The Institutional and Doctrinal Roles of "Conscience" in the Law of Contract[+]

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"The modern revival of conscience as a touchstone of legal rights and obligations may yet act as a spur to renewed interest in an ancient topic."[1]

I INTRODUCTION

The language of conscience increasingly pervades the private law. This takes a number of forms, including specific doctrines such as "unconscionable dealing" and elements within other doctrines such as promissory estoppel. In some Common Law jurisdictions it also takes the form of statutory provisions that prohibit, for instance, "conduct that is unconscionable within the meaning of the unwritten law".[2] In these and other legal contexts, the law has recourse to conscience or its converse concept, unconscionability, as a determinant of legal rights and obligations.[3] The legal rules, in other words, are "explicitly anchored in conscience".[4]

This has led some to call for "an urgent stocktake" of the present state of the law.[5] Such calls are justified. Important questions arise as to what is meant by "conscience" in those particular contexts, whose conscience is at issue, and why. Principled and tolerably certain answers to those questions are necessary so that parties can plan their affairs and shape their conduct accordingly. Inevitably, perhaps, such an inquiry will prove at least partly quixotic due to the ineliminable vagaries of

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[1] Seddon and Ellinghaus (eds), *Cheshire & Fifoot's Law of Contract* (8 Australian ed, 2002) 1140.

[2] Section 51AA(1) of the Trade Practices Act 1974 (Cth) provides: "A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

[3] This article is confined to the private law and does not address equity's role in relation to rule rigidity in statute law or delegated legislation.

[4] Seddon and Ellinghaus (eds), *Cheshire & Fifoot's Law of Contract* (7 Australian ed, 1997) 907.

[5] Horrigan, "The Expansion of Fairness-Based Business Regulation – Unconscionability, Good Faith and the Law's Informed Conscience" (2004) 32 ABLR 159, 160.

conscience-based standards. Nonetheless, the law's fundamental respect for the autonomy of those subject to its rules requires that equitable standards must be amenable to principled analysis and that their various applications must bear scrutiny. Justice Tipping expressed the point aptly when his Honour explained that "the Courts must attempt some elucidation of the concept" for "[e]ven a Court of equity cannot ... throw up its hands and say: I don't know how to describe the beast but I will tell you when I see one."[6]

Process and Approach

The proliferating literature on the role of conscience in the private law is, at times, susceptible to caricature. In particular, the temptation exists to set up a dichotomy between the "strict and complete legalism"[7] thought to represent the past and the flexible, individualized justice that is sometimes said to characterize modern jurisprudence. On that view, conscience and legalism are treated as polar opposites; each subversive of the other. The section heading to the Australian edition of *Cheshire & Fifoot's Law of Contract*, "the emergence of conscience and decline of legalism," illustrates that approach.[8] As Professor Duggan observes, this trend has been "greeted with excessive pessimism in some quarters and excessive optimism in others".[9] That observation is apt. It is important at the outset of this article to acknowledge the risk of overstating the extent of change.

The core claim of this article is that conscience-based standards do not subvert contract law provided that their institutional and doctrinal roles are properly construed and limited. In support of that claim, this article addresses the historical and jurisprudential bases for the intervention of the courts through conscience-based doctrines in the transactions of private parties. This is done with a view towards demonstrating that the existing doctrinal limitations are not simply policy calibrations, designed by the courts purely for various social and economic advantages, but principled corollaries of deeper premises which inhere in the institution of contract in pluralistic market democracies.

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[6] *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, 457 (HC).

[7] Sir Owen Dixon's reference to "strict and complete legalism" in "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi, xiv is commonly invoked in the literature as a defining statement of judicial practice in that era. The connotations associated with such references vary.

[8] Seddon and Ellinghaus (eds), supra note 1, 1137.

[9] Duggan, "The Profits of Conscience: Commercial Equity in the High Court of Australia" (2003) 24 Aust Bar Rev 150, 172.

Given such a general level of inquiry, there is a further risk of oversimplifying the matter by addressing conscience as though it were a monolithic concept amenable to abstract analysis shorn from its specific applications and legal doctrines. That would be misconceived. As Professor Bigwood explains, "appeals are not generally made directly to 'conscience' in order to resolve particular disputes between litigants, but rather the inquiry is channelled, and hence disciplined, through specific rules and criteria that express the unconscionability idea".[10] To adopt Professor Leff's analysis, "one is arguably arguing about the right sub-questions, not about the content of an *n*th level abstraction like 'unconscionability'".[11] Consequently, and acknowledging Professor Watts' observation that unconscionability is "never more than a label anyway", this article endeavours to explore the principles that stand behind the label in some of the various contexts to which it is applied.[12]

The imperative for asking those questions is not restricted to conceptual clarity. The failure to maintain and observe important distinctions with respect to those questions has from time to time led courts into error. As Robert Fardell QC and Kerry Fulton argue, "reducing equitable notions to a general unconscionability test can only lead to an arbitrary and inconsistent application of the law".[13] McGhee, in his editor's preface to the present edition of *Snell's Equity*, has observed that the use of terms such as "unconscionable" in increasingly diverse contexts, "may have masked rather than illuminated the underlying principles at stake".[14] A modest illumination is the goal of this article.

Overview of Conclusions

Broadly speaking, this article concludes that conscience has no free-floating role in the private law. In other words, conscience carries determinative force only insofar as it is referable to and mediated by a specific legal doctrine. Suggestions that there is an overarching principle against unconscientious or unconscionable conduct are inherently question-begging and unclear in their scope, origin, and effect.

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[10] Bigwood, "Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part I" (2000) 16 JCL 1, 8.

[11] Leff, "Unconscionability and the Code – The Emperor's New Clause" (1967) 115 U Pa L Rev 485, 541.

[12] Watts, "The Judge as Casual Law Maker" in Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 201.

[13] Fardell and Fulton, "Constructive Trusts – A New Era" (1991) NZLJ 90, 103.

[14] McGhee (ed), *Snell's Equity* (30 ed, 2000) Preface.

Moreover, such a proposition is insupportable by the foundational case law and misconceived in light of the liberal conception of contract that informs our private law.[15] Accordingly, as a matter of historical development and principle, this "beguiling heresy" ought to be rejected.[16]

II A LINGUISTIC AND HISTORICAL STARTING POINT TO THE MEANING OF CONSCIENCE

Generalized definitional analysis cannot be expected to take the matter very far and there is some truth to the observation of Deane J that "the role of unconscionability is better described than defined".[17] Conscience is too amorphous a concept to be susceptible to analysis by abstraction and the use of further general words to explain the concept is prone to tautology. "Definition", as Lord Scarman noted in *National Westminster Bank plc v Morgan*, "is a poor instrument when used to determine whether a transaction is or is not unconscionable".[18]

It is as well to illustrate that by considering two definitions. The *Shorter Oxford English Dictionary* defines "unconscionable" to include the meaning: "showing no regard for conscience". Margaret Halliwell in her text, *Equity and Good Conscience in a Contemporary Context,* opines that, "the essence of the principle of unconscionability is that a party in either a social or commercial relationship with another person will not be allowed by equity to take unconscientious advantage of that other person".[19] In either case, it is difficult to glean useful insights. This is hardly surprising and certainly no criticism of the respective authors. It reflects the inherent problems in defining what is really a pejorative conclusory label by reference to other general words. Elements of circularity and question-begging are bound to emerge.

The General Contours of Conscience

Nonetheless a generalized analysis does establish some basic distinctions, or "boundary markers" to adopt Professor Horrigan's phrase, and also

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[15] Both the phrase and the concept of the "liberal conception of contract" have been adopted from Bigwood, supra note 10.

[16] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 700 (HL) per Lord Diplock.

[17] *Commonwealth v Verwayen* (1990) 170 CLR 394, 440.

[18] [1985] 1 AC 686, 709 (HL).

[19] Halliwell, *Equity and Good Conscience in a Contemporary Context* (1997) v.

dispels preliminary misconceptions that words such as "conscience" or "unconscionable" might suggest.[20] Accordingly, this section of the article considers four points that emerge from the historical development of the jurisdiction. As Professor Robert Bork explains in a different context, "one of the uses of history is to free us of a falsely imagined past".[21]

First, conscience, insofar as it is recognized by the law, is an institutional concept rather than a private and idiosyncratic one. Lord Ellesmere stated in the *Earl of Oxford's Case* that "the office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions, of what nature soever they be".[22] Sir Thomas More in *Cook v Fountain* made clear that the Chancellor's conscience was not his "natural and private conscience but a civil and official one".[23] The United States courts have expressed the same point by stating that the conscience of the equitable jurisdiction is a "judicial and not a personal conscience".[24] Judicial "conscience" is said to designate "the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals and by which it tests the conduct and rights of suitors".[25]

Secondly, notwithstanding the inherent flexibility of the equitable jurisdiction, equity now proceeds on the basis of settled principles. That state of affairs has long been the orthodoxy and it is important not to caricature the Chancellors as wielding entirely untrammelled power. As Sir Frank Kitto noted:[26]

> When, in the 17th century, Selden enlivened his table talk with a cynical likening of the measure of Equity to the length of the Chancellor's foot he was much behind the times, for the metamorphosis of the Chancellor's power unrestrained by objective rules into a jurisdiction applying a body of positive law had made great progress already.

That is not a novel observation. Harman LJ, delivering his judgment in *Bridge v Campbell Discount Co Ltd*, pointed out that, "since the time of

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[20] Horrigan, supra note 5, 167.
[21] Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 15.
[22] (1615) 1 Ch Rep 1, 6.
[23] (1676) 3 Swan 585, 600.
[24] *National City Bank v Gelfert* 29 NE 2d 449, 452 (NY Ct Apps, 1949).
[25] Ibid.
[26] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (2 ed, 1984) v.

Lord Eldon ... equitable jurisdiction is exercised only upon well-known principles".[27] To similar effect, Peter Birks once concluded:[28]

> If we are not to lose ground in the development of the sophisticated rationality which is essential to the role of law in modern society, it will be essential not to exaggerate either the mission of equity to do unanalysed justice or a mysterious peculiarity in the quality of equitable rights and duties.

Thirdly, the law is not so much concerned with a positive conception of what conscience requires but to restrain equitable fraud. In *Nocton v Lord Ashburton*, Viscount Haldane LC explained that, "what [equitable fraud] really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience".[29]

Fourthly, and more controversial than the foregoing points, the High Court of Australia has recently recognized that the phrase "unconscionable conduct" may give rise to what the majority described as the "false notion" that there is a general principle of unconscionable conduct in the nature of a defence or cause of action.[30] Some confusion, or perhaps more accurately "loose analysis",[31] has arisen from the attempts to subsume various doctrines within a single organizing principle of unconscionability.[32] One prominent illustration of the efforts to unify disparate doctrines under the concept of unconscionability is the following proposition of the learned authors of *Cheshire & Fifoot's Law of Contract*:[33]

> The variety of contexts in which conscience has served as an ultimate criterion of contractual liability allows, and indeed demands, that they be subsumed under some general principle. That principle must be, ultimately, that a party to a contractual

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[27] [1961] 1 QB 445, 459 (CA).
[28] Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWALR 1, 24.
[29] [1914] AC 932, 954 (HL).
[30] *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 325 (joint judgment of Gleeson CJ, McHugh, Gummow, Hayne, and Heydon JJ).
[31] Horrigan, supra note 5, 167.
[32] Hayne J has remarked that terms such as "unconscionable" are "sprinkled through pleadings or submissions much as castor sugar is sprinkled upon a bowl of strawberries in the hope that the consumer may find the dish more palatable." See "Commercial Law – Private Business/Public Concern" (Keynote Address, Annual Centre for Commercial Law Conference, September 2002) reported at (2002) 23 Aust Bar Rev 24, 26.
[33] Seddon and Ellinghaus (eds), supra note 1, 907.

> transaction may neither assert a contractual right nor deny a contractual obligation if it would be unconscionable to do so.

With respect, that proposition, at least when stated so broadly, is probably wrong as a matter of law and misleading as a matter of doctrinal analysis. It is misleading because subsuming problems is not the same as solving them and may contribute little to organizing the doctrines within a coherent framework.[34] The claim that Seddon and Ellinghaus' proposition is wrong as a matter of law is supportable by reference to decision of the Privy Council in *Union Eagle v Golden Achievement Ltd* where the Board noted that the "principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth", which explains "why it continues to beguile and why it is a heresy".[35] In making that statement, the Board noted with approval the rejection of a similarly formulated "beguiling heresy" by Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*.[36]

In this article's respectful view, it seems plain that the courts of England and Wales have set their face against recognizing such a principle. Moreover, that rejection is a long-standing one. As Lord Radcliffe observed in *Bridge v Campbell Discount Co Ltd*:[37]

> I do not think that it would be at all an easy task, and I am not certain that it would be a desirable achievement to try to reconcile all the rules under some simple general formula. Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly sceptical of the court's duty to apply the epithet "unconscionable" or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident, etc.

The High Court of Australia has also taken the opportunity in *Tanwar Enterprises Pty Ltd v Cauchi* to reject the proposition that "there is an equitable defence to the assertion of any legal right, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right".[38] As with the Privy Council decision, it is submitted

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[34] Leff, supra note 11, 559.
[35] [1997] AC 514, 519.
[36] Supra note 16, 766.
[37] [1962] AC 600, 626 (HL).
[38] *Tanwar Enterprises Pty Ltd v Cauchi*, supra note 30, 325.

that the High Court has signaled its disapproval of the use of unconscionability as a catch-all principle of law.

Such disapproval is appropriate. Bigwood notes that "it is currently vogue to argue for unification among equitable doctrines" and goes on to observe that "we should be wary of simplicity-of-one arguments, for with them comes the risk of failure to establish and maintain good intellectual order in private law".[39] Although it is too soon to make firm predictions, there are signs of increasing resistance to "simplicity-of-one arguments" from the leading appellate courts. For instance, Hayne J in his keynote address to the Annual Conference of the Centre for Commercial Law made approving reference to Birks' remark that "[t]he lawyer who deals in 'unconscionable behaviour' is rather like the ornithologist who is content with 'small brown bird'".[40] His Honour then proceeded to observe that "it is important to recognize that the broad and general specification of standards to be applied does not provide the answer to any inquiry — it presents the starting point for much deeper and more difficult inquiries requiring the articulation of what it is about a particular event or transaction that warrants the application of the relevant description".[41] His Honour's pithy conclusion that "it is not sufficient to sprinkle qualitative descriptions of behaviour over them, leaving parties, lawyers and courts to debate what effect is to be given to those descriptions" strikes to the heart of the academic debate.[42]

The distinction that the above discussion seeks to draw has been succinctly expressed by the Right Honourable E W Thomas in "The Conscience of the Law":[43]

> The question before the court may be whether a contract has been part performed, or whether an agent has acted within the scope of his or her authority ... Those questions will be determined in accordance with the relevant body of law. *The law's compunction against exploitation underlies these particular questions but does not comprise the particular question itself.* In this way justice, or the concept of fairness, is given effect in accordance with conventional legal methodology. The judge in deciding that a contract is unenforceable ... will do so having regard to accepted rules, principles and precedent. It is the accepted rules, principles

[39] Bigwood, supra note 10, 10.
[40] Birks, supra note 28, 16.
[41] Hayne, supra note 32, 27.
[42] Ibid.
[43] Thomas, "The Conscience of the Law" (2000) 8 Waikato L Rev 1, 21.

> and precedent which manifest the law's underlying aversion to exploitation. (Emphasis added.)

A legal inquiry, then, must be channelled through specific doctrines and rules. There is no direct recourse to a free-standing conception of morality.

Whose Conscience?

Having briefly considered the generalized boundaries of conscience and unconscionability, it is necessary to identify *whose* conscience is at issue. That inquiry is rarely undertaken. To adopt Professor Klinck's words, "most frequently, courts are simply vague about whose conscience they are referring to: 'conscience' is treated almost as an attribute without a possessor".[44]

As Professor Bigwood observes, the answer will depend upon the jurisdictional basis of the legal doctrine in question.[45] It is a doctrine-specific inquiry. In most cases, the conscience at issue will be the conscience of the person against whom it is asserted that the particular doctrine ought to apply. As indicated above, the requisite standard of probity and conscientiousness is an institutional one. Lord Nicholls has observed "honesty is not an optional scale, with higher or lower values according to the moral standards of each individual".[46] Nonetheless, "unconscionability is normally measured against the mind of the defendant".[47]

That proposition, occasionally, has been cast into doubt. Unorthodox answers to the question "whose conscience?" skew the reasoning process and yield results that are difficult to reconcile with principle and precedent. By way of illustration, it is useful to consider the contrasting approaches to this question adopted by the New Zealand High Court in *Powell v Thompson*,[48] on the one hand, and *Equiticorp v Hawkins*,[49] on the other hand.

Powell v Thompson principally concerned knowing receipt. However, for present purposes, it is Thomas J's discussion of knowing assistance that is of interest (notwithstanding that this was obiter dicta).

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[44] Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46 McGill LJ 571, 602.
[45] Bigwood, supra note 10.
[46] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 389 (PC).
[47] *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, 325 (HC) per Tipping J.
[48] [1991] 1 NZLR 597 (HC).
[49] [1991] 3 NZLR 700 (HC).

In relation to the issue of whose conscience was relevant Thomas J stated:[50]

> While it is frequently said that equity will not assist a third party unless his or her conscience is affected by knowledge of the competing equitable interest, it is not the defendant's conscience which is primarily in issue. It is whether, in all the circumstances, the conscience of equity is offended by the unjust enrichment of the plaintiff.

With respect to his Honour that statement does not accord with the orthodox understanding of the issue.[51] It has long been the law that the conscience of the defendant is the focus, rather than the conscience of equity or the court.[52] Although the courts have "determine[d] in an objective way what a defendant's conscience should dictate", the conscience which must be touched by the requisite knowledge remains that of the defendant.[53] Were it to be otherwise, the juridical basis of the doctrine would be undermined by, in effect, shifting the test from dishonesty to negligence. Knowing assistance would, on that view, transform into a principle that would more accurately be termed "negligent assistance".

III THE INTERFACE BETWEEN CONSCIENCE AND CONTRACT IN A MARKET ECONOMY AND PLURALIST DEMOCRACY

The foregoing discussion on the sources that inform the law's conscience and the boundaries inherent in the application of that conscience has already suggested the extent to which the role of conscience within the legal system is contingent upon the political and economic foundations of New Zealand, the United Kingdom, Australia, and other comparable states. Broadly speaking, the role of conscience is to be construed consistently with the principles that underpin the system as a whole. This section of the article considers the implications that follow from the core characteristics of our system. For the purposes of this discussion, three

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[50] *Powell v Thompson*, supra note 48, 609.
[51] See Dugdale, "A Polite Response to Mr Justice Thomas" (1993) 23 VUWLR 125.
[52] See eg *Re Montagu's Settlement Trusts* [1987] 1 Ch 264.
[53] *Equiticorp v Hawkins*, supra note 49, 727.

features are emphasized. First, New Zealand and comparable states[54] are representative democracies in which the will of the citizenry is expressed by representatives chosen in free elections. Secondly, citizens have differing conceptions of the good life. The society and its institutions generally respect those differing conceptions, within various limits, and reflect certain liberal values such as tolerance and a respect for individual autonomy. In other words, the community is pluralistic. Thirdly, the means of production, distribution, and exchange are largely, although not exclusively, in private ownership. The market, subject to limited state regulation and intervention, is the primary mechanism for setting prices of most goods and services, and the means by which most economic transactions take place. The outcomes of that system are subject to redistribution. Broadly speaking, the economic system can be described as free-market or capitalist.

It is suggested that one of the consequences of these deep-seated foundations is the limitation of the role of conscience as applied through the judiciary to corrective justice rather than redistributing wealth or restructuring society.[55] The conception of justice in the common law and equity is necessarily process-oriented and corrective rather than end-state oriented and distributive for two reasons. First, liberal pluralist democracies cannot generate a consensus behind a conception of substantive justice, and the judiciary is not an appropriate institution to construct or impose one. In other words, judge-made law is not a continuation of politics by other means. Secondly, the judicial process is not amenable to distributive justice objectives in a practical sense. To borrow Judge Easterbrook's phrase, one should bear in mind "the inability to restructure society through the judicial process".[56]

The Absence of a Substantive Conception of Justice

No distributive formula can generate sufficient consensus to achieve legitimacy as an objective of the judicial branch. A number of diverse theories, however, compete in the political marketplace of ideas.

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[54] Any attempt at a unified descriptive phrase would be inevitably value-loaded.

[55] Of course, corrective justice does "redistribute" wealth from one litigant to the other in a general sense of the expression. What is described in this article as redistribution is the transfer of wealth with a view towards achieving a distributional objective (such as to reduce inequality either between particular persons or classes of persons).

[56] Easterbrook, "The Inevitability of Law and Economics" (1989) 1 Legal Educ Rev 3, 27. Again, a qualification in understanding that phrase is required. Judicial decisions do, in a sense, restructure society through, for example, deterring certain kinds of behaviour or fashioning rules which advantage another. The law of torts is replete with such examples.

Consider for example the question of what is due to each citizen in terms of resources or welfare. From each according to his ability to each according to his need? To each equally? To each according to his or her marginal utility? To each according to what another has voluntarily transferred?

In New Zealand, and most comparable countries, none of the foregoing distributional principles form the basis of the allocation of resources. An impersonal market determines price and allocates resources. Innumerable tastes, preferences, demands, inputs, and innovations by consumers and producers determine market outcomes. Such outcomes are just in market terms, if the individual transfers were consistent with the prevailing transactional rules. The end-state outcomes, however, would not necessarily, if ever, be those that would be reached by a human agency making a de novo distribution of society's resources. Whereas a human agency would need to provide *moral* reasons or criteria for such a hypothetical allocation, market outcomes do not proceed upon centralized criteria as to the distributional outcome. The end-states will not reflect a pattern, either moral or geometric. They will reflect luck as well as wise choices. As Hayek observes, a market order, "does not and cannot achieve a distribution corresponding to any standard of material justice".[57] For that reason, most modern states also construct tax-and-transfer systems with redistributive objectives. Such systems shift end-state outcomes in the direction of patterns which are considered more just by the majority of citizens, while retaining the liberty and wealth-creating advantages of market economies.

It is trite to observe that the existence and extent of state intervention in the distributive outcomes generated by markets is controversial. That supplies a good reason to suppose that it is a balance best struck by the elected representatives of the citizens rather than the courts. It is useful, however, to consider potential conceptions of substantive justice that might be put forward. At the least, it ought to be acknowledged that if unconscionability is to be treated as a substantive conception rather than a procedural one, then it will become "a silent agent of distributive justice".[58] For that reason, it is appropriate and necessary to test the legitimacy of these conceptions.

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[57] Hayek, *Law, Legislation and Liberty. Volume 2: The Mirage of Social Justice* (1976) 81.
[58] Gray and Gray, *Elements of Land Law* (3 ed, 2001) 781.

1 Laesio Enormis *and Value-Based Theories*

A transaction might be considered unconscionable if there is sufficient disproportionality between the benefits conferred on one party relative to the other. To similar effect, one might consider the degree of deviation from market value. Commonly used formulations of value-based indicia of fair outcomes include "gross undervalue", "imbalance of benefits", "an immodest gain", and "a one-sided bargain".[59] Ellinghaus, for example, has endorsed the line of US decisions on excessive prices referred to below. He writes:[60]

> It is submitted that these authorities make clear that a sufficient disparity between "value" and price may, by itself, be a species of unconscionability. There is certainly no particular cause for alarm at such a conclusion. The civil law has worked happily with the notion of *laesio enormis* for a long time. That the precise degree of disparity required for a finding of unconscionability has not been defined is a matter for rejoicing rather than for sorrow.

But any conception of substantive fairness based on equality of exchange confronts two decisive objections. First, why ought the law supervise transactions to monitor parity of exchange? In the absence of any concern over the quality of the parties' consent to the deal, it is not apparent what concern it is of the law that a person is prepared to enter into transactions conferring unequal benefits or where one party will incur a net loss on the transaction. Sometimes market actors will pay irrationally high prices for goods or services or assume too much risk in a transaction. Nonetheless we trust that individuals are, in general, the best judges of their own interests. Megan Richardson has cogently summarized the arguments in favour of the liberal conception of contract which derive both from society's respect for the dignity of individuals and from utilitarian-economic arguments.[61] For example, the law has eschewed strong paternalism in part due to a deep conviction that, as John Stuart Mill put it, "the mental and moral, like the muscular powers, are improved only by being used".[62] The law respects and holds individuals to bad bargains as well as good ones because otherwise one would not be

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[59] Chen-Wishart, *Unconscionable Bargains* (1989) 51.
[60] Ellinghaus, "In Defence of Unconscionability" (1969) 78 Yale LJ 757, 790.
[61] Richardson, "The Utilitarian-Economic Model of Contractual Obligation: Unconscionability at the Frontier" (1995) 20 MULR 481.
[62] Mill, *On Liberty* (1962 ed) 138.

able to meaningfully make choices as an autonomous person, or fully develop the faculties that are essential to a liberal democratic society. Liberty, then, includes the freedom to act improvidently.[63] Even more fundamentally, security of contract would be undermined if one party could avoid performance on the basis that the benefits or burdens would be unevenly distributed.

Moreover, it will sometimes be rational to sell goods below cost. After all, firms and individuals operating in competitive markets are constrained to sell at market price even if that is lower than their own costs.[64] Below-market sales may allow firms or individuals to earn a return sufficient to contribute to fixed costs, despite being insufficient to meet variable costs. In the short-run that may be a rational strategy. Far from being objectionable from a conscientious standpoint, the ratcheting down of prices, even below cost, through competitive processes yields tremendous benefits for consumers and benefits the economy generally. The laws are not "balm for rivals' wounds" and it is inherent in the "ruthless" philosophy of the market that uncompetitive market actors will suffer loss and ultimately be eliminated from the market.[65] The harsh consequences for individuals are addressed through social safety nets funded by taxes and the provision of public goods.

On the demand side, it is also clear that paying very high prices or assuming lop-sided risks may be rational and inevitable in the circumstances of the market. Consider, for example, the complainant in *Vencer Mortgage Investments Ltd v Batley, Batley and Biedler* who contracted to pay 37 per cent interest on the sum borrowed.[66] As the Court found, the complainant's financial circumstances would not have enabled him to raise credit on preferable terms.[67] Notwithstanding the apparent harshness of the credit terms, the price of credit is determined by markets and calibrated to the risk of default on the part of borrowers.

That is not to say that society does not have a legitimate democratic preference for restricting what interest rates may be charged. But such preferences are better expressed by majority voting among citizens than majority voting among judges.[68] In other words, as Leff argues, the issue is not whether freedom of contract is inconsistent with the statutory interdiction of certain practices because plainly the legislature can and does prevent certain forms of contractual behaviour.

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[63] See generally, *Brusewitz v Brown* (1923) 42 NZLR 1106, 1109 (SC) per Salmond J.
[64] See *AA Poultry Farms Inc v Rose Acre Farms Inc* 881 F 2d 1396, 1401-1402 (7th Cir, 1989).
[65] *Ball Memorial Hospital Inc v Mutual Hospital Insurance Inc* 784 F 2d 1325, 1338 (7th Cir, 1986).
[66] (1985) 64 BCLR 254.
[67] Ibid 261-262.
[68] See generally Waldron, *The Dignity of Legislation* (1999).

Rather it is to say that it is for parliament and not the courts to make this decision. Leff's words are apposite: "[A] court ought ... not to be allowed to subsume its social decisions under a high-level abstraction like 'unconscionability'.... More particularly with respect to the *Williams* case concept that the poor should be discouraged from frill-buying, no legislature in America could be persuaded openly to pass such a statute, nor should any be permitted to do so sneakily."[69]

Secondly, what is the metric by which value could be assessed? An account of substantive justice that regards significant deviation from objective market value can deal with this objection in a straightforward fashion. However, any approach which treats gross imbalance as sufficient to set aside transactions faces difficulties in answering this objection. In a market economy, allocative efficiency is achieved where goods and services go to those market actors who are prepared to pay most for them. Value-based theories assume that bargains can be measured as if on a scale, whereas in reality it is unclear how the courts could feasibly assess the "business sense" of a transaction. This is particularly so where individuals pursue "idiosyncratic goods and risky investments"[70] which are not readily commensurable with an orthodox value metric.

2 Community Values

The most plausible and legitimate source from which any conception of substantive fairness might be derived is the community itself and such values as may be immanent within the community. Such an approach would, however, require its proponents to answer a number of fundamental questions. Justice Heydon, writing extra-judicially, quite properly asks:[71]

> How are contemporary "community values" to be discovered? How are "community values" in former times to be discovered? Do applicable "community values" exist when the community is pluralist and divided on many questions? How can searchers for community values distinguish between their personal values and the values which are distinct from their own?

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[69] Leff, supra note 11.

[70] Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract" (1995) 24 J Legal Stud 283, 286.

[71] Heydon, "Judicial Activism and the Death of the Rule of Law" (2004) 10 Otago L Rev 493, 513.

As his Honour intimates, the identification of community values in the process of judge-made law is a fraught exercise. There is a tendency to proceed on the basis of generalized assertions and reach contestable conclusions. By way of example, and as a counter-point to Justice Heydon's approach, Lord Cooke of Thorndon has written extra-judicially:[72]

> Indeed one is beginning to suspect that the criterion of fairness can produce more certainty than the a priori arguments of technically learned lawyers. In a democratic and egalitarian society, and New Zealand sets out to be and largely is (though regrettably less than affluent), *it may be that once the facts of any given case have been fully elicited most people would agree on the fair result.* If the law provides that answer, it satisfies proper expectations. *To the extent that the law produces a result that is not fair in a particular case, the law has failed. Bad law makes hard cases.* For fairness to work as an effective criterion it is necessary that the society have a more-or-less common set of values and that this value be high among them. While New Zealand is in many respects a vocal and divided society ... I think that the ideal of fairness and a sense of what it requires in particular cases is quite strongly evident. (Emphasis added.)

With respect to his Lordship, these observations are somewhat surprising in three respects. First, it is not clear that "fairness" expressed at such a broad level of generality is a workable criterion at all. Although the ideal of fairness is not to be doubted, it begs the question "what is fair?" His Lordship quite accurately identifies the necessary proviso to his argument: society must share a "more-or-less common set of values". Doubtless, in general, the law should be fair, just, and reasonable but as the level of abstraction reduces, the scope for reasonable disagreement increases sharply. An appeal to fairness at the highest level of abstraction is not especially useful for the law's purposes.

The second relevant difficulty with his Lordship's argument is that it is simply open to doubt on an empirical level: is it likely that a representative sample of the citizenry would reach a consensus on a given case as his Lordship suggests? Leaving aside plainly hopeless cases, it is not clear that any such consensus would result. Although empirical claims of this nature are not amenable to scientific proof, it seems, at least, equally plausible to suppose that a significant proportion of the

[72] Cooke, "Fairness" (1989) 19 VUWLR 421, 422-423.

population might be *less* likely to support equitable intervention than the courts in some of the leading cases.[73]

Finally, does the law "fail" when an unfair result is reached in a particular case? With respect, that is a doubtful suggestion. As Bagnall J opined in *Cowcher v Cowcher* in support of his proposition that "rights of property are not to be determined according to what is reasonable and fair or just in all the circumstances":[74]

> In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent, out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.

By way of a further counter-point to Lord Cooke's argument, it is convenient to set out the view of Gleeson CJ:[75]

> It is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case.

To similar effect, Kirby P opined in *Biotechnology Australia Pty Ltd v Pace*:[76]

> But the law of contract which underpins the economy, does not, even today, operate uniformly upon a principle of

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[73] For instance, it seems plausible (as a concededly untested assertion) that the case of the infatuated solicitor in *Louth v Diprose* (1992) 175 CLR 621 would divide the sympathies of a representative sample in Lord Cooke's thought experiment. See Sarmas, "Story-telling and the Law: A Case Study of *Louth v Diprose*" (1994) 19 MULR 701 for a feminist perspective on the case which casts Ms Louth as the victim and the solicitor, Mr Diprose, as the exploiter.

[74] *Cowcher v Cowcher* [1972] 1 WLR 425, 430 (Family Division).

[75] Gleeson, "Individualised Justice – The Holy Grail" (1995) 69 ALJ 421, 432.

[76] (1988) 15 NSWLR 130, 132 (SC).

> fairness. It is the essence of entrepreneurship that parties will sometimes act with selfishness. That motivation may or may not produce fairness to the other party. The law may legitimately insist upon honesty of dealings. However, I doubt that, statute or special cases apart, it does or should enforce a regime of fairness upon the multitude of economic transactions governed by the law of contract.

The approaches of Gleeson CJ, Kirby P and Bagnall J are preferable. It is unavoidable that settled principles will create hardship for many contracting parties by holding them to disadvantageous bargains. As Gleeson CJ has observed, "we do not need a law of contract to compel people to honour favourable bargains".[77] An open-ended formula to pursue fairness unrestrained by principle and precedent would be contrary to the foundations of the rule of law as an institution. It would have especially severe practical consequences for the law of contract.

The Democratic Bargain and the Unsuitability of the Common Law for End-State Restructuring of Society

The previous section defends the private law's focus on corrective justice, as opposed to distributive justice, on the grounds that there is no conception of distributive justice with sufficient mandate to be applied by the judiciary. The second reason for believing that the judge-made law ought not to address bargaining outcomes is that it is simply an unsuitable vehicle for doing so.

The practical aspect of this has been summed up well by Lord Diplock's observation that "the Courts could never have created the Welfare State".[78] His Lordship's point was not only that the courts ought not to have done so but that it was a matter for which they are "unfitted by the very nature of the judicial process".[79] The courts' powers are "essentially negative" and their direct power is limited to the cases that come before them, while creating indirect consequences that may not be within the contemplation of the court in laying down a particular rule of law.[80] That recognition of the limitations of the judicial function is especially important in the context of distributive justice. As Professor Fried argues, "redistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than

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[77] Gleeson, supra note 75, 428.
[78] Diplock, "The Courts as Legislators" in Harvey (ed), *The Lawyer and Justice* (1978) 263, 279.
[79] Ibid.
[80] Ibid.

themselves".[81] Accordingly, any effective and coherent approach to redistribution must take place through the organs of the executive and legislature.

Judge Easterbrook, writing extra-judicially, characterizes judicial limitations somewhat more strongly:[82]

> You cannot transfer wealth unless you control price, quantity and quality; if you control only quality, the price will rise and the quantity will fall. A judicial decree saying, "all housing must be suitable for the middle class" produces housing that only the middle class can afford. A decision annulling a contract or warranty, on the ground that it is a printed term or some similar ground, does not affect the price; it simply reduces the number of options available and may eliminate a beneficial one. Knowing the inability to restructure society through the judicial process should make us appropriately modest.

One might not accept the full implications of Judge Easterbrook's argument.[83] Nonetheless, his Honour's remarks usefully illustrate the ways in which judicial attempts to transfer wealth may prove not only ineffective but also counter-productive and economically inefficient.

Lord Diplock's observation might seem too plainly correct to occasion any notice. However, as set out in the final section of this article, the failure to observe that fundamental point has led some courts in the United States into error in their attempts to provide judicial remedies against "substantive unconscionability".

It remains to consider the theoretical objection based on the "democratic bargain", which has to some extent been foreshadowed in the previous discussion. In essence, the argument consists of the claim that the rule of law precludes a partisan political role for judges. Accordingly, the use of judge-made law to implement a substantive conception of conscience, in the sense of rebalancing outcomes to achieve "fairness", would be inconsistent with the rule of law. The elected representatives of the people have the democratic mandate to restructure society and redistribute property on the basis of distributive

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[81] Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981) 106.
[82] Easterbrook, supra note 56, 27.
[83] After all, courts do imply terms by law into contracts. The probable effect of such terms on price is not in itself a decisive objection.

justice. That point was well-expressed by Lord Scarman in *National Westminster Bank plc v Morgan*:[84]

> [E]ven in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task (and it is essentially a legislative task) of enacting such restrictions on freedom of contract as are in its judgement necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.

This article does not attempt to develop a foundational defence of those premises. Instead, it makes the fairly modest claims that those premises are fundamental to our legal system and that the recognition by the judiciary of a distributive morality in the private law would be contrary to those premises.[85]

IV REFLECTIONS ON THE ROLE OF CONSCIENCE IN THE UNCONSCIONABLE DEALING DOCTRINE

It is useful to test the previous discussion in a particular doctrinal context.

Broadly, the doctrine of unconscionability requires that a party seeking to set aside the contract must establish that it was under a known special disability in dealing with the other party such that it is unconscionable for the stronger party to enforce the bargain or retain the benefit of the bargain.[86] The doctrine is based on a principle against exploitation or, as Dal Pont puts it, "it is in exploiting the weaker party's

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[84] Supra note 18, 708.

[85] In other words, the article, for practical reasons related to the scope of the inquiry, is content to assume the legitimacy of the present state of legal arrangements and premises which underpin, for example, the institution of contract. This article's claims about the role of conscience in the contract law of New Zealand appeal to other values immanent in that institution. The article reasons "from the inside out". See Dworkin, "In Praise of Theory" (1997) 29 Ariz St LJ 353. See generally Rawls, "Two Concepts of Rules" (1955) 64 Phil Rev 3.

[86] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

known disadvantage that the stronger party behaves unconscionably".[87] From this proposition, two important and closely-related questions arise. First, must the unconscionability stem from a procedural defect in the transaction, such as a failure to understand, or can a gross inadequacy in exchange suffice? Secondly, what types of disability will meet the threshold of a "special disability"? Plainly, disabilities which might be described as "constitutional disabilities", such as illiteracy, senility, or drunkenness have sufficed. Disabilities of that kind are cognitive weaknesses of either a temporary or permanent nature. The problem is whether "situational" disadvantages, such as severe economic inequality, fall within the true scope of the jurisdiction.

The Procedure-Substance Distinction

The orthodox approach to the doctrine of unconscionability dealing emphasizes the law's concern with procedural unconscionability rather than substantive unconscionability. As Bigwood expresses the point, the law is motivated to intervene by "unfairness in the bargaining *processes*" rather than "unfairness in the bargaining *outcomes*".[88] That orthodoxy is, however, contested by some commentators who assert the sufficiency of substantive unfairness. For instance, Mindy Chen-Wishart challenges "the conventional wisdom that procedural unfairness, whether in terms of impaired consent or of unconscientious conduct, is the only legitimate juridical basis of relief in consensual dealings".[89] Chen-Wishart expresses the essence of her position in the following terms:[90]

> [J]udicial concern with substantive unfairness features much more prominently than the Courts have hitherto articulated and that, in fact, unconscionability is best understood as primarily, although not exclusively, responding to this concern. ...
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> The judicial reticence in acknowledging the full extent of substantive concerns, whether conscious or unconscious, is significant for practitioners. They need to recognise not only the "stuff" of which a successful case of unconscionability is made, but also to appreciate how this is to be presented in the

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[87] Dal Pont, "The Varying Shades of 'Unconscionable' Conduct – Same Term, Different Meaning" (2000) 19 Aust Bar Rev 135, 138.
[88] Bigwood, *Exploitative Contracts* (2003) 267 (original emphasis).
[89] Chen-Wishart, "The *O'Brien* Principle and Substantive Unfairness" (1997) 56 CLJ 60.
[90] Chen-Wishart, supra note 59, 104, 119.

> language of procedural ills in order to maximise its acceptability. Covert tools may not necessarily be undesirable if they perform worthy functions reliably, and if the danger of spotlighting them is to provoke a reactionary backlash.

With respect, and without mordancy, that is a remarkable and unsustainable account not only of the doctrine of unconscionable dealing but, more importantly, the nature of judicial decision-making. The preliminary misconception in that thesis is to treat the law as a "confidence trick", to use Birks' phrase, and to downplay the fact that judges are "restrained in their creativity by the system of reasoning which they serve, and they are qualified for by the work which they do, not as chosen representatives, but by hard-won mastery of that specialised rationality".[91] Her inversion in the final sentence of the passage quoted above of Llewellyn's statement that, "covert tools are never reliable tools" is disconcerting in its treatment of legal principles.[92]

The most important difficulty, however, is that the case law does not support the gloss that Chen-Wishart places upon it. The leading cases affirm the orthodox rule that inadequacy of consideration is an insufficient ground to resist performance unless procedural unconscionability is present. In all events, where procedural unconscionability is present, it is beside the point that there has been no inadequacy of consideration. Toohey J expressed that basic principle in *Louth v Diprose*, stating that the courts "are not armed with a general power to set aside bargains simply because, in the eyes of the judges, they appear to be unfair, harsh or unconscionable".[93] Kirby J acknowledged in *ACCC v CG Berbatis Pty Ltd* that, "the quality of the bargain (or the adequacy of the consideration) has never been either a necessary or a sufficient element for establishing unconscionable dealing".[94]

In essence, Chen-Wishart's thesis amounts to a claim that substantive fairness can be discerned as the primary[95] rationale for the law's response if one reads between the lines of the case law that holds to the contrary or by relying on fragments of dicta. For instance, the Privy Council decision in *Boustany v Pigott* states that "objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power" and further

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[91] Birks, supra note 28, 98.
[92] Llewellyn, "Book Review: The Standardisation of Commercial Contracts in English and Continental Law" (1939) 52 Harv L Rev 700, 703.
[93] Supra note 73, 654 (dissenting on other grounds).
[94] (2003) 214 CLR 51, 90.
[95] Chen-Wishart, supra note 59, 104.

explains that unconscionability does not relate "to the terms of the bargain but to the behaviour of the stronger party".[96] Chen-Wishart notes this authority but then observes that: "[T]hat such judicial articulations do not accurately reflect judicial actions was made clear to me in my study of cases [the reference is to *Unconscionable Bargains* (1989)] on unconscionable bargains".[97]

There are rather more natural explanations for the coexistence of inadequate consideration in cases of procedural unconscionability. First, people rarely complain about advantageous contracts. Secondly, as the cases themselves observe, gross undervalue can constitute evidence tending to support other legally determinative elements of the doctrine. Inequality of exchange may provide evidence in a case involving procedural impropriety. As Fullagar J observed in *Blomley v Ryan*:[98]

> But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specifically important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.

Bigwood summarizes that position in the following terms:[99]

> Although content-independency or proceduralism does not perforce exclude probative status being assigned to end-states in the normative inquiry, it does deny that end-states, such as substantive unfairness, can themselves be regulative in the inquiry, having direct determinative force.

For those reasons, this article shares the orthodox view that the doctrine of unconscionable dealing looks to procedural unconscionability rather than substantive unconscionability. But it is interesting to speculate on the state of the law under the converse approach. One way such an inquiry could proceed is by considering the United States authorities decided under the Uniform Commercial Code. There are two claims to be made here. First, the attempts under the Code to give effect to a substantive conception of unconscionability have led to arbitrary and unprincipled decisions. Secondly, the arbitrariness of the United States

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[96] (1995) 69 P & CR 298, 303 (PC). See also *O'Connor v Hart* [1985] 1 NZLR 159, 171 (PC).
[97] Chen-Wishart, supra note 89, 64.
[98] *Blomley v Ryan* (1956) 99 CLR 362, 405.
[99] Bigwood, supra note 88, 273.

case law is not merely contingent on circumstances peculiar to those jurisdictions, although such circumstances do play a significant role, but is inherent in the concept of "substantive unconscionability". In other words, the most serious difficulty with § 2-302 lies in its application to the fairness of the terms of the resulting bargain. If those twin claims are sustainable, then the experience of the United States under the Code supplies a significant reason to doubt the arguments of those academic commentators who suggest that there is a principled and coherent way to give effect to a substantive conception of unconscionability.

UCC § 2-302 relevantly provides that "if the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable", it may refuse to enforce the contract, sever the offending clause and enforce the remainder of the contract, or limit the application of the clause.

In the forty-nine states where the section has been incorporated into statute law the courts have treated § 2-302 as having both a procedural and substantive dimension. That interpretation follows from the Official Comments to the Code, which state that the "basic test" is whether the clauses involved are so one-sided as to be unconscionable.[100] Consequently, there is now a substantial body of case law to the effect that "gross excessiveness of price alone can make an agreement unconscionable".[101] It is to be noted, however, that there are also divergent lines of authority which hold that both procedural and substantive unconscionability must be present to render a contract unenforceable.[102]

As indicated above, there are compelling reasons to believe that § 2-302 has given rise to arbitrary and unprincipled decisions. At the least, the conceptual basis of decisions given on the basis of substantive unconscionability has not been satisfactorily developed. Professor Robert Braucher, one of the participants in the development of the provision, concluded in 1970 that "we are probably not much more ready now than we were twenty years ago to arrive at a comprehensive reasoned elaboration of what is unconscionable".[103] In itself that is not a fatal objection. Any number of legal concepts have not received a comprehensive reasoned elaboration. Certainly, Braucher continues to defend the provision and aligns himself with Ellinghaus in that respect.[104]

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[100] UCC § 2-302 cmt 1 (1996).
[101] *Ahern v Knecht* 563 NE 2d 787, 792 (Ill App 2 Dist 1990).
[102] *Patterson v Walker-Thomas Furniture Co* 277 A 2d 111 (DC Ct Apps, 1971).
[103] Braucher, "The Unconscionable Conduct or Term" (1970) 31 U Pitt L Rev 337, 347.
[104] See Ellinghaus, supra note 60.

The Braucher remark is, however, indicative of the equanimity with which even supporters view the provision. Ellinghaus, for example has observed with reference to Llewellyn that, "even its presumed chief draftsman seems in the end to have had only half a fondness for it".[105]

A brief survey of the literature suggests that the section's critics are legion. The chief objections are that the section gives rise to "unreasoned" or "arbitrary decisions based on personal value judgments".[106] The decisions proceed on "a case-by-case basis" and have "little precedential value".[107] Professors James White and Robert Summers argue that "experimentation with even a single case shows this test to be nearly useless" and go on to describe the Official Comments to the Code as "simply a string of subjective synonyms covered with a heavy value gravy".[108] Professor Leff scathingly remarks that the section demonstrates that "it is easy to say nothing with words".[109] That brief sample of criticism illustrates the controversy of the section, and provides a starting point for the argument that many of the decisions under the section are unsustainable as a matter of principle.

The central difficulty with the leading cases on substantive unconscionability is the absence of an adequate account of the meaning of unconscionability. The term is fastened to the contract or clause as a conclusion based on the facts and the rationale for doing so is usually obscure in any particular case and inconsistent across the range of cases. In *American Home Improvement Inc v MacIver*, the Court based its finding of substantive unconscionability on the seller's excessive mark-up.[110] The wholesale value of the goods in that case was $959 and the sales price was $2,568. From those facts, it is far from evident that the mark-up was grossly excessive and the Court itself was unclear as to the basis for that conclusion. Professor Speidel suggests that in order to constitute an excessive price, the courts will require a sufficient disparity (possibly two to one) between the price charged by the seller and the average of all retail prices charged for like goods in the community in which the seller resides.[111] Attempts to rationalize the outcomes of decisions along mathematical lines reflect the arbitrariness of the

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[105] Ibid.
[106] Hillman, "Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302" (1981) 67 Cornell L Rev 1, 15.
[107] Brown, "The Uncertainty of U.C.C. Section 2-302: Why Unconscionability has become a Relic" (2000) 105 Com LJ 287, 295 and 298.
[108] White and Summers, *Uniform Commercial Code* (4 ed, 1995) 213.
[109] Leff, supra note 11, 558.
[110] 201 A 2d 886 (NH 1964).
[111] Speidel, "Unconscionability, Assent and Consumer Protection" (1969) 31 U Pitt L Rev 359, 372.

decisions themselves. As Horowitz concludes, that logic suggests that courts ought to act as "roving commissions to restructure contractual relationships".[112]

The foregoing discussion has been intended to demonstrate the first claim of this section of the article: that the operation of § 2-302 is unprincipled. But, more than that, the US decisions on substantive unconscionability lack coherence because the concept of substantive unconscionability is not suitable to enforcement through the courts in the absence of some principled elaboration of what is meant.[113] In other words, the criticism of decisions such as *MacIver* is not intended to demonstrate that the Court misapplied § 2-302 but rather that the Court was "encouraged by 2-302 to behave *in just that way*".[114] The real difficulty does not lie with individual courts or judges who, after all, must apply the legislation before them. The difficulty lies with the notion of substantive unconscionability itself.

V CONCLUSION

This article explores the contexts in which contract law and Equity treats "conscience" as a lodestar by which rights and obligations are determined. Its conclusions are primarily cautionary: the law should be careful in subsuming legal rules beneath the slippery rubric of conscience or unconscionability. There is much to commend a conservative approach to respecting the institutional and doctrinal limitations of conscience lest, to adopt the conventional warning, it become an altogether unruly horse.

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[112] Horowitz, "Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts" (1986) 33 UCLA L Rev 940, 948.

[113] Many of its supporters come close to acknowledging as much by, for example, suggesting that it "defies lawyer-like definition" Calamari and Perillo, *The Law of Contracts* § 9-40 (3 ed, 1987) 406. That is a surprising statement, given that courts, backed by the power of the state, must apply the concept.

[114] Leff, supra note 11, 550 (original emphasis).