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## Squeezing Subjectivity from the Doctrine of Unconscionability

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# SQUEEZING SUBJECTIVITY FROM THE DOCTRINE OF UNCONSCIONABILITY

PAUL BENNETT MARROW<sup>1</sup>

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## I. INTRODUCTION

Determinations about unconscionability are subjective. To date no one has been able to articulate an objective standard. Statutes that empower the judiciary to make findings of unconscionability almost uniformly fail to define what qualifies.<sup>2</sup> Judges are left to fashion solutions that they, and they alone, believe address their charge. Different results from different judges are what can reasonably be expected absent an agreed upon definition.<sup>3</sup> The issue takes on the character of the debate some decades ago around defining pornography. Recall the famous statement by Mr. Justice Stewart who acknowledged defeat in arriving at an actual definition of pornography

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<sup>2</sup>An exception is § 2-719(b)(3) of the Uniform Commercial Code that defines unconscionability as: “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.” U.C.C. § 2-719(b)(3) (1998). In New York the General Business Law, § 396(r) defines price gouging during “abnormal disruptions of the market” as being unconscionable. N.Y. GEN. BUS. LAW § 396(r) (McKinney 2004).

<sup>3</sup>“The decided cases do not invoke the doctrine of unconscionability in any systematic or even coherent way. Claims of substantive unfairness are mixed with suggestions of fraud, cognitive deficiency and duress, so that it is not possible to discern a pattern in the factual situations.” CHARLES FRIED, CONTRACTS AS A PROMISE 103 (1981).

but who nevertheless declared categorically: “I could never succeed intelligibly in doing so. But I know it when I see it.”<sup>4</sup>

If only it were so simple! As Professor Leff noted in his landmark treatise on the subject of unconscionability,<sup>5</sup> “[W]hat may permissibly make the judges’ pulses race or their cheeks redden, as so to justify the destruction of a particular provision, is, one would suppose, what the judge ought to have been told by the statute.”<sup>6</sup> Leff concludes that there is “nothing clear about the meaning of ‘unconscionable’ except perhaps that it is pejorative.”<sup>7</sup> He goes on to say that without more of a definition, all attempts are doomed to failure, and concludes, “[I]t is easy to say nothing with words.”<sup>8</sup>

From the perspective of the legislature, the failure to settle on an acceptable definition is no accident. By charging the courts to make determinations “*as a matter of law*,” legislatures have created a failsafe mechanism for protecting against any predatory practices not otherwise addressed by the law, practices that might create an uneven playing field for those who lack either the ability or the savvy to realize what it is they are confronting. Of course, this assumes that there is a need for a failsafe mechanism in the first place. This Article argues that the need is really quite limited because the existing legislative designs are so complex and so far reaching that the doctrine of unconscionability, as it presently exists, is no longer required. It is time to update the doctrine to reflect current conditions. One of the byproducts of the updating process is the acceptance of a definition that eliminates, to the extent possible, subjectivity.

How does subjectivity come into play? I submit that subjectivity is a function of the focus of analysis. Courts determine unconscionability by determining how a suspect term impacts the parties to the agreement. I propose a different approach. I suggest that rather than looking at the impact on the parties, the focus should be on the impact that a suspect term has on third parties. With this in mind, I submit that a term is unconscionable only if:

1. With respect to any contract:
  - a. The term undermines the integrity of the contracting system itself, or
  - b. The term undermines the integrity of any statutory scheme granting to a court the power to review agreements allowed by the statutory scheme.
2. With respect to matrimonial agreements:
  - a. The operation of the term appears likely to result in any party to the agreement seeking public assistance, or
  - b. The term interferes with the ability of a party to seek reform to avoid having to seek public assistance, or
  - c. Adversely impacts the interests of children of the marriage.

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<sup>4</sup>Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>5</sup>Professor Leff was commenting on § 2-302 of the Uniform Commercial Code.

<sup>6</sup>Arthur Allen Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

<sup>7</sup>*Id.* at 487.

<sup>8</sup>*Id.* at 559.

Issues of unconscionability are most often encountered in two arenas: commercial agreements<sup>9</sup> and family law agreements. In the first arena this Article proposes that the analysis should focus on the impact of a suspect term on the integrity of the contracting system or to an enabling statute. If a contract term materially undermines or compromises the integrity of the system for contracting or the integrity of an enabling statute, it should be found unconscionable. In the family law arena things differ because of the substance of the relationships involved and because the need for mutual consideration is de-emphasized. Accordingly, in this arena there are additional criteria. If the term has a materially adverse impact on the state as the default provider of public assistance, or if the term interferes with the ability of a party to seek reform to avoid having to petition for public assistance, or if the term adversely impacts the interests of children of the marriage, it should also be deemed unconscionable.

In all other instances and in either arena, where there is concern about either the conditions that brought about a term or the operation of the term on the parties themselves, there is no need for the court to consider unconscionability.

What do I mean by “undermining of the integrity of the contracting process”? This Article proposes that where enforcement of a term creates a precedent that is in conflict with an established requirement for an otherwise acceptable and enforceable contract, or where enforcement of a term would sanction a violation of public policy, it can be said that the term undermines the integrity of the contracting process. For example, if a contract is framed as a mutual exchange but contains a term that defeats this purpose and is in reality nothing more than an illusion, it can be said that to uphold it would defeat a basic purpose for the contracting process. The same rules of construction apply to the undermining of the integrity of an enabling statute.

At first glance the proposal may seem strange. After all, the proposal is at odds with all settled thinking about unconscionability. But it really goes to the heart of the problem. In today’s world we find a plethora of regulatory programs applicable to a wide variety of schemes and contracts. The need to protect contracting parties through indeterminate judicial oversight has been, in large measure, supplanted by legislation. The traditional purposes supporting the doctrine of unconscionability have been dramatically diluted by these schemes. Where there is no controlling legislation, the primary and overriding purpose for the doctrine should be to protect a public interest and/or the interests of those who, while not parties to the negotiations can be nevertheless directly and adversely impacted by the terms of the contract. In short, the parties themselves should expect to be bound by their arrangement subject to public policy concerns. Protection of the parties from an unwise arrangement is unwarranted unless there is a legislative foundation for the judgment.

Claims of “unfairness” resulting from inequalities in bargaining power, over reaching, oppression or any one of a myriad of other conditions mentioned later in this article, are trumped by the reality that not signing a given agreement is *always* an option. Removing these excuses from the determination of unconscionability deletes from the equation the unbridled subjectivity that is so prevalent today. The question is no longer “why did the party sign” but rather “what consequences does

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<sup>9</sup>Commercial agreements include the full spectrum including business-to-business agreements, consumer agreements and employment agreements.

enforcement of this agreement have for the legal system?" The answer to the revised question yields a ruling as a matter of law.

It is axiomatic that parties to any contract must stand behind their commitments, even if it turns out that with the advantage of hindsight a commitment seems to be unwise. Society does not and should not, have an interest in determining the propriety of a given contract. The public interest is in making sure that a term is enforceable unless it operates to undermine the overall integrity of the contracting process. Within this framework, unconscionability should be said to be available as a defense only when it is believed that a given term serves to undermine the integrity of the system of contracting. This approach provides a definition for unconscionability. If the concept of unconscionability is thus limited, the scope of subjectivity is in turn limited to determinations about what does and what does not undermine the reliability of our system of contracting.

The present method of defining unconscionability focuses on the impact of a given term solely on the immediate parties to the agreement.<sup>10</sup> If determinations of unconscionability are deemed *sui generis*, the rulings have no precedential value as each ruling is tailored solely to the facts of the case before the court. This, in and of itself, is questionable, where the ruling is made under the authority of the Uniform Commercial Code or similar statutes, because of the requirement that such determinations be made as a matter of law, not fact.<sup>11</sup> Moreover, there is a very

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<sup>10</sup>The current focus is thought by some to be intentional. See *Ex Parte Foster*, 758 So. 2d 516, 521 n.4 (Ala. 1999) ("Alabama law provides no explicit standard for determining whether a contractual provision is unconscionable; instead, each case must be decided on its own facts, based on several important factors that encompass aspects of both procedural and substantive unconscionability"). In *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906 (Kan. 1976), the court observed that "[t]he UCC neither defines the concept of unconscionability nor provides the elements or perimeters of the doctrine. Perhaps this was the real intent of the drafters of the code. To define the doctrine is to limit its application, and to limit its application is to defeat its purpose."

<sup>11</sup>See Uniform Commercial Code § 2-302:

- (1) If the court *as a matter of law* finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause 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.

U.C.C. § 2-302 (1998) (emphasis added).

New York has a similar statute tailored for real estate leases.

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

subtle implication inherent in the *sui generis* approach. Beneath the surface these determinations become the foundation for the doctrine that courts should be encouraged to utilize subjectivity when reaching determinations about unconscionability. Implied is the suggestion that courts act properly by leveling the playing field when the legislature fails to do so. Without placing limitations on subjectivity there is a real risk that the judiciary will use its discretion to promote social concerns. Provisions in the fine print of an agreement, say, eliminating a warranty, may appear unconscionable to a judge who favors consumer protection but may seem reasonable to a judge who believes such matters are best determined by the legislature.<sup>12</sup> Similarly, an arbitration clause in a sales agreement may seem unconscionable to a court concerned about a unilateral obligation for arbitration, but may be perfectly acceptable to a court that is concerned with the efficiency of an arbitration clause.<sup>13</sup>

It is time to update the doctrine by taking these realities into account. The failure to modernize the doctrine has four undesirable and yet avoidable consequences: (1) Decisions that are to be made as a matter of law are actually limited to unique factual circumstances and are therefore of little precedential value. (2) The existing doctrine can be used to correct for buyer's regret. This consequence implies that the law is an instrument to be used to undermine, not fortify, the integrity of the contracting process because it encourages contracting parties to believe that it is acceptable to enter into an agreement without really meaning it. (3) Decisions are inconsistent, making predictability all but impossible. (4) The doctrine is positioned as a platform for judicial activism concerning areas of social policy best addressed by the rigors of the legislative and political processes.

Existing law contains seeds that, if properly cultivated can be extended to support the proposal outlined in this Article. This is especially true in the family law arena where much has already been done to reduce judicial activism and unrestrained subjectivity. In this arena unknowns associated with the so-called "procedural" component of unconscionability, i.e., the conduct of the parties during the contract formation process, have been almost entirely defined by legislation. But even in this arena, much room still exists for improvement.

Consider the consequences of a finding of unconscionability. It affords relief from the consequences of the commitment by a party who participated in the

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2. When it is claimed or appears to the court that a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

(emphasis added). New York Real Property Law § 235-c (McKinney 2004).

<sup>12</sup>See *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 491-93 (Cal. Ct. App. 1982).

<sup>13</sup>Compare *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002) with *Conseco Fin. Corp. v. Wilder*, 47 S.W.3d 335 (Ky. Ct. App. 2001). In *Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 416 (Ala. 1999), the court summarized the controversy: "The doctrine remains on the launch pad, regardless of personal views regarding the efficacy of arbitration versus litigation in certain settings, until such time as Congress or the United States Supreme Court directs otherwise." For a detailed discussion of the controversy within the context of employment agreements, compare *Northcom, Ltd. v. James*, 694 So. 2d 1329 (Ala. 1997), with *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669 (Cal. 2000).

negotiations and accepted a given term. It is a “get out of jail free” card, valuable currency, which should not be made readily available. The parties to an agreement should not be encouraged to expect relief from missteps or bad judgment simply because one or more of the parties later perceives that an accepted term is unfair. If the judicial system is drawn into such a quagmire, it risks protecting contracting parties from their own mistakes or whims. There is no public interest in such an outcome unless it serves to protect an underlying interest benefiting the greater good.

Even the vocabulary used to describe the situs of unconscionability, “procedural” and “substantive,” bespeaks attitudes about the impact of the agreement on the parties and not the interests that society has in the contracting process or an enabling statute. Neither component suggests any concern for the collateral impact of a suspect term on those not a party to the contract.

The result is a thicket of conflicting decisions and unstructured rules that cite as the basis for unconscionability vague terms such as “oppression”, “unfair surprise”, “harshness”, “unequal bargaining power”, “overly harsh”, “one-sided”, “unreasonably favorable to the drafter”, and “shocks the conscience”. These words say very little, perhaps even nothing, if they are employed in a vacuum. Why is disparity of bargaining power relevant? How much disparity is needed to create the imbalance that is proffered to be problematic? Why is a party’s education a consideration, given the reality that some very well educated people are still unable to comprehend all the implications of a given term and that some very savvy individuals lack any education at all? How much education is required to ensure that a party can be said to have entirely comprehended the consequences of a given term or agreement? When, *as a matter of law*, is a contracting term harsh or oppressive? When, *as a matter of law*, is a surprise unfair? The list goes on and on. Something more tangible is required, i.e., a context that incorporates the fundamental concerns of society in resolving the issues troubling contracting parties. The contextual framework advocated in this article reduces the considerations involved in the final judicial determinations and makes it easier to predict the outcome. Without such a contextual framework, the muddle knows no bounds.

The uncertainty resulting from the current approach led one judge, commenting on a family law agreement, to observe:

The majority’s disregard of our standard of review and its application of a nebulous unconscionability standard invites, even compels, judges to patronizingly and paternalistically meddle in the proposed stipulations of presumptively competent divorcing adults, with very little guidance or principle other than our own personal sense of what feels fair and right. That strikes me as the very essence of a government of people, rather than a government of laws. When the outcome of a case can depend not upon rules, laws and standards of review, but upon what strikes appellate judges as fair and equitable, then this Court has assumed more power than wise people ought to be comfortable exercising.<sup>14</sup>

To some, what this Article proposes may seem quite harsh. They would argue that the playing field is uneven and that courts should properly become involved in the restoration of fairness when the need presents itself. The answer to these critics

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<sup>14</sup>Crawford v. Crawford, 524 N.W.2d 833, 837 (N.D. 1994) (Neumann, J. dissenting).

is that the playing field really is not as distorted as they may fear. On balance the benefits realized by modifying the doctrine, i.e., reduced subjectivity and judicial activism, trump the fears of those who perceive the need for a fail-safe mechanism even if it permits unrestrained judicial subjectivity.

This Article's proposal will no doubt have its detractors in the ranks of the judiciary for understandable reasons. To date, the judiciary has willingly struggled with the challenges inherent in a definitional vacuum. From this great effort has emerged a search for what is fair and just. But in reality, this focus has resulted in a system that is rife with confusion and unpredictability. With time, that perspective will change and the judiciary will depart from the present methodology in favor of a system that supports the public good by providing a simpler and more predictable system for dealing with the question of what is unconscionable.

Finally, my proposal does not leave contracting parties out in the cold. If it is agreed that a given practice is thought to be sufficiently offensive and unfair as to require a declaration that it is against the public's interest, the proper forum for that debate should be before the legislature where a system of regulation can be considered and adopted. Whatever the issue, the legislative process is best suited to finding a solution that has broad application, as is evidenced by the existing abundance of legislative schemes governing areas such as consumer contracts and credit, insurance, credit cards, auto leasing, mortgages, sale of securities and real estate offerings and, of course, domestic relations.<sup>15</sup>

In this Article I also restate the vocabulary traditionally used to describe unconscionability. Virtually all courts have come to accept the idea that there are two "components" for describing the geography associated with unconscionability, i.e., *procedural* and *substantive* unconscionability.<sup>16</sup> This system for arranging the judicial inquiry does not provide a definition of unconscionability. It just tells us where to look for evidence of unconscionability. Procedural unconscionability relates to the actions of the parties during the negotiations leading up to the acceptance of a given term. For example, perhaps one party takes unfair advantage during the negotiation process by embedding a term deep into a series of form contracts where it is unlikely it will be uncovered. This scenario has been declared by some courts to be evidence of procedural unconscionability.<sup>17</sup> Procedural unconscionability is about the actions of the parties and not about the actual operation of the agreement.

Substantive unconscionability is focused on the operation of the terms of the contract on a given party. For instance, contracts that entitle one party to litigate in the courts while compelling the other party to resort to arbitration have been found to be substantively unconscionable.<sup>18</sup>

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<sup>15</sup>For example, if it is determined that it is unfair to privately mandate that disputes about malpractice claims must be submitted to arbitration, legislation can be put in place to address such a practice. *See Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

<sup>16</sup>These terms have even found their way into some of the controlling legislation. *See* MINN. STAT. § 519.11 (1a), (2) (c) (2004).

<sup>17</sup>*See Sivestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Kinney v. United Healthcare Serv.*, 70 Cal. App. 4th 1322, 1329-31 (Cal. Ct. App. 1999).

<sup>18</sup>*See* cases cited *supra* note 13. *Compare* *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999) *with* *Harris v. Green Tree Fin. Corp.*, 183 F. 3d 173 (3d

The problem is that in accepting the terminology, the courts inadvertently superimpose another layer of complexity into the analysis requiring one to first ask, what is meant by the nomenclature? The terms seem to take on a life all their own. In virtually all reported decisions involving the doctrine, courts feel compelled to devote at minimum multiple paragraphs of explanation about what their terminology is intended to do. Since the terms describe something, is it not better to just say what they describe and go from there?

Using the accepted terms, the judicial inquiry about unconscionability is as follows: Can a court arrive at a determination as to unconscionability if there is only a showing of either procedural or substantive unconscionability or must both components be established?

This statement actually contains five questions adding unnecessary complexity to any analysis. The questions are: (1) What is meant by procedural? (2) What facts constitute procedural? (3) What is meant by substantive? (4) What facts constitute substantive? And (5) must there be a showing of both procedural and substantive facts? Instead, why not simply ask: During the negotiations leading to a contract have the parties done anything that is unconscionable, and if so, did it result in a term or agreement that operates in an unconscionable manner? This would greatly simplify the analysis because it focuses the inquiry on what is and what is not unconscionable, not on what is first meant by procedural or substantive and, only then, what is meant by unconscionable.

Part II of this Article examines in detail the proposition that unconscionability refers solely to the degradation of the integrity of the contracting process as applicable to the commercial arena. Part III examines the issue within the context of family law.

## II. RETHINKING THE ROLE OF UNCONSCIONABILITY IN THE COMMERCIAL ARENA

This Part explores the proposition that within the commercial arena a contract should be deemed unconscionable only if it can be shown that its enforcement undermines the integrity of the contracting process as evidenced by an adverse impact on our system for contracting or an enabling statute.

### A. *The Basic Premise*

The freedom to contract is not without consequences. Parties who freely enter into agreements are required to honor their commitments. Through legislation and the courts, society provides mechanisms to insure that contracts, once made, are adhered to. Society has an interest in the efficacy of this system. For the most part society takes no position on the appropriateness of a contract term and does little to keep parties from entering into ill-advised arrangements. But there is an apparent exception: unconscionability. An assortment of statutes, some of which are situation regulatory schemes and some of which have broad and unspecified application, permit judicial intervention to regulate against the enforcement of terms or conditions determined *as a matter of law* to be unconscionable. There is broad support for the proposition that an inadvisable arrangement is not unconscionable without something more. That “something more” is what converts the imprudent to the unconscionable.

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Cir. 1999); *Armendariz*, 6 P.3d 669; *Iwen v. United States West Direct*, 977 P.2d 989 (Mont. 1999).

But what qualifies as “something more”? How does a court differentiate between a foolish arrangement and one that is so unfair as to be unenforceable? In the days of the early common law, the standard was a contract “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>19</sup> This standard was adopted at a time when sophisticated regulatory schemes simply did not exist. In modern times there are countless statutory designs that clearly provide a declaration as to what public policy is in matters of contract etiquette and propriety. The judicial role as a policing agent has been limited by legislative fiat. Nevertheless, courts perceive a charge to make determinations of unconscionability if they suspect that a given contract or term “is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.”<sup>20</sup> But when is a contract term “grossly unreasonable”? And more importantly, why does society need to intervene if the integrity of the contracting process is not destabilized?

Most courts make determinations about unconscionability by evaluating the behavior of the parties during the negotiation process and the operation of the terms on the parties of the contract. At first blush that seems to make perfect sense. But inherent in the simplicity of that approach is a serious risk: the court may become involved in a dispute in which society has no interest, and, in doing so, the court may establish an inappropriate precedent. This pitfall is a by-product of the legislative failure to define the term “unconscionable” and the delegation of that task to the judiciary.

People who sign contracts are presumed to have done so voluntarily and without duress. Said another way, the parties to a contract are presumed to have acted in their own respective best interests during the negotiation process. To overcome this presumption, facts must be presented that establish either that the negotiation process was tainted by duress or fraud or that the term sought to be enforced is in violation of public policy. If this burden cannot be met, the plaintiff can still prove facts establishing unconscionability. Facts establishing that it was not a good idea to assume a certain set of obligations are insufficient to overcome the presumption. Many courts, however, ascribe to the belief that a showing that one party or another has “overreached” is sufficient. In other words, in the analysis of unconscionability, overreaching, duress and fraud are given the same status. The three factors are thought to interfere with a true meeting of the minds and the possibility of true mutuality. One can easily understand the conclusion of duress if there is proof that an agreement was signed while facing a loaded pistol. Similarly, the intentional concealment of a material fact reasonably leads to the conclusion that there could be no meeting of the minds. But in the case of a claim of “overreaching” it becomes more difficult, if not impossible, to know when the victim is actually trying to work free of an agreement that has been determined, with the advantage of hindsight, to be unwise. Judicial scrutiny in the name of unconscionability based on actions or behavior attendant to the negotiation process is risky because of the possibility that the court will become involved in a *de facto* determination about the *advisability* of the undertaking. It is difficult to conjure up a scenario where something less than

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<sup>19</sup>Earl of Chesterfield v. Jannssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

<sup>20</sup>Mandel v. Liebman, 100 N.E.2d 149, 152 (N.Y. 1951).

actual duress – that loaded pistol – can be said to actually result in someone *having* to sign a contract. In the absence of duress, the option not to sign is *always* available.

The same concerns are present if the determination about unconscionability is linked to the operations of a given term. If the singular complaint is that the term operates on one of the parties in an unfair manner, the question must be asked: Why did he or she sign it in the first place? Absent a showing that the term impacts the integrity of the contracting process, the public interest is not served by judicial interference in what may be no more than an afterthought about propriety, because of the risk that the determination will be made based on a subjective determination about the operation of a suspect term on a party to the contract, i.e. is it “fair?” This possibility is overcome if the basis for judicial involvement is restricted to claims of unconscionability linked to the integrity of the contracting process or an enabling statute. Typical of such situations are terms that operate to render an otherwise enforceable agreement an illusion.

Consider a contract pursuant to which a seller “consigns absolutely and forever” paintings to an art dealer who undertakes no obligation to actually sell the paintings, but who agrees that if a sale is realized, the seller will receive an amount equal to 50% of the proceeds. Assume that the attorney for the art dealer drafts the contract in question and the seller does not consult an attorney. The paintings, with one exception, are never sold and seller receives very little in exchange for the consignment that is to last “absolutely and forever.” That was the situation confronting a New York court in *In re Estate of Friedman*.<sup>21</sup> While the court discussed the “substantive” and “procedural” problems it identified, these were given a second tier position for the determination of unconscionability. The court found as the central reason for declaring the agreement unconscionable that it was so illusory as to lack mutual consideration, and in so doing squarely recognized that, if the agreement were allowed to stand, the integrity of the contracting process would have been undermined.<sup>22</sup> Moreover, in reaching its decision, the court took into account the accepted business practices of the art field<sup>23</sup> and thereby acknowledged that any

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<sup>21</sup>407 N.Y.S.2d 999 (N.Y. App. Div. 1978).

<sup>22</sup>“In sum, the ‘consideration’ given for this ‘sale’ was so contingent and so dependent upon the discretion of one who had a ‘built-in’ conflict of interest as to be grossly inadequate. This patent inadequacy so permeates the ‘agreement’ as to render it unconscionable. As Virginia Zabriskie put it at the hearing, ‘[there] is nothing in it for the artist.’” *Id.* at 1009.

<sup>23</sup>The court stated in its opinion:

At the hearing before the Surrogate, three expert witnesses testified for petitioner as to the regular method of dealing (“usage of trade”) between artists and art dealers. Virginia Zabriskie, an art dealer who has operated the Zabriskie Gallery in New York City for 22 years (and who also operates a gallery in Paris), testified that dealers generally take paintings on consignment or purchase them outright. In the former case, the consignment would normally be for two years because artists usually want to be shown at least every two years. Estates would consign paintings for a longer period of time and might be exhibited every three years. The longest consignment she had ever handled was five years, and she has never heard of a consignment lasting 14 years or more. When a dealer purchases paintings outright, the consideration is an “[absolutely] fixed sum” of money payable “[then] and there” or “over a period of time”. The contract under consideration at bar is not customary in the art field

ruling upholding the agreement would be against prevailing industry standards. And finally, the decision of this court was free of any subjective test. Unconscionability was defined within the context of the integrity of contracts used in the art field, with the impact of this particular agreement on the parties being a secondary consideration. Had this court applied any other standard, it would have been compelled to address whether the terms were “fair” for the petitioner, a subjective test.

The arbitration clause dispute presented in *Villa Milano Homeowners Association v. Il Davorge*,<sup>24</sup> is an example of a term found to manipulate a result not otherwise recognized under established principles of law. There, pursuant to state law, a developer of a condominium project prepared and recorded a declaration of covenants, conditions and restrictions that contained, among many other things, a clause (embedded on page 66 of the filing) that required the purchaser of a condominium unit to arbitrate complaints for damages arising from design defects. No purchaser was given an opportunity to negotiate any of the terms,<sup>25</sup> including the arbitration provision.<sup>26</sup> Most important, the court noted that the filing by the developer appeared to be a unilateral attempt to circumvent a statutory prohibition against using an arbitration clause in a real property transaction to “preclude or limit any right of action” for construction and design defect.<sup>27</sup> The court held the attempt to circumvent state law was a shock to the conscience, and thus unconscionable,<sup>28</sup>

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because “[there] is nothing in it for the artist”. No objections were taken to any of this testimony.

*Id.* at 1003.

<sup>24</sup>102 Cal. Rptr. 2d 1 (Cal. Ct. App. 2000).

<sup>25</sup>The declaration of covenants, conditions and restrictions contained a provision entitling purchasers to *seek* an amendment provided that with respect to the arbitration clause in particular, no amendment was allowed without the consent of the developer, even when the later no longer owned property in the complex. “With respect to the arbitration provision in question, then, it truly is a ‘take it or leave it’ proposition, with no opportunity for subsequent amendment at the sole discretion of the homeowners.” *Id.* at 6.

<sup>26</sup>“The arbitration clause provision did not comply with the procedural requirements of the Code for Civil Procedure in that the arbitration clause was not properly titled and displayed prominently in the fashion required by the Code for Civil Procedure. Moreover, purchasers of the units were not required to actually initial the clause upon acceptance of the terms of the filing, as was required by the Code for Civil Procedure.” *Id.*

<sup>27</sup>*Id.* at 8 (quoting § 1298.7 of the California Code of Civil Procedure). Section 1298.7, Effect of arbitration provision on other causes of action, states:

In the event an arbitration provision is included in a contract or agreement covered by this title it shall not preclude or limit any right of action for bodily injury or wrongful death, or any right of action to which Section 337.1 or 337.15 is applicable. §§ 337.1 and 337.15 provide for a cause of action for latent deficiencies in the construction of real property.

CAL. CODE CIV. P. § 1298.7 (2004).

<sup>28</sup>The court stated:

Il Davorge recorded the Villa Milano CC&R’s in 1992, more than three years after the July 1, 1989 effective date of Code of Civil Procedure section 1298.7. (Code Civ. Proc., § 1298.8.) It maintains that doing so was perfectly appropriate, because CC&R’s are not among the enumerated types of real property sales documentation to

and declared the filings in violation of the stated public policy of California.<sup>29</sup> In other words, the court found that the conduct of the developer coupled with the operation of the clause itself, served to undermine the integrity of the contracting process and was thus unconscionable.

The recent decision in *Gray v. Conseco, Inc.*<sup>30</sup> involved a very different type of arbitration clause, one that was found *not* unconscionable because it presented no threat to the integrity of the contracting process. Here, borrowers were required as a condition of a loan, to execute a note that contained an arbitration clause that was not binding on the lender but that was binding on the borrower. The claim that the one-sided nature of the clause was unconscionable was rejected on contract grounds. The court held: “First, under general principles of contract law, a non-mutual contract is valid and not unconscionable so long as there [is] some consideration on both sides. Second, a contrary rule would impose a special burden on agreements to arbitrate and therefore conflict with the federal policy favoring arbitration.”<sup>31</sup>

This court was able to avoid the trap of becoming involved in an illusory policy issue involving a perceived or claimed inequity in bargaining power and in so doing, refrained from establishing a precedent that would have itself been offensive to the integrity of the contracting system.

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which section 1298.7 applies. (Code Civ. Proc., §§ 1298, 1298.7.) It appears II Davorge sought to accomplish by way of the CC&R’s that which section 1298.7 blocked it from doing via a purchase agreement. It intended to bar the individual unit owners from filing construction or design defect actions against it in court. This flies in the face of the obvious legislative intent to permit home buyers to have their construction and design defects claims heard in a judicial forum. It is a blatant attempt to curtail the statutory rights of the home buyers and simply shocks the conscience.

102 Cal Rptr. 2d at 8.

<sup>29</sup>The court declared:

In construing public policy with respect to arbitration clauses, our final consideration is the effect of California Code of Regulations, title 10, section 2791.8, n11 governing the contents of arbitration clauses contained in CC&R’s. The Department of Real Estate (DRE) adopted the regulation pursuant to Business and Professions Code section 11001. That section permits the adoption of regulations as reasonably necessary for the enforcement of the Subdivided Lands Act. “The purpose of the Subdivided Lands Act ‘is to protect individual members of the public who purchase lots or homes from subdividers and to make sure that full information will be given to all purchasers concerning . . . essential facts with reference to the land.’ The law seeks to prevent fraud and sharp practices in a type of real estate transaction which is peculiarly open to such abuses.” In furtherance of this purpose, a subdivider is required to obtain a DRE-issued public report concerning a development before it may commence sales. As part of the public report application and review process, the subdivider must submit to the DRE copies of documentation it proposes to use in connection with the subdivision, such as the articles of incorporation and bylaws of the homeowners association, and the CC&R’s.

*Id.* at 9-10 (internal citations omitted).

<sup>30</sup>No. SA CV 00-322, 2000 U.S. Dist. Lexis 14821 (C.D. Cal. Sept. 29, 2000).

<sup>31</sup>*Id.* at \*14. For an excellent discussion of judicial attitudes towards arbitration clauses and the potential for unwarranted judicial activism see Susan Randall, *Judicial Attitudes Towards Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

These cases all share one common analytic factor: judicial refusal to impose subjective views about the underlying policy issues involved in the terms being challenged as unconscionable. Instead, the court in each case resolved the matter by measuring the challenged term's impact against the requirements of our system for meaningful private agreements. No attempt was made to level the playing field. In each case the court limited its role to the application of existing law to the facts presented by facts before it.

*B. Reported Cases Where the Court has Legislated on an Ad Hoc Basis*

In contrast to *Friedman*, *Villa Milano* and *Gray*, the following cases illustrate the problems associated with the application of the doctrine predicated upon judicial subjectivity. In each case the court expressed its private view on an underlying policy issue that was best addressed through the political process and legislative regulation.

Consider first the case of a contract term found to be unconscionable by virtue of being oppressive. One party, the purchaser, signs an installment credit agreement pledging as collateral in the event of non-payment the item purchased together with numerous other assets previously purchased from the same seller and agrees that upon the non-payment of any one of the items, the seller shall be entitled to repossess all the items thus pledged. Is it unconscionable for the creditor to seize and dispose of all the assets pledged? This was the situation in *Williams v. Walker-Thomas Furniture Company*.<sup>32</sup> The lower court acknowledged that there was no applicable legislation affecting this type of sales agreement and for that reason granted the defendant the right to replevy all the items purchased by the plaintiff.<sup>33</sup> The Circuit Court reversed, holding that the agreement was unconscionable, and finding the agreement unfair and thus unenforceable.

But was this agreement really unfair, or more to the point, was it unconscionable? Nothing about the agreement conflicted with public policy, and the court below acknowledged this. Nothing in the agreement degraded the contracting process. Unquestionably, the seller had drafted and presented for acceptance an agreement that gave the seller every advantage should the purchaser default. It is common practice for lenders to take all precautions needed to guard against the risk of default. The agreement protected the seller in the event of a default by 1. Giving the seller every opportunity to collect what was rightly due the seller, and 2. Deflecting from the seller the risk of depreciation and wear and tear that could reasonably be expected due to the purchaser's use of the items pledged as collateral. In short, the agreement was crafted as it was for good reason: the protection of the seller against improper actions and conduct by the purchaser. This raises the question of what was wrong with the seller doing so? By taking sides in the dispute, the Circuit Court imposed its view that installment credit agreements need regulation, notwithstanding the reality that the agreement was in keeping with locally accepted commercial practices, practices not otherwise subject to any public policy prohibition, and that in no way compromised the contracting process. There is no doubt that the purchaser received the goods she contracted for. She also made no claim that she was hoodwinked into the transaction or that the transaction was a sham or that she was

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<sup>32</sup>350 F.2d 445 (D.C. Cir. 1965).

<sup>33</sup>*Williams v. Walker-Thomas Furniture Company*, 198 A.2d 914, 916 (D.C. 1964).

made a victim of fraud or duress. Perhaps most important, there was no denial that she was in default of her obligations. The dissenting judge noted these difficulties in his dissenting opinion:

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

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I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.<sup>34</sup>

Without doubt, the defendant was in a superior position and was able to dictate the terms concerning the collateral for the loan. Further, the plaintiff was not sophisticated or well educated, and unquestionably did not seek assistance of an attorney before signing the installment agreement. Nevertheless, the plaintiff signed the agreement and the defendant complied with its obligation to transfer to the plaintiff the property that she bargained for. The court sided with the plaintiff for social policy reasons, subjective in nature, and in doing so created a precedent for the proposition that an otherwise proper agreement was unenforceable for reasons that were outside the accepted commercial standards. Thus, social policy and subjectivity trumped any concerns for the integrity of the contracting process.

Had the court considered the terms using the accepted rules for contract formation, the terms in question would have been sustained. There was nothing about the terms that suggested any transgression that was offensive to our system of contracting such as a failure of consideration or a manipulation that attempted to disguise a term. Indeed, just the opposite was the case. In short, the court's enforcement of the agreement would have been consistent with the standards of the day. The result would have had no adverse impact on the interests of society in an efficacious system for contracting.<sup>35</sup>

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<sup>34</sup>350 F.2d at 450-51 (Danaher, J., dissenting).

<sup>35</sup>In contrast to the *Williams* case, consider *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824 (N.Y. 1988). There, the defendant assumed an obligation under a letter of credit to make full payment of an agreed sum, if required, to a designated third party. The plaintiff executed a security agreement that gave the defendant the general lien and right to seize any and all deposit accounts that the plaintiff maintained at the defendant bank. After the defendant made the payments required under the letter of credit, it learned of events that triggered the general lien and made the seizure authorized by the security agreement. Plaintiff was not notified of the seizure and issued checks drawn on an account that was seized only to have them returned unpaid. Plaintiff sued claiming that the security agreement was unconscionable and the claim was rejected. The court found the general lien to be in accord with reasonable commercial practice and noted that the defendant, like the defendant in the *Williams* case, had complied with all of its contractual obligations. "Moreover, considering their commercial context, their purpose, and their effect, those terms were not so overbalanced in favor of Chase as to be found substantively unconscionable." *Id.* at 829. In short, the court found that the defendant was doing nothing more than assuring that it was made whole for having undertaken to extend credit to the plaintiff. It found that there was nothing in the terms of the agreement that if enforced that would have had a materially adverse effect on the contracting process itself.

The often cited case of *Cambell Soup Co. v. Wentz*<sup>36</sup> underscores the proposition that a determination about unconscionability can be used to provide a “get out of jail free card” where one party to a contract has clearly made a bad bargain and nothing more. Here a supplier of carrots agreed to supply the plaintiff with all carrots grown on a certain plot of land at a fixed price of thirty dollars a ton. By the time the carrots were ready for harvest the market price had surged to \$90 a ton. Realizing that it made a bad deal, the grower told the plaintiff that it could not meet its obligation and proceeded to sell its produce to a third party. The court refused to grant specific performance citing as the reason the harsh terms of the bargain.<sup>37</sup> The court properly identified that the seller had made a money-losing compact and then preceded to refuse equitable relief on the grounds that to do so would be upholding a harsh bargain. This raises a threshold question: what is wrong with a court’s holding a party to the proper terms of a contract, even if harsh? At no place does the *Campbell* court cite any feature in the agreement that was illegal, against public policy or defective because it degraded the integrity of the contracting process. The sole reason for refusing to uphold the contract was the court’s reading of a group of terms and conditions that favored the plaintiff over the growers. In other words, the court was expressing its subjective views about a money losing arrangement.

Concerns about overcharging where parties have negotiated the terms should not be deemed grounds for a decision about unconscionability absent an objective standard linking enforcement to the undermining of the contracting process. Failure to follow this guideline can lead to uncertainty and confusion. Consider the agreement in *Frostifresh Corp. v. Reynoso*.<sup>38</sup> There, a salesman persuaded the defendant to sign an installment sales agreement for the purchase of an appliance. The salesman manipulated the defendant by making suggestions that the appliance would actually cost nothing because of offsets that the plaintiff would pay the defendant if the plaintiff made sales to friends and neighbors of the defendant. Compounding the situation, the defendant spoke no English, but the agreement that he signed was entirely in English. In reality, the agreement called for the defendant to pay an assortment of charges and fees, driving the cost of the appliance up from \$348 to \$1,145.88. While the court, citing *Campbell*, made the determination that the agreement was unconscionable on the grounds of the excessive price, there was no need for it to have done so. Clearly, there was no meeting of the minds given the

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Thus, the court remained out of the dispute, leaving the parties to comply with the terms of the agreement that they had struck. Had the court done otherwise, it would have established a precedent declaring it unconscionable for a lender to take any and all precautions in the event of non-payment by a borrower and the result would have been a chill for commercial activity associated with this type of transaction.

<sup>36</sup>172 F.2d 80 (3d Cir. 1948).

<sup>37</sup>The court stated:

The reason that we shall affirm instead of reversing with an order for specific performance is found in the contract itself. We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience. For each individual grower the agreement is made by filling in names and quantity and price on a printed form furnished by the buyer. This form has quite obviously been drawn by skilful draftsmen with the buyer’s interests in mind.

*Id.* at 83.

<sup>38</sup>274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966), *rev’d* 281 N.Y.S.2d 964 (N.Y. App. Div. 1967).

manipulations of the salesman.<sup>39</sup> The court could have easily found the agreement unconscionable as being one that undermined the integrity of the entire contracting system.<sup>40</sup> In failing to do so, the court established as possible precedent a rule predicated on subjectivity.

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<sup>39</sup>Should a court consider the inability of the defendant to read the text of the agreement? On balance, the answer is “no.” The defendant clearly would have known that she could not read the text and she had the obligation to find out what it said before signing it. If she willingly and voluntarily waived obtaining a translation and perhaps advice, she did so at her own peril.

<sup>40</sup>Consider New York General Business Law § 396(r):

Price gouging

1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services.

In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.

2. During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price. For purposes of this section, the phrase “abnormal disruption of the market” shall mean any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor. For the purposes of this section, the term consumer goods and services shall mean those used, bought or rendered primarily for personal, family or household purposes. This prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both sold by one party to another when the product sold was located in the state prior to the sale. Consumer goods and services shall also include any repairs made by any party within the chain of distribution of consumer goods on an emergency basis as a result of such abnormal disruption of the market.
3. Whether a price is unconscionably excessive is a question of law for the court.
  - (a) The court’s determination that a violation of this section has occurred shall be based on any of the following factors: (i) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a

*Entergy Mississippi, Inc. v. Burdette Gin Co.*<sup>41</sup> illustrates how the lines between judicial subjectivity and legislative mandates can become blurred. There, employees of the defendant were injured while performing a maintenance operation. The scaffolding they were working on came in contact with an uninsulated power line belonging to Entergy. As a condition to getting service from Entergy, the employer had executed an agreement that required the employer to acknowledge that it was unlawful to erect any structure within eight feet of a high voltage line and further required that the employer indemnify Entergy for any claims made by anyone injured as a result of a violation of the eight foot restriction. The Mississippi Public Service Commission had previously given approval to the terms of the challenged agreement and all of the terms including the indemnification provision. Entergy was sued by the injured employees and sought to enforce the indemnification provision. The employer claimed the agreement was unconscionable. The court ruled the agreement unconscionable. It held that Entergy had “legal resources available . . . as compared to most of its customers” and that the contract was also one of adhesion.<sup>42</sup> Three Justices dissented, pointing out that the court should not insert its “own public policy views” in a case where the legislature has granted broad powers to a commission for the purpose of determining public policy.<sup>43</sup> Nothing in the agreement undermined the integrity of the contracting process. Indeed, the agreement was sanctioned by the public agency with regulatory authority. The court’s intervention placed it squarely in the middle of a dispute that focused on the

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combination of both factors in subparagraphs (i) and (ii) of this paragraph.

- (b) In any proceeding commenced pursuant to subdivision four of this section, prima facie proof that a violation of this section has occurred shall include evidence that
  - (i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or
  - (ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area. A defendant may rebut a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.
- 4. Where a violation of this section is alleged to have occurred, the attorney general may apply in the name of the People of the State of New York to the supreme court of the State of New York within the judicial district in which such violations are alleged to have occurred, on notice of five days, for an order enjoining or restraining commission or continuance of the alleged unlawful acts. In any such proceeding, the court shall impose a civil penalty in an amount not to exceed ten thousand dollars and, where appropriate, order restitution to aggrieved consumers.”

<sup>41</sup>726 So. 2d 1202 (Miss. 1998).

<sup>42</sup>*Id.* at 1207.

<sup>43</sup>*Id.* at 1209-10.

impact of the subject term on just the parties to the agreement in question. The public's interest in the agreement and in particular in the indemnification provision had already been considered and the terms were in no way shown to be disruptive to the integrity of the contracting system. These realities notwithstanding, the court nevertheless imposed its own public policy views and struck down the agreement as unconscionable, and in doing so, established as precedent for the proposition that judicial views on public policy can be allowed to trump those of the legislature.<sup>44</sup>

Finally, *Sosa v. Paulos*<sup>45</sup> illustrates the lengths that a court will go to impose its views about public policy. This case turned on whether or not the plaintiff had been given a meaningful choice when she signed an agreement that contained an arbitration clause, and whether or not a provision concerning the payment of costs was unconscionable and against public policy. Her surgeon produced the agreement less than an hour before he operated on her. The agreement called for arbitration and required that the arbitrators be board-certified surgeons. Moreover, the agreement required that the patient to pay the costs incurred by the defendant in defending himself if the arbitration panel awarded the patient less than half the amount being sought in arbitration. But most important, the agreement also contained a provision entitling the patient, without restriction, to revoke the agreement within fourteen days after signing. The court struck down the agreement, citing the doctrine of unconscionability. The court acknowledged that there was nothing in the Utah Arbitration Act prohibiting an arbitration agreement between a physician and a

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<sup>44</sup>Four years later, the same court, in *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002), struck down an arbitration provision in an agreement signed in connection with sale of a truck. The *Taylor* court cited as the basis for the decision the discussion in *Entergy* about the relevance of adhesion agreements to the analysis of how a party's conduct contributes to the determination of unconscionability. The court went on to note that the clause in question was one-third the size of many other clauses in the agreement and was preprinted. But nowhere in the decision did the court indicate that the clause in any way undermined the integrity of the contracting process, and in so doing, it imposed its views on the public policy mandates of the Federal Arbitration Act. One Justice dissented, not in the result, but in the reasoning. He found that the agreement lacked mutuality of obligation and that as such, it undermined the integrity of the contracting system. *Id.* at 719 (McRae, J., dissenting).

See also *Sablosky v. Edward S. Gordon Company, Inc.*, 535 N.E.2d 643, 646 (N.Y. 1989). The *Sablosky* court held that an arbitration clause in an employment agreement is not unconscionable on the grounds that there was nothing in the clause that did violence to the integrity of the contracting process. The court stated as follows:

Mutuality of remedy is not required in arbitration contracts. If there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement. Our holding is consistent with decisions which have repudiated the necessity for mutuality of remedy in contracts and with similar views of leading commentators. Since it is settled that the validity of an arbitration agreement is to be determined by the law applicable to contracts generally, there is no reason for a different mutuality rule in arbitration cases. Moreover, recognition that mutuality of remedy is not required in arbitration is logically consistent with our recent statement in *Weiner v. McGraw-Hill, Inc.* that "while coextensive promises may constitute consideration for each other, 'mutuality', in the sense of requiring such reciprocity, is not necessary when a promisor receives other valid consideration".

*Id.* at 646. (citations omitted).

<sup>45</sup>924 P.2d 357 (Utah 1996).

patient. Nevertheless, it declared that upon “a showing of evidence that a term is so one sided as to oppress or unfairly surprise an innocent party,”<sup>46</sup> a term would be found to be “substantively” unconscionable. The court found that the requirement that the patient pay the physician’s expenses incurred in defense of the claim to be “without precedent in law” and both unconscionable and against public policy. Moreover, the court found that the plaintiff was placed in a weaker bargaining position by the timing of the presentation of the agreement.<sup>47</sup>

Clearly, the court was concerned about a circumstance that was not otherwise provided for in the Utah Arbitration Act, i.e., the propriety of an arbitration agreement requiring a patient to pay costs and expenses. Still, nothing in the term itself undermined the integrity of the contracting process. The sole issue was whether or not assuming such an obligation had precedent in law. Without question, the term was included in the agreement at the insistence of the defendant. The reason for his insisting on the provision is self-evident; he wanted to discourage what he deemed to be a frivolous action requiring him to incur costs associated with a defense. While the terms may have been stark in that they were designed to give a patient pause before launching a malpractice claim, there was nothing in the provision that, if upheld would cause the court to issue a ruling that would be in violation of accepted principals of contract law. Finally, even if the agreement’s provisions and presentation were unconscionable and against public policy, there was an escape clause. Plaintiff failed to protect herself from the very consequences she was complaining of to the court. Even if there was no meaningful choice when she signed the agreement, she waived the right to cure the irregularity.

All of the above cases have in common a stated attempt by the judiciary to determine more than just that which is or is not “fair.” There is in each case an expression of concern about an underlying policy issue brought to the fore by the factual scenario of a given case. These policy issues should be disposed of by legislation, not by judicial fiat. Each of these above cases could have been disposed of simply by measuring the impact of the suspect term against the interests of third parties and the court, in each case, could have objectively identified terms as unconscionable.

When considering the risks for abuse and weighing them against the possibility of reform as suggested in this Article, recognition must be given to the reality that courts rarely declare contract terms unconscionable. Fears supporting the professed need for judicial involvement to guard against overreaching, oppression and unfair surprise are almost always unfounded, or if such threats do exist they are not sufficient in and of themselves to warrant the risks inherently associated with unbridled judicial activism. Our modern legal system is replete with legislative schemes that are designed to protect the unsuspecting from predatory behavior. If a pattern develops suggesting the emergence of an unwarranted practice, the solution is to adopt legislation banning the practice. The role of the judiciary should be limited to the enforcement of regulatory schemes and the overall protection of our

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<sup>46</sup>*Id.* at 362.

<sup>47</sup>“Backing out of surgery at that juncture would be difficult for the average person experiencing the apprehension and anxiety common to the circumstances. Extraordinary assertiveness on Ms. Sosa’s part was not required, since it was the procedure controlled by Dr. Paulos that made her vulnerable.” *Id.* at 363.

system for contracting from only those practices that act to undermine what is already in place for the protection of the public interest.

The doctrine as applicable to the commercial arena must be updated to reflect the reality of widespread regulatory schemes designed to curb predatory behaviors of all kinds. Given the modern environment, parties to a commercial contract do not require the type of judicial oversight that is presently afforded to them in the name of unconscionability. Absent duress or fraud, all contracting parties have available to them the option of simply walking away from a contract term that is thought to be onerous and unacceptable. The proper modern day judicial function in this arena should be policing against terms that serve to undermine the public's interest in having a reliable system for contracting, not the protection of parties from their own missteps and misjudgments.

### III. RETHINKING THE ROLE OF UNCONSCIONABILITY IN THE FAMILY LAW ARENA

In the family law arena I propose that an unconscionable term should be defined as:

1. One that undermines the integrity of the contracting system or of any statutory scheme that regulates the matrimonial agreements; or
2. That appears likely to require any party to a matrimonial agreement to seek public assistance; or
3. That interferes with the ability of a party to seek reform in order to avoid having to seek public assistance.

Matrimonial agreements are subject to rigorous regulation by statutes that contain provisions that restrict judicial activism and contain subjectivity. The differences between matrimonial agreements and commercial agreements do not end with regulation. Private agreements and settlements in the family law arena serve an assortment of needs not required in the commercial arena.<sup>48</sup> The functions of commercial agreements are unlimited, so terms are designed to provide a road map for achieving the purpose of each individual contract. Matrimonial agreements, on the other hand, are designed to address a limited number of issues, such as the division of property and support and maintenance.<sup>49</sup> Matrimonial agreements are

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<sup>48</sup>As the court in *DeMatteo v. DeMatteo* noted:

Many valid agreements may be one sided, and a contesting party may have considerably fewer assets and enjoy a far different lifestyle after divorce than he or she may enjoy during the marriage. It is only where the contesting party is essentially stripped of substantially all marital interests that a judge may determine that an antenuptial agreement is not "fair and reasonable" and therefore not valid. Where there is no evidence that either party engaged in fraud, failed to disclose assets fully and fairly, or in some other way took unfair advantage of the confidential and emotional relationship of the other when the agreement was executed, an agreement will be valid unless its terms essentially vitiate the very status of marriage.

762 N.E.2d 797, 809 (Mass. 2002) (citations omitted).

<sup>49</sup>In *Bonds v. Bonds*, the court discussed the differences between commercial and matrimonial agreements stating:

Even apart from the circumstance that there is no statutory requirement that commercial contracts be entered into voluntarily as that term is used in Family Code section 1615, we observe some significant distinctions between the two types of contracts. A commercial contract most frequently constitutes a private regulatory agreement intended to ensure the successful outcome of the business between the

also unique in that they address rights that initially come into existence not as a result of a written agreement, but by virtue of the family relationship, rights that can be determined by a court in the absence of an ancillary agreement. In other words, parties to a matrimonial relationship always have an alternative available if disputes cannot be resolved privately. This distinction has a major bearing on the effort to define the term “unconscionable” within the context of the family law arena because it defeats claims that a given agreement was signed in the absence of a meaningful choice. In addition, by their very nature these contracts have the potential to adversely impact not only the contracting parties but also identifiable third party beneficiaries, namely children and the state itself. Given these peculiarities, the rules involving unconscionability part company from those applied to commercial agreements.<sup>50</sup>

It is manifest that the family unit is central to the well being of society and therefore all matrimonial arrangements and agreements are subject to regulation and scrutiny by the state.<sup>51</sup> One of the consequences of the regulatory involvement is that there is considerably less room for judicial activism. Judicial attention is focused on the application and interpretation of clearly defined legislative mandates. For example, many of the regulatory statutes prescribe disclosure and independent counsel. The need for judicial determinations “as a matter of law” is replaced by the requirement that judicial determinations are to be limited to findings of fact.<sup>52</sup> As a result, the focus of judicial activism has moved from the social policy emphasis we saw with commercial agreements to consideration of the wisdom associated with the acceptance of specified terms and conditions found in a matrimonial agreement.

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contracting parties – in essence, to guide their relationship so that the object of the contract may be achieved. Normally, the execution of the contract ushers in the applicability of the regulatory scheme contemplated by the contract and the endeavor that is the object of the contract. As for a premarital agreement (or clause of such an agreement) providing solely for the division of property upon marital dissolution, the parties generally enter into the agreement anticipating that it never will be invoked, and the agreement, far from regulating the relationship of the contracting parties and providing the method for attaining their joint objectives, exists to provide for eventualities that will arise only if the relationship founders, possibly in the distant future under greatly changed and unforeseeable circumstances.

5 P.3d 815, 829 (Cal. 2000).

<sup>50</sup>See Paul Marrow & Kimberely Thomsen, *Drafting Matrimonial Agreements Requires Consideration of Possible Unconscionability Issues*, 76 J. N.Y. STATE BAR ASSOC. 26 (2004).

<sup>51</sup>“Unlike many private contracts, the state has an interest in every marriage contract.” *In Re Estate of Lutz*, 563 N.W.2d 90, 98 (N.D. 1997).

<sup>52</sup>*Id.* In *Penhallow v. Penhallow*, 649 A.2d 1016, 1022 (R.I. 1994), the court noted: Section 15-17-6(d.) states that the “issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law,” and under subsection (a)(2) the agreement must be shown to have been unconscionable “when it was executed.” The act, like the Uniform Commercial Code and the Uniform Marriage and Divorce Act before it, establishes the standard of unconscionability in the negotiations between parties and thereby provides “protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.”  
*Id.* at 1022.

Another peculiarity is the availability of modification based on subsequent conditions. Commercial agreements are scrutinized to determine unconscionability as of the moment that they are executed. Thus, contract formation and the facts surrounding it are relevant. Hindsight and subsequent changes in condition are not considered. Matrimonial agreements, on the other hand, are subject to ongoing review and judicial modification. That review may take into account conditions and events subsequent to the execution of the agreement. For example, an agreement to pay a set sum as support and maintenance may be reasonable when reached, but if at the time of judicial review it can be shown that the effect is to render the recipient a welfare charge, reformation can be ordered on the basis of unconscionability.<sup>53</sup>

But for all the things that distinguish commercial agreements from those reached to memorialize any assortment of family law rights, they share a stark similarity. A contested provision might reflect not unconscionability but rather an unwise decision. Judgments about propriety are unavoidably subjective. No public interest is served when a court attempts to measure the unconscionability of a term claimed inauspicious by an examination of correctness. Doing so undermines the basic tenet that parties must make good on any lawful commitment or agreement freely reached.<sup>54</sup> Claims of unconscionability should not be recognized if the outcome is nothing more than relief from a valid pledge or promise.

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<sup>53</sup>In New York at least, if the provision is embedded in a separation agreement that survives a divorce, the order or judgment can be modified at a later date but only upon a showing of "extreme hardship," not unconscionability. See N.Y. DOM. REL. LAW § 236(B)(9)(b). This would seem to indicate that an extreme hardship is something less than unconscionability. See *Sass v. Sass*, 716 N.Y.S.2d 686 (N.Y. App. Div. 2000).

<sup>54</sup>As the court stated in *Simeone v. Simeone*:

Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. Geyer and earlier decisions required that, at least where there had been an inadequate disclosure made by the parties, the bargain must have been reasonable at its inception. See Geyer, 516 Pa. at 503, 533 A.2d at 428. Some have even suggested that prenuptial agreements should be examined with regard to whether their terms remain reasonable at the time of dissolution of the parties' marriage.

By invoking inquiries into reasonableness, however, the functioning and reliability of prenuptial agreements is severely undermined. Parties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced. If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable. Pertinently, the present agreement contained a clause reciting that "each of the parties considers this agreement fair, just and reasonable . . ."

Further, everyone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their prenuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.

We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what they regard as an acceptable distribution scheme for their property. A court should not ignore the parties' expressed intent by

Judicial subjectivity and activism carry unique consequences in the family law arena. Cases involving matrimonial rights are often contentious, and concerns about judicial subjectivity can make it impossible for the parties to understand and accept judicial determinations. The less subjective the rules and standards used in determining unconscionability, the more likely it is that the parties will respect the outcome.

Of all the expressions used to describe conduct that is said to be unconscionable, in the family law arena, the ones most frequently heard are “overreaching” and “unequal bargaining position.” The dangers presented by such conduct have been addressed, in large measure, by the existing regulatory schemes.

Overreaching can easily be confused with duress and even fraud. But it must be kept in mind that it is neither. What the three terms have in common is the reality of manipulation and dominance by one party. But this is where the commonality ends. Duress implies that the right to refuse to sign was cut off and that the subject agreement was not entered into voluntarily.<sup>55</sup> Fraud requires deceitful concealment of a material fact.<sup>56</sup> But where unconscionability is the issue, neither of these factors is present and the alleged putative party always has available an alternative: not signing and resolving the issue in court.

A domineering and controlling spouse can easily be pigeonholed as one who hijacks his or her mate by taking unfair advantage of emotional weaknesses revealed during the course of the relationship.<sup>57</sup> A classic claim is overreaching by a male who demands, as a condition of marriage, a prenuptial agreement from a would-be wife who is already pregnant with his child. Frequently, the dominating spouse is also the sole provider and therefore has the upper hand regarding knowledge of the family’s financial affairs. Many cases involve claims that a domineering spouse has

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proceeding to determine whether a prenuptial agreement was, in the court’s view, reasonable at the time of its inception or the time of divorce. These are exactly the sorts of judicial determinations that such agreements are designed to avoid. Rare indeed is the agreement that is beyond possible challenge when reasonableness is placed at issue. Parties can routinely assert some lack of fairness relating to the inception of the agreement, thereby placing the validity of the agreement at risk. And if reasonableness at the time of divorce were to be taken into account an additional problem would arise. Virtually nonexistent is the marriage in which there has been absolutely no change in the circumstances of either spouse during the course of the marriage. Every change in circumstance, foreseeable or not, and substantial or not, might be asserted as a basis for finding that an agreement is no longer reasonable. 581 A.2d 162, 166 (Pa. 1990).

<sup>55</sup>See, e.g., *Knutson v. Knutson*, 639 N.W.2d 495, 503 (N.D. 2002); *Lyons v. Lyons*, 734 N.Y.S.2d 734 (N.Y. App. Div. 2001), *app. den. sub nom. Anonymous v. Anonymous*, 771 N.E.2d 834 (N.Y. 2002).

<sup>56</sup>See, e.g., *Matter of Phillips*, 58 N.E.2d 504 (N.Y. 1944); *Panossian v. Panossian*, 569 N.Y.S.2d 182 (N.Y. App. Div. 1991). See also Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11 (2003).

<sup>57</sup>See, e.g., *Pacelli v. Pacelli*, 725 A.2d 56, 58 (N.J. Super. Ct. App. Div. 1999) (“In mid-1985, plaintiff informed defendant that he would divorce her unless she agreed to certain terms regarding their economic relationship. To punctuate his demand, plaintiff moved out of the marital bedroom and into an apartment above the garage.”). See also *Mathie v. Mathie*, 363 P.2d 779 (Utah 1961).

withheld financial information and/or meddled in the selection of an attorney.<sup>58</sup> These activities lead to a baseline argument that an offending agreement was executed because “the devil made me do it.” This argument is emotionally explosive. As a result, courts frequently perceive the need to step in and restore the *status quo* by application of the doctrine of unconscionability. Judicial activism at this level can give the appearance, if not the reality, of subjectivity.

The harsh reality is that the devil’s behavior notwithstanding, an acceptable alternative always exists: The complaining party has the option to refuse to sign, and that refusal does not cut off the right to have issues resolved by a court at some later time.

Today many of the concerns categorized as “overreaching” and/or evidence of an “unequal bargaining position” are addressed by legislation.<sup>59</sup> Some statutes even take into account the concerns of those who are collaterally impacted by matrimonial agreements. Those that leave the term “unconscionable” undefined are best interpreted so as to inhibit judicial activism and subjectivity. Application of the proposals made in this Article simplifies and standardizes the ambiguities left unresolved by the legislature.

#### A. Role of Regulatory Schemes in Defining Unconscionability

Modern statutory schemes regulating family relationships address many, if not all, “procedural” matters and reduce the need for judicial determinations at law concerning conduct during the negotiation phase of contract formation. Judicial intervention is confined to determinations about the impact of terms and conditions. By limiting the circumstances that can be judged unconscionable, and in particular, restricting the scope of the inquiry to the impact a term has on children of the marriage or the state as suggested in this Article, the concept of unconscionability as applicable to the family law arena is modernized and the possibilities for subjectivity dramatically reduced.

The concept of unconscionability is a component part of virtually every regulatory scheme that involves matrimonial agreements.<sup>60</sup> Most statutes focus on

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<sup>58</sup>See *Levine v. Levine*, 436 N.E.2d 476 (N.Y. 1982); *Goodison v. Goodison*, 399 N.E.2d 952 (N.Y. 1979); *Tal v. Tal*, 601 N.Y.S.2d 530 (N.Y. App. Div. 1993). See also Nancy Schembri, Note, *Prenuptial Agreements and the Significance of Independent Counsel*, 17 ST. JOHN’S J. LEGAL COMMENT. 313 (2003).

<sup>59</sup>See *infra* notes 61, 62, 63 and 65.

<sup>60</sup>There are exceptions. For example, a Wisconsin statute on property division states: Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are *inequitable* as to either party. The court shall presume any such agreement to be equitable as to both parties.

WIS. STAT. § 767.255(3)(L) (2004) (emphasis added). In Minnesota, the statute regulating antenuptial and postnuptial contracts does not directly mention unconscionability. Instead the statute requires that such agreements must be “procedurally and substantively fair and equitable both at the time of its execution and at the time of its enforcement . . . .” MINN. STAT. § 519.11(1a)(1) (2004). “Inequitable” has been interpreted to have substantive aspects not dissimilar from those traditionally found in the doctrine of unconscionability. See *Button v. Button*, 388 N.W.2d 546 (Wis. 1986).

unconscionability within the context of support and maintenance and specify the exact contents of matrimonial agreements and list conditions required to assure that the agreement will be legally enforceable.<sup>61</sup> The result is that while the opportunity

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<sup>61</sup>For example, the Uniform Premarital Agreement Act (“UPAA”), Section 3, provides as follows:

CONTENT.

- (a) Parties to a premarital agreement may contract with respect to:
  - (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
  - (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
  - (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
  - (4) the modification or elimination of spousal support;
  - (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
  - (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
  - (7) the choice of law governing the construction of the agreement; and
  - (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.
- (b) The right of a child to support may not be adversely affected by a premarital agreement.

In New York, the Domestic Relations Law § 236(B)(3) is applicable to any matrimonial agreement and provides that parties can make provisions in four areas: 1) Testamentary dispositions and waivers of the right of election; 2) ownership, division or distribution of separate and marital property; 3) maintenance; and 4) custody, care, education and maintenance of children of the marriage. N.Y. DOM. REL. LAW § 236(B)(3).

The Uniform Marital Property Act (“UMPA”) has been adopted in Wisconsin. Section 766.58 on marital property agreements permits separation agreements and makes them subject to the doctrine of unconscionability:

- (1) A marital property agreement shall be a document signed by both spouses. Only the spouses may be parties to a marital property agreement. A marital property agreement is enforceable without consideration.
- (2) A marital property agreement may not adversely affect the right of a child to support.
- (3) Except as provided in §§ 766.15, 766.55 (4m), 766.57 (3) and 859.18 (6), and in sub. (2), in a marital property agreement spouses may agree with respect to any of the following:
  - (a) Rights in and obligations with respect to any of either or both spouses property whenever and wherever acquired or located.
  - (b) Management and control of any of either or both spouses property.
  - (c) Disposition of any of either or both spouses property upon dissolution or death or upon the occurrence or nonoccurrence of any other event.
  - (d) Modification or elimination of spousal support, except as provided in sub. (9)
  - (e) Making a will, trust or other arrangement to carry out the marital property agreement.

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- (f) Providing that upon the death of either spouse any of either or both spouses property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition. Any such provision in a marital property agreement is revoked upon dissolution of the marriage as provided in s. 767.266 (1) If a marital property agreement provides for the nontestamentary disposition of property, without probate, at the death of the 2nd spouse, at any time after the death of the first spouse the surviving spouse may amend the marital property agreement with regard to property to be disposed of at his or her death unless the marital property agreement expressly provides otherwise and except to the extent property is held in a trust expressly established under the marital property agreement.
  - (g) Choice of law governing construction of the marital property agreement.
  - (h) Any other matter affecting either or both spouses property not in violation of public policy or a statute imposing a criminal penalty.
  - (3m) Chapter 854 applies to transfers at death under a marital property agreement.
  - (4) A marital property agreement may be amended or revoked only by a later marital property agreement.
  - (5) Persons intending to marry each other may enter into a marital property agreement as if married, but the marital property agreement becomes effective only upon their marriage.
  - (6) A marital property agreement executed before or during marriage is not enforceable if the spouse against whom enforcement is sought proves any of the following:
    - (a) The marital property agreement was unconscionable when made.
    - (b) That spouse did not execute the marital property agreement voluntarily.
    - (c) Before execution of the marital property agreement, that spouse:
      1. Did not receive fair and reasonable disclosure, under the circumstances, of the other spouses property or financial obligations; and
      2. Did not have notice of the other spouses property or financial obligations.
  - .....
  - (8) The issue of whether a marital property agreement is unconscionable is for the court to decide as a matter of law. In the event that legal counsel is retained in connection with a marital property agreement the fact that both parties are represented by one counsel or that one party is represented by counsel and the other party is not represented by counsel does not by itself make a marital property agreement unconscionable or otherwise affect its enforceability.

WIS. STAT. § 766.58(1)-(6), (8) (2004).

The Uniform Marriage and Divorce Act (“UMDA”) has been adopted in some form in eight states. In Kentucky, section 403.180 of the Revised Statutes provides:

Separation agreement – Court may find unconscionable (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

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- (2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.
  - (3) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance.
  - (4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:
    - (a) Unless the separation agreement provides to the contrary, its terms shall be set forth verbatim or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or . . . .
    - (b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.
  - (5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.
  - (6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

KY. REV. STAT. ANN. § 403.180 (Banks-Baldwin 2004). Compare the Kentucky statute with § 236 B (3) New York Domestic Relations Law:

Maintenance and distributive award. 3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) *provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment*; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

N.Y. DOM. REL. LAW § 236(B)(3) (emphasis added).

The New York statute is silent with respect to the applicability of the doctrine to arrangements involving the ownership, division or distribution of separately owned and marital property. The Court of Appeals in *Christian v. Christian*, however, a case decided before the adoption of New York's Equitable Distribution statute, determined that prenuptial agreements are subject to the traditional doctrine because "unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions between married persons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to

for judicial activism is substantially reduced if not eliminated. Many of the schemes specify that so called “procedural” matters, i.e., those involving the conduct of the parties in the negotiation of the agreement, are to be dealt with by the courts as matters of fact.<sup>62</sup> Assuming that the applicable statutes are complied with, a compact is improper from the perspective of unconscionability only if the operation on any party has an unacceptable consequence. “Unacceptable” almost always is a function of economic fairness, an issue that calls upon courts to rule on adequacy and propriety, issues that are *per se* subjective.<sup>63</sup>

vitate an ordinary contract.” 365 N.E.2d 849, 855 (N.Y. 1977) (citations omitted). Subsequent rulings have determined that Christian is applicable to agreements governed by the Domestic Relations Law. See *Goldman v. Goldman*, 500 N.Y.S.2d 111 (N.Y. App. Div. 1986); *Zipes v. Zipes*, 599 N.Y.S.2d 941 (N.Y. App. Div. 1993).

In Minnesota all matrimonial agreements are required “to be procedurally and substantively fair and equitable both at the time of . . . execution and at the time of . . . enforcement.” MINN. STAT. § 519.11(1a)(2)(c).

<sup>62</sup>UPAA Section 6(a)(2), adopted in twenty-seven states provides as follows:

- (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that
  - (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
    - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
    - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
    - (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party

UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2) (2004).

Some states like Colorado limit the proof of procedural matters. Colorado Revised Statute § 14-2-307(1)(b) provides as follows: “Enforcement. A marital agreement or amendment thereof or revocation thereof is not enforceable if the party against whom enforcement is sought proves . . . (b) Before execution of the agreement, amendment, or revocation, such party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.” COLO. REV. STAT. § 14-2-307(1)(b) (2004). In Minnesota, the statute provides that “[a] post nuptial contract or settlement is valid and enforceable only if at the time of its execution each spouse is represented by separate counsel.” MINN. STAT. § 519.11(1a)(2)(c).

<sup>63</sup>A number of cases have determined that an agreement is unconscionable if by its terms a spouse is rendered a public charge, a risk that outweighs the freedom to contract. See *Lutz v. Lutz*, 563 N.W.2d 90 (N. D. 1997); *In re Marriage of Dechant*, 867 P.2d 193 (Colo. Ct. App. 1993); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *Justus v. Justus*, 581 N.E.2d 1265 (Ind. Ct. App. 1991); *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984). Some statutes identify the state as a third party beneficiary and either prohibit enforcement of any term that renders a signatory a public charge or give the court the power to order the other party to provide a level of support that will eliminate that possibility. See N.Y. GEN. OBLIG. LAW § 5-311 (2004); Except as provided in section 236 of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of the liability to support the other in such a manner that he or she will become incapable of self-support and therefore will likely become a public charge. See also UPAA § 6(b):

If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for

Consider an agreement that provides for support and maintenance. Determinations about what is an appropriate amount for support and maintenance, if made by an agreement between the parties, can only be seen as being adequate or inadequate. There is no middle ground. If it is inadequate in the eyes of the supposed beneficiary, it is so only if the bargain, when made, was a poor bargain. But, as has been noted throughout this Article, a poor bargain is not necessarily an unconscionable bargain.<sup>64</sup> Somehow it has to be established that there is something more that compels the conclusion that the bargain is unconscionable.

But what standard should the court apply? The standard cited in New York's *Christian v. Christian*,<sup>65</sup> that there must be inequality that is so "strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense,"<sup>66</sup> provides little guidance. In actuality this "standard" is undefined and ephemeral, telling us little if anything. By contrast, if the agreement renders the complaining party a public charge, public policy has been violated and there is no need for a subjective determination.<sup>67</sup>

The issue of economic neediness requiring involvement by the state comes into focus: (1) when the agreement is signed; (2) upon review by a court at the time of a divorce proceeding; and (3) at anytime following a divorce decree, assuming that the agreement survives the divorce order or judgment.

When a matrimonial agreement is signed, it must be at the very least fair and reasonable,<sup>68</sup> equitable, and not unconscionable under the Uniform Family Law Acts. In states like New York, stated public policy prohibits any agreement that when signed contains a provision that can result in either party becoming "incapable of self-support and therefore . . . likely to become a public charge." When reviewed by a court at the time of a divorce proceeding, the Uniform Acts entitle courts to review the current circumstances of the parties to determine if the agreement is unfair or unconscionable. Finally, in the aftermath of a divorce proceeding the terms of the agreement can be scrutinized, taking into account the current circumstances of the party suggesting unconscionability, except that in states like New York, the review

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support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to void that eligibility.

<sup>64</sup>See *McFarland v. McFarland*, 519 N.E.2d 303 (N.Y. 1987); *Christian v. Christian*, 365 N.E.2d 849 (N.Y. 1977); *Clermont v. Clermont*, 198 A.D. 2d 631 (N.Y. App. Div. 3<sup>rd</sup> Dept. 1993); *Cantamessa v. Cantamessa*, 170 A.D. 2d 792 (N.Y. App. Div. 3<sup>rd</sup> Dept. 1991); *Golfinopoulos v. Golfinopoulos*, 144 A.D. 2d 537 (N.Y. App. Div. 2nd Dept. 1988).

<sup>65</sup>365 N.E.2d 849 (N.Y. 1977).

<sup>66</sup>*Id.* at 855.

<sup>67</sup>It follows that if an obligation to pay maintenance is so great that it creates the possibility that the party making such payments will become a public charge, or conversely that the amounts being paid are so paltry as to require payments by the state, the obligation must be reformed to avoid an unacceptable result. *Bloomfield v. Bloomfield*, 764 N.E.2d 950, 953 (N.Y. 2001).

<sup>68</sup>"In our view, a 'conscionability' standard is not the same as a 'fair and reasonable' standard. Although there may be substantial overlap between the standards, a standard of conscionability generally 'requires a greater showing of inappropriateness.'" *Upham v. Upham*, 630 N.E.2d 307, 310-11 (Mass. Ct. App. 1994) (citation omitted).

must be made to determine if there is proof of extreme hardship.<sup>69</sup> The standard of extreme hardship, clearly something greater than a mere change in circumstances is, like the term unconscionable, vague and difficult to pin down. For that reason, the standard ought to be, at the least, a contract term that interferes with a party's ability to seek reform and avoid having to seek public assistance. This criterion does not require a party to wait until after becoming a public charge to seek relief.

The vast majority of prenuptial agreements deal exclusively with the distribution of property brought to the marriage by the parties, as well as the distribution of property acquired during the marriage. Occasionally, provision is made for maintenance and support. In states such as New York, these provisions must be "fair and reasonable" when made and not "unconscionable" when application is made to the court for an order of divorce. Other states permit a court to review the terms for support upon application for a divorce taking into consideration a change in circumstances.<sup>70</sup> A change in circumstances is a standard that does not speak to unconscionability, as is the case with "fair and reasonable." Indeed, even in New York, the standard for review, extreme hardship at anytime after the entry of a judgment, is a standard that does not address unconscionability. The Uniform Premarital Agreement Act<sup>71</sup> requires as a condition for enforcement adequate disclosure and evidence that the agreement was entered into voluntarily, thereby removing from the determination issues involving the actions of the parties in the contract formation process in favor of a requirement that the court make determinations as a matter of fact on certain specified matters. The rules urged in this Article speak to the operation of the agreement on third parties in large measure because neither children nor the state have the benefit of disclosure or the opportunity to negotiate. Unconscionability is separated from issues of disclosure and deliberateness. This suggests that the definition must lie someplace other than with the actions of the parties themselves.

Support and maintenance issues appear frequently in separation agreements and stipulations of settlement. The Uniform Acts deny enforcement if a provision is

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<sup>69</sup>See N.Y. DOM. REL. LAW § 236 (B)(9)(b). See also *Pintus v. Pintus*, 480 N.Y.S.2d 501 (N.Y. App. Div. 1984); HAW. REV. STAT. § 572-22 (2004) provides:

A married person may make contracts, oral and written, sealed and unsealed, with her or his spouse, or any other person, in the same manner as if she or he were sole.

An agreement between spouses providing for periodic payments for the support and maintenance of one spouse by the other, or for the support, maintenance, and education of children of the parties, when the agreement is made in contemplation of divorce or judicial separation, is valid provided that the agreement shall be subject to approval by the court in any subsequent proceeding for divorce or judicial separation and that future payments under an approved agreement shall nevertheless be subject to increase, decrease, or termination from time to time upon application and a showing of circumstances justifying a modification thereof.

All contracts made between spouses, whenever made, whether before or after June 6, 1987, and not otherwise invalid because of any other law, shall be valid. HAW. REV. STAT. § 572-22. (emphasis added).

<sup>70</sup>See, e.g., *Lepis v. Lepis*, 416 A.2d 45 (N.J. 1980); *Guglielmo v. Guglielmo*, 602 A.2d 741 (N.J. Super. Ct. App. Div. 1992); *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984); *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990).

<sup>71</sup>UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2). See MINN. STAT. § 519.11(1).

unconscionable when signed. However, these acts also require, as a condition for enforcement and a denial of a finding of unconscionability, financial disclosure and evidence that the agreement was entered into voluntarily.<sup>72</sup> The practical effect of these provisions is the same as that described above concerning premarital agreements. The Acts permit parties a great deal of latitude provided that there is adequate disclosure and evidence that the agreement was entered into voluntarily. Unconscionability is separated from issues of disclosure and deliberateness suggesting that the definition must lie someplace other than with the actions of the parties themselves.

Arrangements involving the distribution of property are unlikely to result in a party becoming a public charge and are therefore best considered using the general rules that apply to commercial contracts.<sup>73</sup> Yet even here virtually all statutory schemes in effect today impose a requirement that there be adequate disclosure. Most statutory schemes also compel parties to seek the advice of independent counsel. The judicial role has been limited to ensuring compliance with the statutory mandates. The existing statutory setting hints at the rules of construction suggested in this Article. As has already been noted, conduct of the parties is, in some schemes, eliminated as an issue of law. The Uniform Premarital Agreement Act provides that a prenuptial agreement is not enforceable if it was not voluntarily executed, was unconscionable when executed, there was a failure to provide fair and reasonable disclosure, or one party did not have adequate knowledge of the other party's property or financial obligations.<sup>74</sup> Moreover, the UPAA provides that where a premarital agreement causes one party to become eligible for public assistance at the time of separation or divorce, the court *may* modify the terms to avoid such eligibility.<sup>75</sup> Similarly, the Uniform Marital Property Act requires disclosure and deems unenforceable any agreement not entered into voluntarily. Moreover, this Act bars parties from making agreements that adversely affect the rights of a child to support.<sup>76</sup> In addition, the Act gives the court the power to modify any agreement that results in a party's becoming eligible for public assistance.<sup>77</sup> The Uniform Marriage and Divorce Act removes from any consideration about unconscionability the issues of custody, support and visitation of children and limits inquiry about

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<sup>72</sup>See *supra* notes 60, 61, 62, and 63.

<sup>73</sup>See, e.g., *Gross v. Gross*, 646 N.E.2d at 509. Upon the consideration of provisions relating to the division or allocation of *property* at the time of a divorce, the applicable standards must relate back to the time of the execution of the contract and not to the time of the divorce. As to these provisions, if it is found that the parties have freely entered into an antenuptial agreement, fixing the property rights of each, a court should not substitute its judgment and amend the contract. A perfect or equal division of the marital property is not required to withstand scrutiny under this standard.

*Id.*

<sup>74</sup>UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1), (2).

<sup>75</sup>UNIF. PREMARITAL AGREEMENT ACT § 6(b).

<sup>76</sup>WIS. STAT. § 766.58(2), (6).

<sup>77</sup>WIS. STAT. § 766.59(9)(b).

unconscionability to “the economic circumstances of the parties and any other relevant evidence produced by the parties.”<sup>78</sup>

*B. Representative cases*

A review of some recently reported decisions illustrates the problems presented by judicial activism in the family law arena. There are common threads running through all the decisions discussed in this subsection. They exemplify the consequences of how judicial activism can trap a court into becoming embroiled in the propriety of the actions of the parties. In each case:

One party made a very poor decision;

There was no compulsion to sign the contested agreement or stipulation;  
and

The party contesting the agreement or stipulation had available as an alternative to signing the right to petition a court for relief.

Consider first *Crawford v. Crawford*.<sup>79</sup> In this case, the husband was a doctor and the wife was college-educated with professional training in the field of criminal justice. The wife, however, had taken a job as a meat wrapper earning a paltry salary. Under a stipulation, the husband received title to the marital dwelling subject to a mortgage and custody of the children. He also agreed to pay the wife spousal support for only six months. The wife agreed to a visitation schedule and also to pay a nominal sum as child support. After judgment was entered incorporating the stipulation’s terms the wife had second thoughts and sought reformation, claiming, among other things, that she had not fully understood what she was doing because of treatments she was receiving for a brain tumor. The lower court found that the wife knew what she was doing when she signed the settlement; she was well educated and had not offered any proof that her health impaired her judgment. The appeals court reversed, giving as the reason the dramatic disparity in income between the parties and the fact that the stipulation entitled the husband to keep most of his income, leaving the wife to make do with little more than her meager salary.<sup>80</sup> In the court’s effort to justify the finding of unconscionability, it ignored the reality that nothing in the stipulation suggested that the wife was placed at risk of qualifying for public

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<sup>78</sup>The Uniform Marriage and Divorce Act has been adopted in eight states. The language quoted is from the Kentucky version. See KY. REV. STAT. ANN. § 403.180. The Kentucky act is silent as to disclosure and independent representation. The version adopted in Arizona makes no reference to unconscionability. Instead, it speaks to economic arrangements that are fair and reasonable. See ARIZ. REV. STAT. § 25-317 (2004). See also COLO. REV. STAT. § 14-10-112 (2004); 750 ILL. COMP. STAT. 5/502 (2004); MONT. CODE ANN. § 40-4-201 (2004); WASH. REV. CODE § 26.09.070 (2004); MINN. STAT. § 519.11.

<sup>79</sup>524 N.W.2d 833.

<sup>80</sup>The court stated:

We agree that the stipulation is so one-sided and creates such hardship that it is unconscionable. Under the stipulation, Kenneth retained almost all of his \$ 130,000 income and acquired custody of the couple’s four children, whose primary care Leslie had provided throughout Kenneth’s lengthy education and training. Leslie, having survived the brain tumor, acquired a degree that to date has not provided her with earnings of more than \$ 3,600 annually.

*Id.* at 835.

assistance. The court conceded her education and the potential that it suggested, but nevertheless ignored the actuality that her circumstances were of her own making.

In a sharply worded dissent, Justice Neumann objected to the vague standard used to define unconscionability and pointed out that the majority was inviting other judges to indulge in patronizing, paternalistic meddling “with very little guidance or principle other than [their] own personal sense of what feels fair and right.”<sup>81</sup> Justice Neumann properly recognized that there was nothing about the settlement that in anyway undermined the integrity of the contracting process or the enabling statute. The wife had simply made a deal that, for whatever reason, she subsequently regretted. From the perspective of precedent, *Crawford* tells the observer only about judicial attitudes on the subject of saving people from their own poor decisions.<sup>82</sup>

*Pacelli v. Pacelli*<sup>83</sup> is an extreme example of the same phenomena. This case involved the entire spectrum of economic concerns, including support, maintenance and equitable distribution. The parties entered into a “mid-marriage agreement” after the husband expressed his desire for a divorce. The wife resisted the dissolution of the marriage and accepted the terms of the agreement hoping that her marriage could be saved. When the agreement was signed, the husband had a net worth of \$6,053,100. The wife was unemployed. The marital estate was valued at approximately \$3,000,000. Under the agreement, in the event of a divorce the wife agreed to accept a lump sum payment of \$540,000.<sup>84</sup> In exchange, the wife granted the husband a release from any claim for equitable distribution and alimony. Prior to signing the agreement, the wife consulted with an attorney who advised her against signing it. She disregarded this advice because of her hope that her cooperation would insure the viability of the marriage. Eight years later the husband sought a divorce. By this time his net worth had increased to \$11,241,500 and the marital estate had increased to approximately \$8,000,000.

The court made it clear that it knew a bad deal when it saw one. The court first concluded that the agreement was “unfair” when signed:

We conclude that in 1985 the marital estate was \$ 3,000,000 . . . . Thus, the \$ 540,000 provided in the agreement was 18% of the marital estate. [The husband’s lawyer] testified that he had advised plaintiff that he could expect “the probable range of equitable distribution could be somewhere around . . . one-third. Could be less, it could be more.” [The wife’s lawyer] testified that an equitable distribution range would be between thirty and forty percent of post-marital assets. Thus, the \$ 500,000 buy out was approximately half of a potential equitable distribution award, using the low end of the range.

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<sup>81</sup>*Id.* at 837 (Neumann, J., dissenting).

<sup>82</sup>For additional examples of unwarranted judicial intervention designed to save a party from a poor decision see *In re Marriage of Richardson*, 606 N.E.2d 56 (Ill. App. Ct. 1992); *Estate of Lutz*, 563 N.W.2d at 90; *Vandenburgh v. Vandenburgh*, 599 N.Y.S.2d 328 (N.Y. App. Div. 1993).

<sup>83</sup>725 A.2d 56. (N.J. Super Ct. 1999)

<sup>84</sup>The wife received \$40,000 as consideration for signing the agreement. The balance, if any, was to be paid upon entry of a judgment of divorce. *Id.* at 62.

The \$ 500,000 also purchased defendant's waiver of alimony. An alimony award in 1985 would have been substantial, perhaps approaching six figures. Plaintiff's annual income in 1984 and 1985 averaged \$ 500,000. The parties lived well. They lived in an expensive home, drove luxury automobiles and vacationed at some of the most desirable destinations. Plaintiff estimated that defendant spent \$ 20,000 to \$ 30,000 per year on clothing from stores such as Bergdorf Goodman. Their son, Tony, went to Deerfield Academy, and Franco went to Choate.<sup>85</sup>

The court then determined that the agreement was "unfair" when measured at the time of the divorce.

It is apparent that the agreement is also unfair when measured in 1994. At that time, plaintiff's net worth exceeded \$ 11,000,000, and post-marital assets were \$ 8,000,000. Thus, \$ 540,000 is approximately seven percent of the 1994 assets. The parties built a home at the Saint Andrews Club in Florida after executing the agreement. It is in joint names and defendant is entitled to one-half of the \$ 1,200,000 equity, or \$ 600,000. Even considering this asset, defendant's distribution is less than fifteen per cent of the marital estate. In light of the inherently coercive circumstances leading to the agreement, the result is unfair, inequitable and unenforceable. The trial court, on remand, must make determinations regarding equitable distribution and alimony, and other ancillary economic issues, if any.<sup>86</sup>

Unquestionably, the wife in *Pacelli* had made a series of very poor decisions.

- She disregarded her attorney's advice not to sign the agreement;
- She permitted herself to be swayed by her compulsion to save her marriage; and
- She accepted monetary terms that were not in her best interests.

As was the case in *Crawford*, there was nothing about the language of the *Pacelli* agreement that suggested that the wife was destined to seek public assistance or that such an application was imminent. As was the case in *Crawford*, there was no suggestion that the contested terms served to undermine the integrity of either the contracting system or any enabling statute. In *Pacelli* there is the additional fact that at the time that the wife signed the agreement, the husband had advised her that he wanted a divorce. Her husband's declaration gave rise to the immediacy of her rights to petition a court to settle her claims for alimony and a property settlement. By signing the agreement she waived her entitlement to judicial intervention. Yet the court, for no reason grounded in law, reinstated her right to seek equitable distribution.<sup>87</sup>

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<sup>85</sup>*Id.* at 62-63.

<sup>86</sup>*Id.* at 63.

<sup>87</sup>Husbands are just as likely to make poor decisions when it comes to marital rights. Consider what happened in *Lounsbury v. Lounsbury*, 752 N.Y.S.2d 103 (N.Y. App. Div. 2001). There, the husband, without the benefit of counsel, agreed to transfer the marital home to the wife. He further agreed that he would make all payments against the mortgage until it was satisfied and would pay all real estate taxes on the property until the children of the marriage turned eighteen even if the wife remarried or cohabited with another adult. "Here,

As a contrast to *Crawford* and *Pacelli*, consider *Steiner v. Steiner*.<sup>88</sup> There, the husband signed an agreement to pay alimony. Some years later, he sought to have this obligation terminated claiming ill health and an increase in the wife's income from other sources. When the agreement was signed, the husband's primary source of income was his military disability payments. While his physical condition had deteriorated, that fact did not have a negative impact on his benefit payments. In fact, while his medical expenses had increased, so had his disability payments. The court would not get involved:

What must be kept in mind concerning this divorce is that the property settlement agreement was just that, an agreed payment whereby Kenneth contracted with his former spouse as part of an overall property agreement to make payments of \$ 900 per month for periodic alimony. That Kenneth might have made a bad deal does not relieve him of his duty to live up to his end of the bargain. In property and financial matters between the divorcing spouses themselves there is no question that, absent fraud or overreaching, the parties should be allowed broad latitude. When the parties have reached agreement and the chancery court has approved it, we ought to enforce it and take as dim a view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts.<sup>89</sup>

Also, as a contrast to *Crawford* and *Pacelli*, consider the circumstances in *Haynes v. Haynes*,<sup>90</sup> a case that involved the distribution of marital property. The husband won \$3,000,000 in a state lottery. The wife was aware of his good fortune. Some months later the husband advised his wife that he wanted a divorce. The wife elected not to resist. The husband asked his attorney to draft the necessary papers and they were presented to the wife. Her signature was sought, and she willingly gave it. Embedded in the documentation was an affidavit that contained a waiver of her right to equitable distribution. She did not seek advice from an attorney and no one explained to her the consequences of her signature. The court refused to reinstate the wife's claim to equitable distribution:

It is extremely well-settled that "a party will not be excused from his [or her] failure to read and understand the contents of a release." When a party signs a document without having read its contents and without any valid excuse for having failed to do so, such party is chargeable with knowledge of its terms (*citations*) and is "conclusively bound" thereby  
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the clauses in the agreement requiring defendant to pay off the mortgage and to pay property taxes until the children turn 18 are not per se unconscionable. In our view, although defendant may have 'given more' than he might legally have been compelled to give, considered in its totality, the separation agreement hardly 'shocks the conscience.'" *Id.* at 107 (citations omitted). See also *Steiner v. Steiner*, 788 So. 2d 771 (Miss 2001); *Knutson v. Knutson*, 639 N.W.2d 495 (N. Dakota 2002).

<sup>88</sup>788 So. 2d 771.

<sup>89</sup>*Id.* at 776 (citation omitted).

<sup>90</sup>2003 N.Y. Slip Op. 50867U (N.Y. App. Div. Mar. 20, 2003).

While it might not have been prudent for Yvonne Haynes to have signed the waiver, her action does not “confound judgment” and it does not “shock the conscience” to hold her to the consequences of her actions.<sup>91</sup>

The situation in *Yuda v. Yuda*<sup>92</sup> provides a good illustration of a case where a court properly found unconscionability based on the conclusion that terms of an agreement could reasonably result in a party having to seek public assistance. There, the husband committed himself to pay maintenance in an amount that was so great that he was in danger of becoming a public charge. In addition, the wife had possession of the marital home and was free to sell it when she, in her sole discretion, deemed it appropriate. When sold, the husband was entitled to half the net proceeds from the sale. The court declared the agreement unconscionable, citing the illusory nature of the agreement’s provisions applicable to the home together with the observation that the support provisions of the agreement, as a practical matter, would render the husband in danger of becoming a public charge. Neither of these reasons was subjective in the sense that they were rooted in a limited desire to correct for poor judgment.<sup>93</sup>

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<sup>91</sup>*Id.* at 7, 9 (citations omitted).

<sup>92</sup>533 N.Y.S.2d 75 (N.Y. App. Div. 1988).

<sup>93</sup>*Sanders v. Sanders*, 287 A.2d 464 (N.J. Super. Ct. Ch. Div. 1972), is another example of a decision based upon a concern over public assistance. This time the fear was linked to a demand to dispose of real property. The parties purchased a home shortly after they were married. The husband provided the cash portion of the purchase price and the parties assumed liability for the mortgage. Title was taken as tenants by the entirety. Throughout the duration of the marriage, the husband made all payments for the mortgage together with taxes and insurance. The wife made no contributions towards the purchase price or the servicing of the mortgage and payment of other expenses associated with the home. Some years later she left her husband. While the parties did not have an agreement, the manner of holding title served a similar function. The parties petitioned the court for disposition of the home. At the time, the husband’s sole source of income was his social security benefits. In addition, he was going blind and had other physical problems. The court held:

We find that taking into consideration all the facts and circumstances of this case – the equities of the parties, the course of conduct of the parties on acquisition, support and maintenance of the marital abode over the years, the age, health and infirmities of the parties, her abandonment of the marital abode and the marital status (and indeed the marriage, which was the only reason for her enjoying an interest in the title to the premises) – such rigorous relief as sought and provided under the old law of distribution of marital property upon divorce would, in this case, be inequitable, unjust and unconscionable. It would cause an old man who has dutifully in good faith provided a home for himself and his wife, his family, to lose his home to a much younger woman who has fled the marital abode, abandoned the marriage and now seeks to liquidate her legal interest at his expense. At his age and with his infirmities and limited income, he would be unable to refinance his home to protect his interest on partition sale, or to purchase her interest or another home. Such an action under the circumstances of this case violates the whole concept of tenancy by the entirety as a protection of the parties to a marriage as security to both spouses during coverture of marital assets that were the work product of their marital economic life and the additional security to the surviving spouse upon the termination of their union by death of the other.

*Id.* at 465-66.

All of the above cases, if resolved using the rules suggested in this Article, would have resulted in determinations about unconscionability that were free from subjectivity. The courts in *Crawford* and *Pacelli* could have made the determination about unconscionability by looking no further than the issue of public assistance. In both cases the denial of the claim of unconscionability would have been justified because in each case the petitioner was capable of caring for herself without the benefits provided for in the contested agreement. The *Steiner* and *Yuda* courts made their determinations by considering the question of the outer boundaries of the need for public assistance. The *Haynes* court properly found nothing in the petitioner's cooperation that suggested anything other than a poor decision.

#### IV. CONCLUSION

It is not an accident that there are no hard and fast rules for the defining what is meant by "unconscionable." Legislatures and courts have approached the possibility with foreboding, fearing that restrictions on the doctrine might result in the elimination of a fail-safe mechanism against predatory practices not otherwise addressed by the law. But as illustrated in this Article, these fears are not justified. Our current legal system has as a bedrock tradition the evolution of legislation for the control and regulation of the human inclination to take unfair advantage. These legislative designs are a statement of the public's interest in the preservation of a flexible and reliable system for contract integrity. Placing limitations on the ability of the courts to expand on the legislature's declaration of public policy outweighs the risk that a deserving petitioner will be denied relief. The role of the judiciary should therefore be restricted to either the enforcement of the legislative schemes or pronouncements about public policy that serve to supplement, not displace, the legislative schemes. The rules outlined in this proposal provide the proper balance.

The rules proffered here assume that it is appropriate for private parties to freely reach agreements with two provisos: (1) that in doing so the parties must be prepared to live up to the agreement and (2) the arrangement is not otherwise in conflict with public policy. These rules also assume that the public has an interest in insuring that parties refrain from agreeing to terms that, if enforced, undermines the integrity of our contracting system or, in the special case of matrimonial agreements, to force the state to provide public assistance or adversely impact the rights of children of a marriage. To the extent that these conditions are met, judicial declarations about the resulting unconscionability of the term are appropriate.

Acceptance of these rules by the public and the judiciary will require a great deal of adjustment. No longer will it be possible for parties to claim the right to be divested of responsibilities assumed by the contracting process. For their part, judges will have to relinquish the power to assist those they perceived as being either an underdog or disadvantaged by chance circumstances, and by doing so will have to forego the granting of "get out of jail free" cards to those who, for whatever reason, enter into improvident arrangements. The judiciary will have to short-circuit any inclination to substitute a judge's wisdom about the propriety of any arrangement in favor of policing against only those terms that impact the public interest. The search for what is and what is not unfair to or for a party to an agreement will have to be abandoned in favor of keeping an eye out for terms that should be unenforceable because of their impact on the public's interest in a reliable system for contracting.

Only those who are not prepared to accept responsibility for a poor decision stand to lose by my proposal. There is no public interest in facilitating the avoidance of an

improvident compact. Excuses such as failure to understand a term, an inability to afford the assistance of counsel, failure to read the contract, overreaching, inequality in bargaining position or the insistence of a party on the use of a standard form agreement, and issues involving the behavior of the parties during the contract formation process, fail to justify a declaration of unconscionability because none explain why the aggrieved party accepted the agreement. In the final analysis the requirement that a party must honor a commitment is in the public interest and only proof of fraud, duress or violation of a stated public policy should be sufficient to justify exculpation from a commitment made.

The rules being proposed empower courts to provide a fail-safe mechanism. If these rules are implemented, then there will be a change in judicial focus. The emphasis will shift from excuses allowed to absolve a party from responsibility to an emphasis on the elimination of threats by private parties to the integrity of the system for contracting.