THE SALIENCE OF POWER IN THE REGULATION OF BARGAINS: PROCEDURAL UNCONSCIONABILITY AND THE IMPORTANCE OF CONTEXT

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INTRODUCTION

This Article commences with a fundamental truism: power constitutes an endemic variable in any social construct, institution, or relationship. Appreciation of this statement requires an understanding of what is meant
by “power.” Some might associate the term with such customary features as “physical might,” or “possession of control, authority, or influence over others.” While strength and control are undeniable features of power, the implications of this term, in my view, are exceedingly more complex. Within the context of social relationships, power becomes ubiquitous, as individuals seek out one another in order to achieve personal goals. As a consequence, power is revealed through the interdependency of parties as they distribute valuable resources. The individual who possesses a desired resource has power over another who desires that resource, and the degree of that power is proportional to the other individual’s need and the availability of alternative sources for that resource. This relational aspect of power has particular significance within bargaining relationships that the common law defines as contracts.

Viewed through this more complex relational lens, power has an indelible impact on the formation, performance and ultimate regulation of contracts. This deduction would seem intuitive. By its generic definition, a contract results from the exchange of promises designed to fulfill personal goals. Individuals maximize those goals through consensual agreements that produce duties and liabilities. This bargaining interaction theoretically results in a vibrant marketplace that encourages exchange and entrepreneurship. In most cases, the resultant contract is an interpersonal enterprise in which bargainers optimize individualized bargaining positions to secure desired goals. The personal achievement of goals, which the economists recognize as a driving force in contract doctrine, transforms power into a salient norm in the formulation of contracts.

Those who possess economic or informational prowess tend to fulfill their expectations in a bargaining relationship. Thus, for example, in a hy-

3. Id. at 32.
4. See ARTHUR LINTON CORBIN, 1 CORBIN ON CONTRACTS § 1.1 (Joseph M. Perillo ed., 1993).
5. In an economist’s view, contract law and its remedies for breach assist parties in bargaining and entering into agreements. This promotes efficient outcomes which encourage the exchange and production of goods and services thus benefiting society overall. Stephen Slate & Kevin Fleming, An Economic Analysis of Contract Law: The Case of Efficient Reliance, 10 U.S. A.F. ACAD. J. LEG. STUD. 159, 162-63 (1999). The classic Restatement definition differs from the economist’s perspective in an effort to be globally applicable. “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). “[The term ‘contract’] is sometimes used as a synonym for ‘agreement’ or ‘bargain.’” Id. § 1 cmt. a (1981).
6. For more concerning the interpersonal nature of bargaining relationships, see infra notes 38-42 and accompanying text.
horetical case involving S, the seller of a valuable widget, and B, who seeks to acquire the valuable widget, the parties will seek out one another to fulfill individual goals. The resultant transaction is relational because the parties are mutually dependent. They both have the power to bargain; however, the distribution of that power between the parties may not be balanced or proportional. For example, if a widget is a rare good that B requires, one could conclude that S’s power in the bargain is superior. Disproportional power, in and of itself, is not per se problematic. Indeed, many bargains suffer from an imbalance of power and, yet, parties, still attain mutually desired goals.

This disproportionality of bargaining power, however, can contribute to disparate outcomes that frustrate expectations. Thus, in the previous hypothetical, S, whose power results from possession of a widget required by B, may succumb to opportunism that either diminishes B’s voluntary assent or produces an agreement with objectively onerous or unfair terms. Power imbalances, in effect, potentially skews the reality of bargaining freedom and reduces confidence in the market.

Because of its inevitable effect on expectation, bargaining power and its proportionality constitute salient norms in the formation, performance, and ultimate adjudication of contracts. Those who apply contract rules such as unconscionability often fail to adequately embrace the normative implications of power in bargaining relationships, particularly when confronted with the determination of whether a bargain or its terms are unconscionable. In the author’s view, the effective application of the rule governing unconscionability requires the recognition of power as an integral factor in contract formation, and its disproportionality should become a central focus in the evaluation of a bargain’s fairness. Despite its lack of definitional precision, common law unconscionability and, in particular, its procedural element, provides the opportunity to explore the context of seemingly unfair bargains and systematically addresses the problems associated with the imbalance of bargaining power. Adjudicators in the field of federal government contracts appear to appreciate this point, demonstrated by their enhanced analysis of context, which reveals the salience of power in bargain formation.

This Article proposes that, in order to appreciate the influence of disproportional power in contractual relationships that result in alleged uncon-
scionable bargains, decision-makers must fully scrutinize the context in which the contract is formed. Such an examination should logically occur in consideration of unconscionability's procedural element, which lends itself to scrutiny of the imbalance of power. One might argue that recognition of disproportional power is a theoretical exercise with little relevance. This Article posits, however, that the need to discern power's influence on the formation of bargains constitutes a significant step that ensures the judicious and insightful invocation of curative remedies and confirms the reality of the parties' assent to contractual terms. Decision-makers who adjudicate disputes in federal government contracts usually examine the implication of power on the ability of disadvantaged bargainers to contract with the government. The highly formalistic doctrine of government contracts, which has specifically provided opportunities for traditionally disadvantaged bargainers to participate in governmental procurements, recognizes the disproportionality of power as an influence on bargaining behavior.

Similar to those who adjudicate government contract disputes, decision-makers who interpret the common law of contract should incorporate a realist's perspective of power as they apply the doctrine of unconscionability. In the evaluation of procedural unconscionability, they should examine the context of the bargain, which reveals the influence of power disproportionality and reinforces greater appreciation of the implications of power in transitional relationships.

Part I of this Article commences with a summary of contract theory, noting its classical and neoclassical dimensions. The classical theory of contract demonstrates the dominance of formalism, the rule-based nature of which regularizes contractual behavior in the abstract, yet suffers a rigidity that eschews more contextual examination of the influence of power rigidity. While neoclassical theory formed the predicate for the modern doctrine of unconscionability, which consists of both substantive and procedural elements, the doctrine's vagueness clouds its normative effectiveness. Part II explores the more realistic examination of power in governmental contract disputes. After a brief exposé of the law of government contracts, Part III notes the origins of unconscionability within government contracts and also demonstrates the tendency of decision-makers in that unique area of contract law to analyze the procedural element of the doctrine in greater detail. Scrutiny of procedural unconscionability in federal government contracts serves as illustrative support for a more realistic consideration of power in common law contractual relationships. Thus, Part IV provides justification for common law decision-makers to view unconscionability and its procedural element as vehicles to explore the realistic implications of power disparity. Most common law decision-makers give short shrift to unconscionability's procedural element, and, instead, base relief on the doctrine's substantive element. This strategy has led to case-by-case decision-making that heightens the uncertainty that is commonly associated with the
doctrine. Expanded analysis of unconscionability’s procedural element would provide greater understanding of the impact of power disproportionality and further justify relief for disadvantaged bargainers.

The common law of contracts will likely retain its formalistic character. Certainly the resurgence of formalism as a dominant postulate of contract law confirms this view.\(^{11}\) This Article does not eschew formalism’s embrace; instead, it implores common law decision-makers to exhaust the analysis of context as required by the rule of unconscionability. Employment of this normative construct should confirm the propriety of relief from unduly burdensome bargains and further contract law’s ultimate goal of market integrity.

I. CONTRACT THEORY AND THE EMERGENCE OF UNCONSCIONABILITY AS A CHECK ON POWER

A. Classical Theory and the Dominance of Formalism

Appreciation of the analysis of power within disputed agreements requires a preliminary understanding of the theory that is foundational to contract rules. Contract law theoretically secures those bargainers who comply with the rules of assent and consideration.\(^{12}\) Conformity with these rules generally ensures a remedy in the event expectations are thwarted.\(^{13}\) Grounded in formalism, contractual rules ostensibly guide market participants through the procurement of goods and services.\(^{14}\) The law of contracts is not totally formulaic, however. In some circumstances, it recognizes inequities that preclude enforcement of seemingly valid agreements.\(^{15}\) Achievement of contractual equity, however, can be difficult, particularly in light of the constraints of proof associated with regulatory devices designed to police unfair bargains.\(^ {16}\)


\(^{12}\) See *infra* notes 28–31 and accompanying text (providing the basic common law rules of contract formation).

\(^{13}\) See *infra* notes 32–33 and accompanying text (noting the bargain principle as a primary determinant of contract validity and enforcement).


\(^{15}\) For a general explanation of contract law’s amelioration of inequities through paternalism, see *infra* notes 47–51 and accompanying text.

\(^{16}\) See *infra* notes 62–65 and accompanying text (providing academic definitions of such prevalent regulatory devices as duress, fraud, undue influence, and unconscionability).
The classical theory of contract formation has kept objectivity as its central focus.17 Commercial growth and activism combined with laissez-faire economics, which dominated commerce in the nineteenth century,18 Individualism and objectivity in the formation and scrutiny of bargains became bedrock elements of contract law.19 This philosophy encouraged the embrace of bargain autonomy, and commensurately encouraged individuals to seek bargains without fear of governmental interference.20


19. The ideological foundation of classical contract theory remains the naturalist notion that individuals have the inherent right and freedom to seek and consummate bargains. This idea dates back to the laissez-faire movement of the nineteenth century. See Adam B. Seligman, Individualism as Principle: Its Emergence, Institutionalization, and Contradictions, 72 Ind. L.J. 503, 509 (1997) (noting the use of classical impediments to contract to preserve the individual freedom to contract).

20. See Samuel Williston, Freedom of Contract, 6 Cornell L.Q. 365, 366 (1921) (recognizing that philosophers of the late eighteenth century advocated the freedom of contract as a guiding postulate). “Freedom” has its definitional base in the Declaration of Independence and reflects Jeffersonian democracy, thereby facilitating individual action and minimizing governmental activity or interference. Id. See also Lochner v. New York, 198 U.S. 45, 53 (1905) (indicating that an individual’s right “to make a contract in relation to his business . . . [constitutes a] liberty of the individual protected by the Fourteenth Amendment . . .”)

Milton Friedman, Capitalism and Freedom (1962); see also Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 570 (1982) [hereinafter Kennedy, Distributive and Paternalistic Motives] (recognizing that “[f]reedom of
Bargain autonomy functions fairly, however, only when parties to a contract either enjoy parity in negotiations or refrain from opportunistic behavior when parity does not exist. Neither of these conditions is guaranteed in any transaction. Parties whose bargaining positions may be inferior to others with whom they negotiate may not only fail to achieve their expectations but also become overly burdened in the performance (or nonperformance) of their contractual duties. This situation, which often disproportionately impacts the disadvantaged party, raises paternalistic concerns related to transactional fairness.21

Despite the occurrence of inequities in certain transactions, the classical theory of contract fails to accommodate adequately problems associated with bargain equity. It instead prescribes universally applied rules of contract formation.22 These rules essentially require that an enforceable contract include exchanged promises sealed by consideration.23 Of course, the genuineness of consent lies at the heart of any valid agreement.24 Genuine consent also confirms a contract’s legitimacy.25 Consideration notwithstanding.

contract is freedom of the parties from the state as well as freedom from imposition by one another”).


24. See supra notes 17–19 and accompanying text (emphasizing contractual freedom, the precursor to consent, as a dominant element of an enforceable contract); see also, Morant, Law, Literature, and Contract, supra note 17, at 10 (stating that consent is “a mandatory requisite of any valid agreement”).

25. Randy E. Barnett, ... And Contractual Consent, 3 S. CAL. INTERDISC. L.J. 421, 424 (1993); see also Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 270 (1986) [hereinafter Barnett, A Consent Theory of Contract] (arguing that “consent theory” is a “moral component that distinguishes valid from invalid transfers of alienable rights”). Professor Barnett further states that consent theory not only provides a foundation for the “objective” approach to the determination of contractual intent but also constitutes a more effective theory to substantiate the enforcement of bargained for exchanges. Id. at 291–94, 297–309.
standing, consent becomes the primary determinant of contract enforcement.

Consent, which is synonymous with intent, has been traditionally regarded as a “meeting of the minds” of the parties. This subjective manifestation defies precision and, thus, becomes an abstraction that leads to the more contemporary preference for objective manifestations. Objective assent combines with the exchange of promises to form a binding agreement. This formulaic principle and its derivative rules originate in English common law. While other theories confirm the essence of contract law,

27. See Morant, Race and Disparity, supra note 17, at 905–07.
30. See Metro Comm’ns Co. v. Ameritech Mobile Comm’ns, Inc., 984 F.2d 739, 744 (6th Cir. 1993) (illustrating that the prerequisites for contract formation are offer, acceptance, and consideration); Tsatsios v. Tsatsios, 663 A.2d 1335, 1339 (N.H. 1995) (stating that “[o]ffer, acceptance, and consideration are essential to contract formation.”); Serand Corp. v. Owning The Realty, Inc., No. C-941010, 1995 WL 653846, at *2 (Ohio Ct. App. 1995) (stating that elements of an effective contract are offer, acceptance and consideration); Jenkins v. County of Schuykill, 658 A.2d 380, 383 (Pa. Super. Ct. 1995) (stating that “[i]t is black letter law that in order to form an enforceable contract, there must be an offer, acceptance, consideration or mutual meeting of the minds”); see also RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining a contract as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”). The Uniform Commercial Code states that a “‘contract’ means the total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law.” U.C.C. § 1-201 (1978). For a more detailed description of the variety of definitions of the term “contract,” see Orvill C. Snyder, Contract—Fact or Legal Hypothesis?, 21 MISS. L.J. 304 (1949). See also Dennis Patterson, The Pseudo-Debate Over Default Rules in Contract Law, 3 S. CAL. INTERDISC. L.J. 235, 236 n.3 (1993) (acknowledging efficiency theory as a descriptive tool in contract law and adopting the Restatement (First) of Contracts (1932) definition of contract that “[a] contract is not a certain sort of promise. Rather, a contract is a promise ‘for the breach of which the law provides a remedy.’”)
31. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J., concurring) (stating that the origins of both tort and contract law can be traced to the “medieval English legal system”); Sir Guenter Treitel, Some Comparative Notes on English and American Contract Law, 55 SMU L. REV. 357, 357 (2002) (noting that contract law in England and the United States have “shared common law principles,” and that comparative exposés of those principles remains plausible given the two systems’ similarities, i.e., the United States’ elements of promissory estoppel espoused in Restatement (Second) of Contracts § 90, and the English version of the doctrine explained in Hughes v. Metropolitan Ry. (1877) 2 App. Cas. 439 (H.L.)); see also Lee Craig, The Thirteen Adjudications of Good Faith
the classical notion, with its emphasis on autonomy, continues as a dominant norm. Reflective of this dominance is the bargain principle, which constitutes the dominant litmus test for a bargain’s validity.33

B. Neoclassicism and the Need for Paternalism

Decision-makers cling to the bargain principle to evaluate agreements.34 The bargain principle’s more rule-based approach to contract validity, however, has discernable shortcomings. Legal rules by their very nature are inherently rigid. As a result, rules sometimes interact crudely and awkwardly in various circumstances.35 The rigidity of contract rules often

Claims, INS. LITIG. REP., March 8, 2002, at 120 (stating generally that damage rules in contracts have their origins in “English common law”); ANDREW BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS: ESSAYS ON CONTRACT, TORT AND RESTITUTION 136-38 (1998) (explaining English law’s fixation with a plaintiff’s expectation interest, which has also been a historical linchpin concept in U.S. jurisprudence relevant to remedies for breach of contract); Mark A. Fehlson, The Public Policy Exception to Employment at Will: When Should Courts Defer to the Legislature?, 72 NEB. L. REV. 956, 959 n.11 (1993) (citing WILLIAM BLACKSTONE, COMMENTS ON THE LAW OF ENGLAND 425 (21st ed. 1847) for the proposition that the American conceptualization of the employment-at-will doctrine has its origins in English common law); see generally KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT (1990).

32. The discussion thus far has centered on what Professors Scott and Kraus refer to as “autonomy” theories. See ROBERT E. SCOTT & JODY S. KRAUSE, CONTRACT LAW AND THEORY 23-26 (3d ed. 2002). Other contractual theories also have considerable import. See Barnett, A Consent Theory of Contract, supra note 25, at 291–94, 297–309 (advancing his preferred “consent theory” and acknowledging the popularity of other theories of contractual obligation, such as: party-based theories, e.g., will and reliance theories; standards-based theories, efficiency and fairness; and process-based theories, bargained theory, the latter of which is the essence of the bargain principle). For another perspective on the theories of contract law, see AMY HILSMAN KASTELY, DEBORAH WAIRE POST, & SHARON KANG HOM, CONTRACTING LAW 24–130 (1996) (providing detailed discussion and analysis of bargain, reliance, and restitution as three “principles” of contract law).


35. See Cass R. Sunstein, Problems with Rules, 83 CAL. L. REV. 953, 957 (1995) (stating that “[o]ften rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved”). Professor Richard McAdams seems to echo this sentiment regarding this pejorative characteristic of rules. Although he speaks in terms of “law” as opposed to “rules,” the rationale remains analogous. He explains his thesis

produces uncertain or disparate effects when applied to a variety of different facts.\footnote{Rules, therefore, are not panaceas in all circumstances.} The very nature of contract formation reinforces this point.

Contract formation is, first and foremost, an interpersonal exchange—one in which parties seek bargainers and evaluate the merits of a potential deal based upon who the bargainers are and what they offer.\footnote{An individual’s political or financial clout impacts these judgments, particularly during the pre-bargain phase in which parties form judgments and make choices that ultimately affect the terms of an ultimate agreement.} Assessment of a party’s ability to bargain, which can also be considered bargaining power, influences both the willingness to bargain with that individual and the terms of the parties’ final agreement.\footnote{Bargaining power constitutes a contextual...}

within the context of racial discrimination as it relates to individualized sacrifices on behalf of groups. \footnote{See Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 HARV. L. REV. 1003, 1007 (1995).} McAdams notes that, notwithstanding the crudeness of law, it may nonetheless significantly influence individual perceptions and attitudes. \footnote{Id. at 1081. McAdams states that law is more crude than an intellectual critique, yet it is inherently more public, and can carry more weight. When Jim Crow laws mandated certain forms of segregation, whites confidently spoke of segregation as the natural order of things; when the laws forbade segregation, discriminatory whites had a greater difficulty believing their own ideology. Rationalizations can be fragile things; sometimes they require that dissent be held to a minimum. Id.} McAdams notes that

\footnote{36. See Sunstein, supra note 35, at 957 (noting the “crudeness” of rules). When issues of race or gender are involved, legal rules, particularly those that are not specifically designed to accommodate such issues, can not only be crude, but lead to misconceptions and create false perceptions. See McAdams, supra note 35, at 1007, 1081. Given these observations, I, too, have cautioned against the over-reliance on rigid rules of contract as they apply to issues of reduced bargaining power. See Morant, Contractual Rules and Terms, supra note 21, at 455-57. 37. See id.; see also Morant, Contractual Rules and Terms, supra note 21, at 462; Sunstein, supra note 35, at 1023. 38. Relational theorists would apparently acknowledge that a contract represents an...}
factor that varies based upon a party’s informational and financial resources. Abuse of power by the party with superior resources contributes significantly to bargaining disparity and impacts contractual fairness and validity.

The bargaining context that includes the manifestations of the parties’ power, together with the shortcomings of formalism, implores a more flexible approach to the application of contract rules. This premise energizes the neoclassicists, who infuse contractual classicism with realism.

41. Imperfect information during pre-contractual negotiations often creates problems for bargainers. See Robert J. Conlin, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 Md. L. Rev. 1, 8 (1992) (discussing the difficulties faced in dispute bargaining as a result of imperfect information); Barry Perlstein, Crossing the Contract-Fort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract, 58 Brook. L. Rev. 877, 882 (1992) (stating that contracts would be “self-executing if information is perfect both during the formation of the contract and through its performance”).

42. This Article employs the term “disparity” as a generalized description of bargaining contexts which include bargainers who operate under some disadvantage that can often be associated with unequal bargaining power or knowledge of the parties to an agreement. See David Milon, Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security, 146 U. Pa. L. Rev. 975, 989 (1998) (defining bargaining power in terms of skill, bargaining leverage, and the ability to impose costs with the intent to gain an advantage in bargain negotiations); Steve D. Shavone & Kenneth Voytek, Economic and Critical Analyses of the Law of Covenants Not to Compete, 72 Geo. L.J. 1425, 1447 (1984). Consequently, those who possess superior bargaining power or knowledge relating to the bargain’s subject matter may exploit this advantage through opportunistic or pejorative behavior. Bias or prejudice may influence bargaining decisions and contractual performance. See infra note 59 and accompanying text. As a possible trigger of bias, disparity can implicate issues of gender, race, class, or comprehension.

43. See generally Mooney, supra note 11.

classicism retains the theoretical essence of classical contract and also promotes a less rigid conceptualization of the valid bargain. Exchange of promises and consideration are no longer sole determinants of a binding promise.\footnote{A promise that can be enforced if it induced reliance under prescribed circumstances is the essence of the promissory estoppel doctrine that is now codified in Restatement (Second) of Contracts § 90 (1981). It has been eschewed as a blow to the reality of true contract. \textit{See generally} GRANT GILMORE, \textit{THE DEATH OF CONTRACT} 57 (1974) (stating that Holmes and Williston's theory of contract "has gone into its protracted period of breakdown almost from the moment of its birth").} Moreover, bargaining process irregularities, which often result from power disproportionality, can impede contractual enforcement.\footnote{For a more thorough discussion of neoclassical theory of contract law, see JAY M. FEINMAN, \textit{The Significance of Contract Theory}, 58 U. CIN. L. REV. 1283, 1285–89 (1990) (providing a detailed explanation of the neoclassical theory of contract law); OLIVER E. WILLIAMSON, \textit{Transaction-Cost Economics: The Governance of Contractual Relations}, 22 J.L. & ECON. 233, 235–38 (1979) (noting not only the characteristics of neoclassical theory, but also delineating the distinctions between neoclassical theory of contract law, classical theory of contract law and relational contracting). \textit{See also} DANIEL A. FABER, \textit{Contract Law and Modern Economic Theory}, 78 NW. U. L. REV. 303, 319–22 (providing a cogent explanation of the "neoclassical" model of contract theory, which, \textit{inter alia}, supports the enforcement of bargained promises). More specifically, a significant amount of scholarship has been dedicated to the neoclassical theory of contract law as it relates to the traditional, contractual paradigm. \textit{See} EISENBERG, \textit{TheResponsive Model of Contract Law}, supra note 17, at 1111 (indicating that neoclassical contract theory should be elaborated in order to ensure that the theory encompasses principles which are "intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contract as a social institution"); \textit{see generally} Eisenberg, \textit{The Bargain Principle and Its Limits}, supra note 33; EISENBERG, \textit{The Principles of Consideration}, supra note 33; MELVIN ARON EISENBERG, \textit{Donative Promises}, 47 U. CHI. L. REV. 1 (1979).} Paternalism checks the legitimacy of contract and protects disadvantaged parties with limited bargaining power.\footnote{\textit{See} NEIL G. WILLIAMS, \textit{What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel}, 70 WASH. L. REV. 1019, 1042 n.170 (1995).} Opportunistic behavior
on the part of advantaged bargainers sometimes leads to excessively onerous agreements requiring reformation or invalidation—actions that preserve the disadvantaged party’s interests. Paternalistic intervention constrains contractual freedom, at least that of the advantaged party, and shields the disadvantaged party from unduly burdensome duties. Paternalism in contract law is closely associated with distributive justice and, thus, provides for a realignment of interests to achieve some measure of equity or fairness.

The neoclassicists, who embrace the notion of fairness, welcome discussions of context that reveal the relevance of power. This contemporary and realistic theory of contract underscores this Article’s initial premise that power impacts the pre-bargaining conduct of parties and the ultimate terms of their contract. Perhaps a typical contractual scenario might illustrate this point. B, the buyer, who is an inexperienced consumer of a specialty good or service, risks executing a contract with potentially onerous terms if S, the more sophisticated seller, includes terms that clearly favor his interests. Typically in such cases, S occupies a superior position in the bargaining relationship due to S’s superior informational or economic resources. S’s superior bargaining position likely motivates S to include terms that are favorable for him but disadvantageous for B. The influence of informational power on bargains has been documented in several contexts. For example, Professor Ian Ayres has demonstrated the function of stereotype and bargaining disparity in the automotive sales market. Power dispropor-

that purports to replace the will of a party with what the decision-maker thinks is better for the party).

49. See Joel Feinberg, Harm to Self: The Moral Limits of the Criminal Law 12-16 (1986) (categorizing legal rules that protect weaker parties from the opportunism of stronger parties as “soft paternalism”; “hard paternalism,” on the other hand, seeks to protect bargainers from their own actions).

50. Id.; see also Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972) (delineating generally the intersection of legal rules with paternalism and other mechanisms).

51. See Anthony T. Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763, 766–74 (1983). Kronman’s example of distributive justice is the decision-maker’s refusal to allow disclaimers of the warranty of habitability in landlord/tenant relationships. The concept of unconscionability would also fit within the rubric of this justification; see also Anthony T. Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472 (1980).

52. The hypothetical loosely resembles the facts of Williams v. Walker-Thomas and other cases discussed in this Article, most of which include the advantaged party’s authoring of terms that favored them, but handicapped the disadvantaged party. See infra notes 91–94 and accompanying text.

53. See Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817 (1991) [hereinafter Ayres, Fair Driving].
tionality and resultant discrimination has also been revealed in employment agreements and real estate purchases and rentals.

Unfair or improvident bargains that result from power disparity may warrant reformation or amendment, particularly if the disadvantaged party's assent to the agreement seems questionable in light of the onerous term(s) in the contract. Interference in bargaining relationships, regardless of the seeming propriety of such action, becomes a precarious exercise. Paternalistic intervention is generally premised on assumptions of the parties' capabilities or intentions. These assumptions arrogantly suggest that decision-makers are superior regulators of the parties' interests. If, as a generally accepted axiom, the parties are the best arbiters of their own interests, then paternalistic intervention might lead to contractual reforms that stray from the parties' original intent and lead to inefficient results.

Intervention into seemingly binding agreements becomes prudent, however, if a term of the parties' contract is unreasonably harsh or burdensome as a result of the parties' disparity of power. Given the importance of consent as a basis for contract enforcement, intervention has greater legitimacy if the disadvantaged party's assent to an onerous term is doubtful. Despite its possible variance from the parties' original intent and the potential for inefficiency, paternalistic intervention, if judiciously administered, has a place in contract law. Power disparity is often manifested by opportunism, which reigns in many cases where the parties' bargaining positions are widely disparate. Protection of disadvantaged parties who are victims of opportunistic abuses of power morally justifies measured intervention.


57. Id.; JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 117 (1980). An example of a paternalistic restriction designed to protect an individual from her own acts would be the prohibition of alcoholic beverages sales on certain days or during certain hours of the day.


59. Opportunism focuses upon a bargainer's self-interest, which can prompt behavior adverse to other bargainers. The definitions of opportunism range both by fields of study and within these same fields. The most frequently cited definition comes from economist Oliver Williamson, who defines opportunism as "'self-interest seeking with guile.'" G. Richard Shell, Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action, 44 VAND. L. REV. 221, 228 (1991) (quoting OLIVER E. WILLIAMSON,
Several interventionist remedies have their genesis in paternalism. Lack of capacity may prevent enforcement of an agreement, or terms thereof, if one of the parties is a minor or operates under some supervening disability.\textsuperscript{61} Other remedies include duress,\textsuperscript{62} fraud,\textsuperscript{63} and undue influence.\textsuperscript{64}

\textit{Markets and Hierarchies: Analysis and Antitrust Implications} 26 (1975)). Another frequently cited definition is "when a performing party 'behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms, leading to a transfer of wealth from the other party to the performer.'" \textit{Id.} (quoting Timothy J. Muris, \textit{Opportunistic Behavior and the Law of Contracts}, 65 Minn. L. Rev. 521 (1981)). For a broader definition of opportunism, see George M. Cohen, \textit{The Negligence-Oppportunism Tradeoff in Contract Law}, 20 Hofstra L. Rev. 941, 957 (1992), stating that "any contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality." See generally Julie Kostritsky, \textit{Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations}, 44 Hastings L.J. 621 (1993) (advocating the use of default rules to prevent opportunism); Richard E. Speidel, \textit{Article 2 and Relational Sales Contracts}, 26 Loy. L.A. L. Rev. 789 (1993) (discussing the threat opportunism poses to bargaining relationships); Barry Perlestein, \textit{Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract}, 58 Brook. L. Rev. 877 (1992) (advocating the use of tort damages to prevent opportunism). Bias or prejudice can intersect with opportunism, or function alone as an influence on bargainers. \textit{See generally Morant, Race and Disparity, supra note 17, at 917.}


61. \textit{See Morant, Race and Disparity, supra note 17, at 920 n.172.}

62. Duress is an "unlawful threat or coercion used by a person to induce another to act (or to refrain from acting) in a manner he or she otherwise would not (or would)." \textit{Black's Law Dictionary} 504 (6th ed. 1990). "A finding of duress at least must reflect a conviction that one party to a transaction has been so improperly imposed upon by the other that a court should intervene." \textit{In re Hellenic Lines, Ltd.}, 372 F.2d 753, 758 (2d Cir. 1967). A contract entered into under duress is voidable at the instance of the party suffering duress. Chouinard v. Chouinard, 568 F.2d 430, 434 (5th Cir. 1978). Duress is predicated on the unlawful acts of the other party. \textit{Id.} Thus, one who enters into a contract because of an unfortunate financial situation or where the other party has refrained from pursuing a legal right in exchange for the contract has not suffered duress. \textit{Id.}; see also \textit{Hugh Gravelle & Ray Rees, Microeconomics} 248-53 (1981).

63. Fraud represents "[a]n intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right." \textit{Black's Law Dictionary} 660 (6th ed. 1990). A statement is fraudulent if the maker intends the statement to induce manifestation of assent and the maker knows that the
Of all paternalistic remedies, however, the doctrine of unconscionability, which focuses on the parties’ disparity of power, may be the most notable.\(^\text{65}\)

C. A Review of the Common Law Doctrine of Unconscionability as a Remedy for Power Disproportionality

As a product of neoclassicism, unconscionability constitutes a potentially effective doctrine to address unfairness resulting from power disparity. An unconscionable term or agreement must exhibit a lack of meaningful choice for the disadvantaged party (procedural unconscionability) and contain a burdensome or unfair term (substantive unconscionability) imposed on the disadvantaged party.\(^\text{66}\) When the procedural and substantive elements are proven, the decision-maker may relieve the disadvantaged party of the obligation to perform.

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\(^\text{65}\) Undue influence is “[p]ersuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.” BLACK’S LAW DICTIONARY 1528 (6th ed. 1990). However, the mere existence of a confidential relationship does not create a presumption that undue influence was exercised. Bradbury v. Rasmussen, 401 P.2d 710, 714 (Utah 1965). The party alleging undue influence must prove it by clear and convincing evidence. See id.; Armstrong v. Anderson, 417 P.2d 326, 328–39 (Okla. 1966).

\(^\text{66}\) The courts have defined unconscionability as “the absence of meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party.” Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (Wis. Ct. App. 1992). Similarly, the West Virginia Supreme Court describes unconscionability as an “overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court’s refusal to enforce a contract as written.” McGinnis v. Cayton, 312 S.E.2d 765, 776 (W. Va. 1984); see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (indicating that unconscionability is 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”). Furthermore, the doctrine is broken down into two components as unfairness in the contract itself—“overall imbalance, one-sidedness, laesio enormis, and the evils of the resulting contract.” McGinnis v. Cayton, 312 S.E.2d 765, 776 (W. Va. 1984). Procedural unconscionability, the court explained, “involves inequities and unfairness in the bargaining process.” Id. at 777.

Procedural unconscionability has also been acknowledged as disparate bargaining positions of the parties. For a complete explanation of the unconscionability doctrine, see Eisenberg, The Bargain Principle and Its Limits, supra note 33, at 748-86; Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause, 115 U. PA. L. REV. 485, 488 (1967) [hereinafter Leff, Unconscionability and the Code].
A case that provided the archetypical example of the unconscionable bargain at common law is the often cited *Williams v. Walker-Thomas Furniture Co.* In *Williams*, a mother who received governmental financial assistance executed a preformed agreement with Walker Thomas Furniture Company for various home furnishings. The disparate bargaining positions of the furniture company and Mrs. Williams exhibited procedural unconscionability. The onerous contractual provision that allowed the furniture company to repossess all items purchased regardless of payments made by Mrs. Williams constituted substantive unconscionability. Despite the existence of facts that supported a finding of unconscionability, the trial court opined that it lacked the authority to provide Mrs. Williams any relief.

The Uniform Commercial Code (U.C.C.) drafters, in U.C.C. section 2-302, define unconscionability more generically and tend to embellish the doctrine’s common law elements. In a dispute involving the sale of goods, decision-makers have the authority to bar enforcement of a contract or a term thereof that is “unconscionable at the time it was made,” with the parties having “a reasonable opportunity to present evidence as to [a contract’s] commercial setting, purpose and effect . . . .” The ultimate goal is the “prevention of oppression and unfair surprise.”

The proposed revision of Article 2 of the U.C.C. by the Consumer/Industry Task Force includes a refinement of the unconscionability doctrine as presently codified in section 2-302. The revised Article 2 defines the doctrine in section 2-105, which requires a finding of both procedural and substantive unconscionability, except when a non-negotiated term

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67. 350 F.2d 445 (D.C. Cir. 1965).
68. Id. at 447-48.
69. See id. at 448.
70. See id. at 447-50.
72. U.C.C. § 2-302: UNCONSCIONABLE CONTRACT OR TERM (2005), reads:

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

(2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
73. Id.
74. Id.
defeats the contract’s purpose, or if unconscionable behavior induced a term or the contract as a whole.\footnote{75}

Notwithstanding the doctrine’s comprehensible procedural and substantive elements that are recognized at common law and in the U.C.C., unconscionability suffers from vagueness that has contributed to subjective decision-making. The doctrine’s broadly-defined elements provide discretionary latitude to decision-makers, arguably lead to uncertainty, and fail to provide adequate guidance as to when the doctrine should be invoked or what factors justify its invocation. As a result, disadvantaged parties seeking relief pursuant to the doctrine must surmise what evidence will prove a term or terms of the disputed agreement to be substantively unconscionable.\footnote{76} These significant shortcomings have left unconscionability vulnerable to considerable criticism.\footnote{77} Inherent vagueness causes the defense of unconscionability to conflict with the formalistic nature of contract law.

Contractual formalism, with its emphasis on rules, has lately become a dominant concept in contract law.\footnote{78} This comes as no surprise given formalism’s rather superficial benefits. Adherence to rules, a bedrock postulate of formalism, presupposes an ease and simplicity in bargain formulation. Rule-based process fosters certainty. Parties, presumably familiar with the rules of contractual engagement, follow the established procedures for contract formation and reap the benefit of enforcement of their bargain. Reliance on formalistic rules also eases the adjudication of disputes, because these rules provide readily accessible formulae for decision-making.\footnote{79}

\footnote{75. See Carol B. Swanson, Unconscionability Quandary: U.C.C. Article 2 and the Unconscionability Doctrine, 31 N.M. L. Rev. 359, 382-84 (2001) (detailing the elements of unconscionability as provided in the revised Article 2 § 2-105).

76. Standards for proof of unconscionability remain vague and imprecise. See, e.g.,\textit{Restatement (Second) of Contracts} § 211(3) (1981) (noting that terms which the author of the contract “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term” may not be binding on the accepting, and usually weaker, party); see also id. § 211 cmt. f (stating that buyers are not bound to a standard form contract’s hidden or latent terms which are “beyond the range of reasonable expectation”); see generally John E. Murray, Jr., The Standardized Agreement Phenomenon in the Restatement (Second) of Contracts, 67 CORNELL L. REV. 735, 765-79 (1982).

77. Scholars have noted the advantages and disadvantages of the unconscionability doctrine. See generally Harry G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 HASTINGS L.J. 459, 482-86 (1995) (stating that unconscionability, as generally applied in all jurisdictions that recognize the doctrine, is limited to application “at the time the contract was made”); see John A. Spanogle, Jr., Analyzing Unconscionability Problems, 117 U. PA. L. REV. 931 (1969) (noting that the doctrine suffers from vagueness and should be applied only when both procedural and substantive conditions are met); Leff, Unconscionability and the Code, supra note 66 (noting the vagueness of U.C.C. section 2-302).

78. For an excellent explanation of the resurgence of formalism in contemporary decision making in contract law, see generally Mooney, supra note 11.

79. See id.
Formalism has notable shortcomings, however. While decision makers dogmatically embrace the simplicity and seeming surety of formalistic rules, they tend to ignore the idiosyncratic influences of attitudes and behavior on resultant bargains. Formulaic decision-making becomes somewhat disingenuous and incomplete and, as a result, belies the reality that contracts constitute interpersonal exchanges.

Formalism, nonetheless, dominates the bargaining world. This assertion has particular validity given that assent, which remains the foundational element of a valid agreement, is generally presumed if it is manifested objectively. Thus, barring definitive evidence casting doubt on the authenticity of a preformed contract, the signed form represents a presumptively valid and binding contract with all required elements. The executed form is *prima facie* enforceable, regardless of the parties' understanding of their duties to perform subsequent to negotiation and execution of the contract.

Routine or regularly occurring transactions are often memorialized in a standard form containing predrafted terms. Also known as a contract of adhesion, this form ostensibly satisfies the formalistic requirements of

80. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), where the court adopts a somewhat laissez-faire attitude toward bargaining relationships. See also *supra* notes 18–20 and accompanying text. For more regarding the seeming rise of classicism as an evaluative norm among judicial decision-makers, see generally *Mooney, supra* note 11 (depicting the American contract jurisprudence's move from egalitarianism to individualistic and conceptionalist model, which facilitates bargained-for exchanges).

81. For more regarding the interpersonal nature of contract formation, see *Morant, Law, Literature, and Contract, supra* note 17, at 4–8.

82. See *Corbin, supra* note 4, § 2.10 (discussing the importance of assent in the context of written contracts).

83. A challenge to the terms of parties' written contracts usually invokes the parol evidence rule, which provides various tests for the admission of certain extraneous evidence intended to supplement or contradict terms of the original writing. See *Restatement (Second) of Contracts* § 213 cmt. a (1981) (stating that the parol evidence rule "defines the subject matter of interpretation"); see generally *John E. Murray, The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts, 123 U. Pa. L. Rev. 1342 (1975); Farnsworth, Meaning, supra note 28; Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161 (1965). For the sale of goods, U.C.C. § 2-202: *Final Expression in a Record: Parol or Extrinsic Evidence* (2005), applies a less convoluted test to determine the admissibility of extrinsic evidence that rebuts or supplements the terms of a written agreement. See *Masterson v. Sine*, 436 P.2d 561, 563-64 (1968) (stating that the analysis employed subject to the language in U.C.C. § 2-202 would exclude extrinsic evidence in "fewer instances").

84. See *Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1177 (1983) (defining a "model "contract of adhesion".") Rakoff's definition refers to the following seven characteristics:

1. The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract.

2. The form has been drafted by, or on behalf of, one party to the transaction.
assent and consideration. Thus, if the form contains the parties’ signatures, the resultant agreement becomes presumptively valid, enforceable and, of course, mutually binding.\footnote{See CORBIN, supra note 4, \S 2.10.}

The inherent benefits of a preformed contract relate to efficiency. Because the form includes most, if not all, of the terms and conditions for the bargain, it substantially reduces transactional costs\footnote{Transaction costs consist of anything incurred in the operation of an “economic system,” and negatively impact the progress of a commercial transaction. See AVINASH K. DIXIT, THE MAKING OF ECONOMIC POLICY: A TRANSACTION-COST POLITICS PERSPECTIVE 38 (1996); Kenneth Arrow, The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation, in PUBLIC EXPENDITURES AND POLICY ANALYSIS 59 (Robert H. Haveman & Julius Margolis eds., 1970); see also R. H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937) (recognizing that market transactions are generally costly, and that businesses may reduce transaction costs if they bring needed services in-house, rather than contracting for such services with third parties).} associated with contract formation.\footnote{Jeffrey W. Stempel, Reassessing the “Sophisticated” Policyholder Defense in Insurance Coverage Litigation, 42 DRAKE L. REV. 807, 829 (1993) (stating that standardization reduces time and money spent on contracting); see also J. Kirkland Grant, Securities Arbitration: Is Required Arbitration Fair to Investors?, 24 NEW ENG. L. REV. 389, 403 (1989) (discussing the advantages of standard form contracts and stating that “standard contract[s] will reduce administrative and transaction costs”); Todd D. Rakoff, supra note 84, at 1221 (noting that standardization is valuable because it reduces transaction costs). Applied to adhesion agreements, the transaction costs associated with bargain formation are reduced since parties are spared the duty to define each and every term of their ultimate contract.} The preformed agreement, however, may also serve as an opportunistic bargaining tool for the more advantaged party to the bargain. Often drafted by the more advantaged party,\footnote{I employ the term “advantaged” to connote that party with greater bargaining power who thus possesses greater resources and transactional knowledge or savvy, therefore, having the ability to potentially dictate the terms of a bargain. The difference in bargaining} the standard form may con-
tain clauses that secure the advantaged party’s expectations but also prejudice the interests of the more disadvantaged party. 89

In most instances involving consumer transactions, the party who drafts the standard form agreement possesses significantly greater informational and financial resources than the non-drafting party. The fact that the drafter also has a highly valued good, which the non-drafting, purchasing party needs, heightens the disproportionality of power between the bargainers. This is commonplace within franchise or exclusive dealer arrangements. 90 The parties’ bargaining disparity is fertile ground for procedural unconscionability. That said, proof of unconscionability’s procedural element will not alone garner relief for the disadvantaged party. A term governing performance must also be considered unduly burdensome. 91

An onerous term in a contract might logically result from power disparity, which is a procedural element. The superior power of the advantaged party, who drafted the form, will usually manifest itself in the form of contingency terms that protect the drafter, yet potentially hurt the non-drafting party. Although they vary depending upon the nature of the bar-

89. By “disadvantaged,” I mean the party with comparatively less bargaining power than the other. For use of the term as it may apply to small businesses, see James L. Huffman, Essay, The Impact of Regulation on Small and Emerging Businesses, 4 J. SMALL & EMERGING BUS. L. 307, 314 (2000) (opining that small businesses are generally disadvantaged in the commercial sphere due to the lack of economies of scale); G. Richard Shell, Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend, 82 NW. U. L. REV. 1198, 1237 (1988) (observing that small businesses suffer from informational disadvantages, lack experience, and fail more often than large businesses); THE SMALL FIRM: AN INTERNATIONAL SURVEY 28 (David J. Storey ed., 1983) (stating that small businesses “suffer more profoundly” from market changes such as a recession, where small businesses, unlike their larger counterparts, lack the cash reserves and economic resources to survive market slowdowns, and that small businesses generally operate in industries where price competition is fierce); see also Donald R. Korobkin, Vulnerability, Survival, and the Problem of Small Business Bankruptcy, 23 CAP. U. L. REV. 413, 427 (1994). For more regarding the “disadvantaged” bargainer, see supra note 42 and accompanying text.


gain, contingency terms may include accelerated payment, liquidated damages and other similar remedial clauses, or termination or default clauses. These clauses generally allow the advantaged party to determine the validity of the disadvantaged party’s performance and, thus, become the palpable manifestation of the advantaged party’s greater bargaining power. If activated, these provisions could result in significant forfeiture or other devastating consequences for the disadvantaged party. The potentially harsh consequences associated with these clauses naturally implicate substantive unconscionability. The formalist, rule-based nature of contract law, however, implores enforcement of these clauses, notwithstanding their considerable unfairness.

92. Accelerated payment provisions generally constitute pre-performance, agreed-upon remedial devices that provide for a party who has breached some term of an agreement to pay a substantial sum (usually the balance) required in the original agreement. See U.S. Leasing Corp. v. Smith, 555 S.W.2d 766, 770 (Tex. Civ. App. 1977) (holding that an equipment lease provision that required lessee to pay accelerated rentals if he breached the lease was an unenforceable penalty).


94. The famous case of Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) provides an example of a particularly burdensome default clause in the consumer (sale of goods) context. As a generalized norm, these clauses impose a burden on the disadvantaged or weaker party (in the case of the hypothetical S) in the event of some failure or nonperformance. Of course, clauses governing nonperformance do not constitute the only possibly burdensome provisions of an agreement. Depending upon the bargaining context, essential or dickered over terms such as price, quantity, and delivery could be burdensome. See generally Morant, Race and Disparity, supra note 17. These terms, however, have a direct nexus to the parties’ respective intent and, thus, are more difficult to evaluate as objectively burdensome.

95. An example of such a clause is termination, which grants to the drafting party (usually the advantaged party) exclusive authority to determine if the non-drafting party (usually the disadvantaged party) has breached.

96. See Gregory C. Yadley, General Solicitation and General Advertising Hurdles to Capital Raising by Small Business in the Brave New World, 28 A.L.I.-A.B.A. 319, 321 (Feb. 16, 1996) (stating that an omnipresent challenge for any small business is the access to capital); Rachel Geman, Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities, 30 Colum. J.L. & Soc. Probs. 369, 399 (1997) (stating that small businesses have difficulty obtaining loans due to their lack of capital); see also Andrew Beckerman-Rodau, Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis, 47 Ark. L. Rev. 603, 635 (1994) (explaining that small businesses lack the capital to use their trade secrets).
The demands of formalism and unconscionability’s vague definition heighten the doctrine’s transactional disutility. Consumers reluctantly plead unconscionability, due in some measure to decision-makers’ seeming distaste for the doctrine and the commensurate low rate of success for those who plead it. It also logically follows that if disadvantaged consumers experience difficulty securing relief pursuant to unconscionability, commercial parties would find the task virtually impossible.

Another, more systemic reason for unconscionability’s disutility is the fragmentary and often deficient analysis employed to determine its applicability. Decision-makers often fail to appreciate and explore the context in which the bargain is formed. Conspicuously absent from the doctrine’s elements is consideration of subjective factors related to power, class, gender, or race. Analysis of procedural unconscionability focuses solely on the parties’ disparate bargaining positions, which are narrowly defined in

97. See generally Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & ECON. 293 (1975) (noting that the doctrine’s generality could prompt its abuse); see also supra note 72 and accompanying text.

98. A discussion with attorneys in the Roanoke, Virginia Office of Legal Aid revealed that judicial decision-makers are reluctant to void agreements or terms thereof based on unconscionability. As a consequence, many of these attorneys attempt to abandon the defense and attack the authenticity of intent in order to relieve their clients of burdensome agreements. In fact, exhaustive research reveals few cases in which consumers have prevailed utilizing unconscionability.

99. See Sandra J. Levin, Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry, 74 CAL. L. REV. 2101, 2108 (1986) (stating that “[c]ourts have exhibited a reluctance to find unconscionability in standard commercial transactions”); Jane P. Mallor, Unconscionability in Contracts Between Merchants, 40 SW. L.J. 1065, 1076 (1986) (discussing the doctrine of unconscionability in contract claims between businesses and stating that “the size of the complaining party’s business is predictive of the outcome of an unconscionability claim, but only because large size implies high bargaining capability and choice” but also stating that, where smaller businesses are highly capable, “facts presented in the high capability and choice cases virtually negate the existence of the forms of unconscionability that occur in other settings”); Steven Goldberg, Unconscionability in a Commercial Setting: The Assessment of Risk in a Contract to Build Nuclear Reactors, 58 WASH. L. REV. 343, 347 (1983) (discussing unconscionability in commercial settings and stating that “merchants have been ‘largely unsuccessful’ in arguing unconscionability . . . their victories have been limited to ‘rare cases’” but that “these generalizations do not represent an immutable rule”). But see G. Richard Shell, Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend, 82 NW. U. L. REV. 1198, 1209 (1988) (stating that courts have recently begun to apply the principle of unconscionability in cases between businesses and in such cases, the courts are not constrained by legal doctrine but are allowed to base their decisions on the “fairness” of the transaction).

100. See Shell, supra note 99.

101. For an analogous discussion of the applicability of unconscionability to issues of fairness in light of socioeconomic differences related to class, see generally Jeffrey L. Harrison, Class, Personality, Contract, and Unconscionability, 35 WM. & MARY L. REV. 445 (1994).
terms of wealth or bargaining acumen. The doctrine does not account for the parties’ pre-bargain attitudes and behavior that may influence the terms of their agreement. Instead of a complete, contextual analysis that includes examination of power disparity and attitudinal influences, decision-makers rely primarily on the perceived substantive unfairness of terms and, accordingly, give short shrift to procedural unconscionability and its focus on power disparity.

There are numerous examples of the common law courts’ tendency to base relief from unfair contract terms on substantive unconscionability. For example, in the classic case of Williams v. Walker-Thomas Furniture Co., the court summarily references the buyer’s gender and economic status but fails to note the intersection of those facts with the business practices of the seller. In Jones v. Star Credit Corp., a case similar to Williams, the court noted that a contract containing egregious price and credit terms agreed to by a welfare recipient was unconscionable primarily because of the ridiculously high price. The court specifically stated that “the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs.” Curiously, the court acknowledged that the contract demonstrates a gross inequality of bargaining power. In fact, it stated that:

There was a time when the shield of “caveat emptor” would protect the most unscrupulous in the marketplace—a time when the law, in granting parties unbridled latitude to make their own contracts, allowed exploitive and callous practices which shocked the conscience of both legislative bodies and the courts.

The effort to eliminate these practices has continued to pose a difficult problem. On the one hand it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand there is the concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community.

Notwithstanding the important dicta that acknowledges the salience of power with unconscionability’s procedural element, the court fails to delineate specific, contextual factors that substantiate the disproportionality of

102. See supra notes 65-66 and accompanying text (describing procedural unconscionability).
103. See supra notes 65-66 and accompanying text (describing substantive unconscionability).
104. 350 F.2d 445 (D.C. Cir. 1965).
105. Id. at 448. For more discussion on Williams, see also Blake D. Morant, The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison, 50 Ala. L. Rev. 63, 108 (1998); Morant, Law, Literature, and Contract, supra note 17; and see generally Morant, Race and Disparity, supra note 17.
107. Id. at 267.
108. Id. at 265.
power in this case.\textsuperscript{109} Similarly in \textit{Henningsen v. Bloomfield Motors, Inc.},\textsuperscript{110} which centered on a disclaimer of warranty clause, the court extensively examined the problems associated with limited warranty provisions in automotive sales contracts yet failed to fully explain that the disproportionate power of the parties contributed to the seller’s inclusion of the disclaimer.\textsuperscript{111}

The court, in the more recent case of \textit{Brover v. Gateway 2000, Inc.},\textsuperscript{112} examined a mail order seller’s custom of including a burdensome arbitration clause in the shipping materials.\textsuperscript{113} The decision in the case continued the judicial trend of a cursory discussion of procedural unconscionability. In fact, the court acknowledged that, despite New York common law’s requirement that both procedural and substantive unconscionability must be proven to substantiate relief, the arbitration provision in this case was so extreme as to justify relief.\textsuperscript{114} The court provided sparse commentary on such contextual factors as the buyer’s lack of choice and the arm’s-length nature of the transaction. Those contextual factors notwithstanding, the court rested its decision on the onerous nature of the arbitration clause.\textsuperscript{115}

Other noteworthy cases reflect the view that the procedural element of unconscionability may be given scant analysis if the substantive element is deemed to be demonstratively unfair. In \textit{Carboni v. Arrosipde},\textsuperscript{116} the court found that a debtor’s agreement to a $4000 loan with an interest rate of 200% per annum, to be paid off originally in three months for a sum of $6000,\textsuperscript{117} was both procedurally and substantively unconscionable, despite the court’s view that the “procedural aspect of unconscionability in this case

\begin{itemize}
  \item \textsuperscript{109} \textit{Id.}
  \item \textsuperscript{110} 161 A.2d 69 (N.J. 1960).
  \item \textsuperscript{111} \textit{Id.} at 95 (holding that where a purchase order for a new automobile contained an express warranty stating it was in lieu of all other warranties, express or implied, the manufacturer’s attempted disclaimer of an implied warranty or merchantability was invalid as against public policy).
  \item \textsuperscript{112} 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).
  \item \textsuperscript{113} \textit{Id.} at 569. In \textit{Brover}, consumers brought suit against Gateway for breach of warranty, breach of contract, fraud, and unfair trade practices. Gateway moved to dismiss on the basis of an arbitration clause contained in the terms and conditions agreement sent along with the shipped goods, which stated that terms and conditions were accepted if goods were retained beyond thirty days.
  \item \textsuperscript{114} \textit{Id.} at 575 (holding that although the arbitration clause was not a material alteration of the terms of the preexisting oral contract and not an unenforceable contract of adhesion, the clause, requiring arbitration to take place in Chicago and under the rules of International Chamber of Commerce (ICC), was nonetheless substantively unconscionable).
  \item \textsuperscript{115} \textit{Id.} at 574. In holding the arbitration clause unconscionable, the court based its ruling on the excessive cost burden imposed on the purchaser in arbitrating before the ICC, noting that the ICC was not regularly used for consumer matters, and that a claim of less than $50,000 required advance fees of $4,000, more than the cost of most Gateway products. \textit{Id.}
  \item \textsuperscript{116} 2 Cal. Rptr. 2d 845 (Cal. Ct. App. 1992).
  \item \textsuperscript{117} \textit{Id.} at 846.
\end{itemize}
was slight."  

A surprising number of domestic relations cases in the Commonwealth of Virginia follow this trend. The case of *Pledger v. Pledger* noted that a separation agreement that provided generously for the wife while placing an extreme financial burden on the husband was unconscionable, primarily because the agreement "shocks the conscience" by leaving him a monthly income of $186. Some judicial decision-makers confine analysis of unconscionability’s procedural element to the emotional advantage taken by one spouse over another. Thus, in *Blosser v. Blosser*, the court found that a separation agreement heavily favoring the wife "shocks the conscious" and was unconscionable and unenforceable. Likewise in *Derby v. Derby*, the terms of the parties’ separation agreement were found to be unconscionable because they "shock the conscience" and that, procedurally, the husband was emotionally weak and believed that God had spoken to him. While the cases in Virginia do not represent a trend, they nonetheless underscore decision-makers’ seeming reliance on unconscionability’s substantive element as the justification for relief provided to the disadvantaged party.

The analysis thus far is not meant to suggest that decision-makers never detail the power disproportionality in cases where relief is based on unconscionability. In fact, some courts provide significant analysis of unconscionability’s procedural element. For example, in *Albert Merrill School v. Godoy*, the court extensively explained the procedural unconscionability of a contract for tuition and fees for a data processing technician course at plaintiff’s school. In fact, the procedural analysis drove this court’s decision, which noted (1) the “disproportionate” levels of educa-

118. *Id.* at 851.
119. *Id.*
121. *Id.* at 2. Note, however, that the court observes that the husband’s lack of an attorney constitutes a significant procedural problem. *Id.*
123. *Id.* at *2.*
125. *Id.* at 80.
126. Of course, some domestic relations cases in Virginia deny relief from alleged unfair agreements if they are neither substantively nor procedurally unconscionable. For example, in *Fields v. Fields*, No. 86-C-68, 1990 WL 751142 (Va. Cir. Ct. May 2, 1990), during the course of divorce proceedings, the wife signed a property settlement agreement that gave the husband sole ownership of the marital residence. The court found that the agreement was not unconscionable, given that the wife had some time to look the agreement over with her attorney, and the agreement was not shockingly one-sided. *See id.*
128. *Id.* at 380.
tion between the plaintiff and defendant, (2) the poor English ability of the defendant, (3) the deceptive manner in which the school allowed the defendant to enroll in and continue a course he was unable to pass, and (4) the "absence of meaningful choice" on the disadvantaged party's part. In an unusual twist, the court provided little analysis of substantive unconscionability. Moreover, the court in Currie v. Three Guys Pizzeria Inc., extensively discusses the contextual factors demonstrating the power disparity between a businessperson and an elderly, "unsophisticated, minimally educated" woman, whose contract was ultimately found unconscionable.

Notwithstanding the courts' analyses in Albert Merrill School and Currie, most of the cases cited in this Article confirm a central thesis: common law decision-makers rely primarily on the substantive unconscionability of a case to justify relief to the disadvantaged party. Such incomplete analysis fails to conform to the strictures of the doctrine's rule, which requires explication of substantive and procedural unconscionability. Failure to conform decision-making to the established rule contributes to ad hoc decision-making that furthers the uncertainty that presently plagues the doctrine. While terms that "shock the conscience" certainly warrant scrutiny, common law decision makers must fully evaluate unconscionability's procedural element to verify the context that produced the onerous terms and, thus, confirm the disadvantaged party's entitlement to relief. Substantiation of both elements of unconscionability also confirms to the rudiments of the doctrine's rule.

The vagueness associated with unconscionability and the renewed dominance of formalism in contract law would seemingly leave most disadvantaged parties without much recourse if they have signed onto inequitable or burdensome bargains. This Article posits, however, that these impediments to relief pursuant to unconscionability could be ameliorated with improved analysis of the doctrine's procedural element. Common law decision-makers must shun their proclivity for truncated analysis of procedural unconscionability and scrutinize more closely the context that gives rise to the demonstrative unfair bargain.

129. Id. at 381.
130. Id. at 381–82.
131. Id. at 382–84.
132. Id. at 381.
133. Id. at 384.
135. Id. at 496.
137. See supra notes 65-66 and accompanying text (defining rules governing substantive and procedural unconscionability).
138. See supra note 76 and accompanying text.
II. FEDERAL GOVERNMENT CONTRACTS AND THE ASSESSMENT OF POWER IN UNCONSCIONABLE CONTRACTS

Unconscionability's procedural element accommodates detailed analysis of the context that gives rise to unduly onerous bargains. As previously noted, however, many cases that have invoked the doctrine focus primarily on substantive unconscionability and fail to explain fully the procedural dimension. An examination of the analysis of unconscionability within the specialized area of federal governmental contracts provides insight into the practicability of a thorough examination of context as a determinant of procedural unconscionability.

A. The Rudiments of Federal Government Contract Law

The law of federal government contracts accommodates analysis of the influence of power within bargains. This is paradoxical, given that the rudiments of government contract law remain steeped in formalism. In its most basic form, the law of federal government contract constitutes a complex matrix of positive laws that direct the federal government's purchase of goods and services. This section of the Article focuses on fundamental principles of federal government contract law, which constitutes the model for state and municipal governmental contracting rules. The Federal Acquisition Regulation (F.A.R.) is the primary body of rules governing sales of goods and services to the government. In light of the government's fiduciary responsibility to the body politic, the F.A.R. and other related rules impose detailed and strict requirements for those seeking to contract with the federal government. The totality of these rules ensures achievement of such norms as cost effectiveness and quality and furthers other policy objectives as defined by Congress and the President. The law of governmental contracts contrasts sharply with the law governing private contracting, which, despite such codified innovations as the Uniform Commercial Code, remains grounded in common law. The common law of contract
has its genesis in personal autonomy, where private, more symmetric transactions between parties are motivated by personal interests such as gain.143

The law of federal government contracts governs asymmetric transactions, with the government as the dominant party who, in most instances, defines the terms and conditions of potential agreements. The government generally seeks private contractors who will provide goods or services in accordance with policies that further the public’s interests. These policies include, *inter alia*, competition, transparency, integrity, and fairness.144

Several policies, in particular those that assist traditionally disadvantaged parties such as small businesses, are designed to ensure a degree of justice and fairness in the federal government’s contracting process. Implementation of these policies, however, has produced controversy. In recognition of the limited power that certain parties possess, the federal government has set aside a proportion of contracts for small business entities.145 These set-aside programs maximize opportunities for traditionally disadvantaged parties to participate in governmental procurements and foster commercial relationships between small and large contractors.146 Notwithstanding judicial challenges,147 the federal government’s policy to assist disadvantaged parties remains largely intact.148 Moreover, these programs have contributed to continuing partnerships between disadvantaged and advantaged parties. These programs have also contributed to an awareness of

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143. For a discussion of the genesis of private contract law, see supra notes 30–31 and accompanying text.

144. For more on the objectives of government contracting, see Steve L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 THE PROCUREMENT LAWYER 103 (2002), which includes such factors as the minimization of costs and the assurance of quality.


power disproportionality as it affects certain parties who contract with the federal government. 149

Despite its distinction from common law contracts, federal government contract law is fundamentally tied to certain aspects of private law. Commercial law that governs private contracts binds the government unless federal statutes or regulations provide otherwise. As the United States Supreme Court notes, "[i]f [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." 150 It is clear, however, that the many statutes and regulations that proscribe the rules applied to government contracts trump commercial law in virtually every instance. This basic principle is as old as government contracting and is moralized in the Supreme Court’s following statement:

Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law. 151

As discussed in the following section of the Article, the federal government shares the common law and U.C.C.’s definition of unconscionability.

B. The Defense of Unconscionability in Federal Government Contracts

Although the modern doctrine of unconscionability evolved from common law and later became codified in the U.C.C., the doctrine has historical roots in the law of federal government contracts. The nineteenth century case of Hume v. United States 152 noted the jurisprudential origins of the doctrine in a dispute involving the Department of Interior’s procurement of shucks for a governmental hospital in Washington. The government imprudently accepted the contractor’s inflated price for the shucks and subsequently sought to void the contract on the basis of mistake. 153 The Court of Claims found no evidence of mistake; however, it voided the contract due to unconscionability. The court’s rationale included the view that the exorbitant price agreed to for the shucks was “grossly unconscionable,” because it reflected “a contract which no man in his senses, not under delusion, would

149. See infra notes 152–61 and accompanying text (discussing federal government contract disputes that focus on the unconscionability defense).
151. The Floyd Acceptances, 74 U.S. 666, 680 (1868).
152. 21 Ct. Cl. 328 (1886), aff’d, Hume v. United States, 132 U.S. 406 (1889).
make, on the one hand, and which no fair and honest man would accept on the other."\textsuperscript{154} The Court of Claims ultimately reformed the contract to reflect the fair market price for the shucks.\textsuperscript{155}

The Supreme Court's decision in \textit{Hume} has considerable significance. The grant of relief to the government as a party to a contract established the doctrine's relevance in disputes involving federal government contracts. The case also recognized procedural and substantive unconscionability as predicates for relief provided to the disadvantaged party.\textsuperscript{156} Thus, \textit{Hume} became the precursor to the modern common law of unconscionability, the U.C.C.'s definition of which has been adopted by government contract decision-makers.\textsuperscript{157} Also significant in \textit{Hume} was the successful claim by the government, which is generally considered to be an advantaged party. Perhaps this finding for a party who does not typically suffer from power disproportionality signifies a certain judicial tolerance for unconscionability as a remedy for unfair bargains.

While \textit{Hume} reflected the common law courts' tendency to focus on substantive unconscionability,\textsuperscript{158} adjudicators of disputes in modern government contract cases appear to analyze more extensively within unconscionability's procedural element the disproportionality of power among the government and its contractors. For example, a decision to void a disclaimer of implied warranties in the sale of surplus items to a private contractor rested on a finding that the "buyer is an ordinary consumer, not an expert, and so must rely upon the [government's] description in order to evaluate risks inherent in the contract."\textsuperscript{159} Moreover, in \textit{In re Clarke}, the Armed Services Board of Contract Appeals invalidated an agreement due to the contracting officer's suspect verification of the bid of an inexperienced "27 year old meatcutter" who commenced a landscaping business.\textsuperscript{160} In fact, consideration of the context of the bargain, including elements of power disproportionality, appears to be de riguer in the application of the unconscionability doctrine.\textsuperscript{161}

\textsuperscript{154} Id. at 410 (citations omitted).
\textsuperscript{155} Id. at 415.
\textsuperscript{156} Id. at 413–14.
\textsuperscript{157} See Donald P. Arnava, \textit{Unconscionability Under UCC § 2-302: How It Applies to Commercial and Government Contracts}, 12 UCC L.J. 48 (1979) (noting that federal courts are willing to use the doctrine to void contracts between the federal government and a private contractor when the result is unconscionable due to government failure to follow Federal Procurement Regulations (now Federal Acquisition Regulations)); see also supra note 72 and accompanying text (citing to the language of U.C.C. § 2-302).
\textsuperscript{158} See supra note 65 and accompanying text (discussing common law decision-makers' focus on substantive unconscionability).
\textsuperscript{159} See \textit{In re Vahdat}, GSBCA No. 5916, 81-2 BCA ¶ 15,199 (1981).
\textsuperscript{160} See \textit{In re Clarke}, ASBCA No. 24306, 82-1 BCA ¶ 15,627 (1982).
\textsuperscript{161} See, e.g., Mills v. United States, 410 F.2d 1255, 1258 (Ct. Cl. 1969) (stating that "advanced age and limited education" is a relevant inquiry into unconscionability); Hamilton
Discussion thus far is not intended to suggest that decision-makers in federal government contracts are more apt to relieve disadvantaged bargainers due to unconscionability. In fact, there are few successful claims of relief due to the alleged unconscionability of terms in a government contract. The paucity of successful grants of relief notwithstanding, decision-makers who adjudicate claims of unfairness in a government contract are more apt to scrutinize the effects of power disparity. Perhaps this tendency is a by-product of the federal government’s set-aside programs,\textsuperscript{162} which have increased a generalized awareness of power disproportionality among those who regularly participate in government contracting. Regardless of the reasons for this enhanced scrutiny of power disproportionality in government contract cases, the fact that it occurs is instructional for decision-makers who interpret the doctrine in common law cases.

III. TOWARD AN ENHANCED ANALYSIS OF POWER IN COMMON LAW CONTRACTS

The admittedly brief discussion of unconscionability in federal government contracting is intended to assist in the advancement of a fundamental thesis—that the evaluation of fairness within binding contracts requires examination of the full context of the parties’ bargain. This context includes the influences of attitudinal biases, power disparities, and opportunism. In most cases, governmental contracts decision-makers tend to examine context to determine whether a contract merits a remedy. Common law decision-makers should follow this example, despite the inherent distinctions between common law and governmental contract adjudicators.

Those who adjudicate government contract disputes at the most preliminary of stages function as administrative decision-makers. Government contracts remain an administrative process in which decision-makers have the authority to gather facts and assemble a record suitable for review by higher authorities.\textsuperscript{163} This record substantiates the administrative decision-

\textsuperscript{162} See supra notes 145-46 and accompanying text (noting the federal government’s programs are designed to ensure participation of traditionally disadvantaged businesses in government contracts).

maker's findings in disputes. In fact, government contract decision-makers, as administrative authorities, are considered expert fact-finders, imbued with significant discretion to determine the relevant facts of disputes. This fundamental element of administrative decision-making explains why government contract adjudicators delve probatively into the context of bargains.

While common law decision-makers may not be considered expert fact-finders, trial courts nonetheless possess the authority to decide what facts are relevant to claims of the parties. Trial courts have as a tacit mandate the duty to determine the essential facts of a dispute. Given that contract claims are initiated within trial courts or lower judicial bodies, decision-makers in that setting can, and must, explore the bargaining context fully to determine the merits of a claim. This mandate becomes imperative because unconscionability, as a matter of law, specifically requires common law decision-makers to confirm whether a claim for relief satisfies the doctrine's procedural and substantive elements.

The duty of common law decision-makers at the trial level to scrutinize and decide facts creates an opportunity to deepen the analysis of unconscionability. Examination of context, which fits within unconscionability's procedural element, should become an endemic exercise in the adjudication of contracted fairness. Procedural unconscionability forms the contextual predicate for unfair contractual terms. Therefore, a palpable nexus exists between substantive and procedural unconscionability. Unfair terms that satisfy substantive unconscionability naturally flow from a context of power disparity—a significant factor of procedural unconscionability. The


164. Koch, supra note 163, at 731 (stating that administrative decision-makers have a duty to assure an adequate record).

165. See, e.g., Volpe v. Ne. Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982) (stating that it is the duty of an administrative law judge to make findings of fact); NLRB v. Clement Bros. Co., 407 F.2d 1027, 1029 (5th Cir. 1969) ("It is the Board's primary responsibility to find the ultimate facts under the statute."); Trans-American Van Serv. Inc. v. United States, 421 F. Supp. 308, 316–17 (N.D. Tex. 1976) (stating that the ICC has a duty to make findings of fact and that the court is not empowered to substitute its judgment for that of the agency).

166. A generally accepted maxim is that trial judges have the authority to determine procedural and evidentiary matters. See Martin B. Louis, Discretion or Law: Appellate Review of Determinations That Rule 11 Has Been Violated or That Nonmutual Issue Preclusion Will Be Imposed Offensively, 68 N.C.L. Rev. 733, 733 (1990).

case of Williams v. Walker-Thomas Furniture Co. demonstrates this point. Certainly the Walker-Thomas Furniture Company’s knowledge and perception of potential customers such as Mrs. Williams, who have limited resources and few consumer choices, must have constituted an incentive to include the onerous credit terms in her standard form contract.

But what contextual factors should be considered? The advantaged party’s perceptions, beliefs, and biases related to the disadvantaged party may prompt the advantaged party to include unduly onerous or burdensome terms in the executed contract. Context also encompasses the limited choices of the disadvantaged party, whose only manifestation of assent is by signature on a contract of adhesion. As the overall theme of this Article echoes, a fundamental aspect of the bargaining process is the bargaining power of the respective parties with power defined as education, knowledge, and bargaining sophistication. Heightened analysis of these factors within unconscionability’s procedural element enriches an evaluative process that determines whether a disadvantaged party merits relief.

There is, perhaps, a basic jurisprudential reason to evaluate with greater scrutiny unconscionability’s procedural element. The complete examination of the doctrine’s procedural element conforms precisely to the tenets of the rule governing the doctrine. The seemingly regular failure of common law decision-makers to analyze the context of the bargain and their commensurate, primary reliance on substantive unconscionability abridge the rule of law that defines the doctrine. Given judicial decision-makers’

168. 350 F.2d 445 (D.C. Cir. 1965).
170. See Stirler v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 143-44 (Cal. Ct. App. 1997); Patterson, 18 Cal. Rptr. 2d at 565-66. For more on contracts of adhesion, see supra notes 84-85.
171. See supra note 66 and accompanying text (discussing the procedural aspect of unconscionability).
172. Some may argue this additional step is superfluous, given the present procedural triggers of unconscionability. However, the doctrine’s amorphous definition, coupled with its assault on the resurgent formalistic notion of contract, requires more detailed confirmation of the need for remedy. Certainly the advantaged party, who maintains the superior position and drives the terms of the bargain, may be influenced cognitively by his perceptions and beliefs regarding the disadvantaged party. Consideration of this cognitive process lends credence to the need for judicial intervention via unconscionability.
173. See, e.g., Randell v. Johnson, 227 F.3d 300, 301 (5th Cir. 2000) (“The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court ‘the prerogative of overruling its own decisions.’”) (quoting Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998)); Collins v. Click Camera & Video, Inc., 621 N.E.2d 1294, 1299 (Ohio Ct. App. 1993) (stating that a litigant must allege and prove both procedural and substantive unconscionability in order to establish that a particular contract is
present embrace of formalism and the requirements of the rule governing unconscionability, it would be reasonable, if not compulsory, for them to embrace an enhanced analysis of unconscionability’s procedural element.

Despite its compatibility with the formalists’ notion of rule compliance, the argument for more in-depth analysis of unconscionability’s procedural element may be met with resistance by those who abhor the doctrine’s tendency for uncertainty.\textsuperscript{174} Enhanced evaluation of procedural unconscionability may not cure the vagueness that plagues the doctrine; however, it does confirm the overall contextual inequity that substantiates relief in disputed transactions. Furthermore, and notwithstanding its ambiguity, the doctrine of unconscionability ultimately guarantees the reality of the parties’ assent to an agreement or certain terms thereof. This assent constitutes the very essence of contract validity.\textsuperscript{175} Assent can be impacted by a variety of phenomena, including contextual factors related to disparity and opportunism.\textsuperscript{176} These factors impact assent and, therefore, cast doubt on the reality of the parties’ volition to contract. Broadening review of preformation and contextual factors, particularly within unconscionability’s procedure element, confirms the reality of assent, as well as the need to relieve the disadvantaged party of her obligation to perform onerous terms of the bargain.

Unconscionability originates from the reality that bargaining inequities are endemic with the transactional context. The doctrine’s procedural element, which requires examination of the context of a bargain, constitutes a quintessential, realist critique.\textsuperscript{177} To optimize unconscionability’s utility,\textsuperscript{178} however, decision-makers must regularly and fully examine the influences of power disparity, which is an omnipresent factor of the transactional context. Greater analysis of procedural unconscionability accomplishes this objective.


\textsuperscript{175} “Consent” or “assent” has been noted to be a key concept in the establishment, and ultimate enforcement, of a contractual arrangement. See Peter H. Schuck, \textit{Rethinking Informed Consent}, 103 YALE L.J. 899, 900 (1994) (acknowledging that “[c]onsent is the master concept that defines the law of contracts in the United States”).

\textsuperscript{176} See supra note 59 and accompanying text.

\textsuperscript{177} See supra notes 11–61 (discussing the critical theories of contract law).

CONCLUSION

"A contract can be defined by law, but it is also made by imperfect people."
—The Paper Chase179

In a perfect world, all parties, regardless of power disparities, would enter into bargains that are mutually fulfilling. The resultant contracts contribute to a functional market. The world, however, is far from perfect. Many bargaining relationships include parties with disparate economic or informational resources and, as a consequence, suffer from an imbalance of power. While a disproportionality of power is not necessarily fatal to the achievement of mutual expectations, it can easily become the precursor to inequitable or imprudent bargains that, in the long-term, diminish confidence in the market. Contract law attempts to ameliorate power disproportionality through such regulatory devices as unconscionability. Although unconscionability can potentially alleviate the adverse effects of disproportionality, the doctrine's somewhat amorphous definition contributes to a disutility that limits its effectiveness.

The common law of contracts and those who apply its rules often fail to embrace adequately the normative implications of power in bargaining relationships. In the author's view, the effective application of contractual rules such as unconscionability requires the recognition of power as an integral factor in contract formation. The disproportionality of power among bargainers should become an endemic factor in the determination of an unconscionable interpretation of the rules that regulate transactional conduct. Decision-makers who apply common law of contract need only study the law of federal government contracts to understand the salience of power in bargain formation. From its inception, federal government contract law, which is steeped in formalism, not only acknowledges the impact of power on contracts with the government, but also cures the effects of bargaining disparity with rules that provide opportunities for disadvantaged bargainers. The federal government’s appreciation of power disproportionality encourages a general sensitivity to bargaining inequities and theoretically enhances a universally participatory market.

Similar to the adjudication of unconscionable agreements in the area of government contracts, decision-makers who interpret the common law of contracts can, and should, more probingly evaluate the dynamic of power as they determine the unconscionability of a contract or its terms. This recommendation does not require supplementation of the established rule. Instead, decision-makers need only incorporate a more realistic view of

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179 DVD: THE PAPER CHASE (Showtime Networks 1978) (on file with author).
power within unconscionability's procedural element. A more focused assessment power not only justifies remedies for bargains that are patently disparate, but also instills in future bargainers a greater appreciation of power's impact on bargaining relationships.