	130	0	134	121	14	1131	7.8
193	Kentucky	60	51	76	57	92	32	98	92	39	73	92	12	774	4
117	Louisiana	43	9	25	28	57	3	25	61	12	46	5	16	330	2.8
155	Maine	103	85	98	58	88	10	0	75	18	97	14	16	662	4.3
3272		1720	1728	1966	1400	2384	1611	661	2314	672	2388	1986	294	19124	5.9

PRIVATE RELIEF	1720	1728		1400	2384	1611								11231	3.5
PUBLIC RELIEF			1966					661	2314	672		1986		7599	2.3
UNCLEAR													294	294	0.9
TOTALS														19124	5.8

Unconsc/Appendices/D--Relief-All Jurisdictions