

NEITHER A RULE NOR A STANDARD: EXERCISING MORAL JUDGMENT IN CONTRACT LAW

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Thesis

Commutative justice teaches that a contract is unconscionable when the values exchanged are not substantially equal. In competitive markets, an exchange is substantially equal when a buyer pays the market price.

Drawing on the comments to the Uniform Commercial Code, contemporary American courts divide the field of unconscionability into two components: procedural and substantive unconscionability. This division is unhelpful when addressing contracts of adhesion. A contract is adhesive when its terms cannot be negotiated. All contracts of adhesion should be treated as procedurally unconscionable.

Contemporary American courts have not provided a standard by which to evaluate substantive unconscionability. The classical notion of equality in exchange—commutative justice—adopted into the Western Christian tradition and historically incorporated into the Western legal tradition provides such a standard. The virtue of commutative justice presupposes a particular account of human nature and the reality of human ends. The contemporary American legal tradition—whether autonomy- or efficiency-based—has little space for either human nature or human ends. Scholars who meaningfully identify with a pre-modern religious tradition should seek to revitalize a “thick” human anthropology and a substantive human teleology in legal discourse.

Judging the substantive unconscionability of contracts of adhesion is difficult where manufacturers and sellers create and sell products that are differentiated in multiple respects. Determining the competitive market price is rendered even more complex where differentiation is found in non-salient legal terms. Nonetheless, with some adjustments, combining behavioral economics and intensive fact-finding would permit courts to render the moral judgment that a particular contract of adhesion is unconscionable.

Introduction

The contract law doctrine of unconscionability was reinvigorated with the adoption of the Uniform Commercial Code.¹ The UCC raised unconscionability from the backwaters of contract defenses to a doctrine that has regained a significant place in the common law as well.² Following the seminal opinion of J. Skelly-Wright in *Williams v. Walker-Thomas Furniture*³, most courts have analyzed unconscionability in procedural and substantive terms. Courts considering the defense under the common law of contract also have come to adopt this two-fold analytic framework. Precisely what amounts to either procedural or substantive unconscionability remains, however, opaque.

Arthur Leff has told the story of how the UCC version of unconscionability came to be.⁴ Suffice it to say that from 1941 until its final enactment by the States, the meaning of unconscionability swung from unfairness in the bargaining process to inclusion of terms beyond the pale to deliberate ambiguity. Early drafts had identified unconscionability with failure to read a term or having failed to bargain for it. By 1949 the pendulum had swung to lopsided terms notwithstanding subjective

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¹ UCC § 2-302.

² Restatement (Second) Contracts 208.

³ Cite

⁴ Arthur Allen Leff, Unconscionability and the Code—The Emperor’s New Clause.

assent. And then in 1952 the drafters fudged in the proposed comments that ultimately defining unconscionability in terms of itself.

Unconscionability's conceptual distance from 1941 to 1952 is worth a short discussion. The materials accompanying the 1941 draft would have insulated dickered contracts from significant scrutiny for substantive unconscionability. Form contracts, however, would not have received a pass. Instead, the validity of such contracts would be measured in terms of overall balance. As one of the comments to the 1941 draft put it:

[S]ince the rules of the Act are drawn with a careful balance of the rights and needs of buyer and seller, a form which cumulates too many departures from those rules in material particulars, and in favor of one side only, begins to take on the aspect of the unconscionable.

In other words, the initial revisions to the Uniform Sales Act provided a comprehensive and balanced set of rights and duties of buyers and sellers from which they were free to depart but only if the process of contracting revealed meaningful assent. In the large universe of “form-pad” contracts there would be no presumption of assent and contracts thus formed would be measured against the default terms of new code. Too great a disparity would entail unconscionability of the entire contract. Such an understanding of unconscionability was similar to the notion of commutative justice.

The lay of the land looked quite different by 1952. Gone were the intimations that form contracts should be evaluated apart from negotiated deals. Added, however, was the power of courts to strike individual unconscionable contract terms. In other words, the latest (and current) version section UCC 2-302 invited courts to exercise a power they had always disclaimed—to rewrite the parties' contract. The issue of institutional competence, difficult enough when the question was overall contract balance, is magnified when a court is challenged with pulling one block from the Janga tower of a contract. Gone too was the tie of unconscionability to overall balance or fairness in exchange. Beginning with the 1952 version of the UCC courts were authorized to conclude that a term was unconscionable when it was, well, unconscionable.⁵

Prior to the UCC, unconscionability had a long history in English and American law. Most of this history came from courts of equity or, after the merger of law and equity in America, in cases seeking an equitable remedy. Most, but not all. Successful unconscionability cases generally presented two factors: a sharp-dealing party making a deal with an unsophisticated one (the ancestor of procedural unconscionability) plus a grossly imbalanced exchange (comparable to today's substantive unconscionability).

In many contemporary circumstances it would make little sense to require procedural unconscionability. There is little about which to negotiate in the contemporary world of consumer transactions given the ubiquity of electronic click-wrap contracts and widespread use of standardized written forms of agreement. Procedural unconscionability may retain a concern in cases of negotiated contracts but in the standardized world unconscionability, if it is to retain any role, unconscionability should be deployed for substantive reasons. To put it another way, we can presume procedural unconscionability in contracts of adhesion.

Contract theorists and judges of a utilitarian bent have objected to application of substantive unconscionability for two principal and related reasons. First and fundamentally, without some particularized reason to believe there was something wrong with the process of contract formation,

⁵ See Leff, *supra* note 4 at 527 (“How much of a gain . . . is likely when there is substituted for the court's obligation to give false reasons for its behavior, a specific power to give no reason at all?”).

the parties should be presumed to be the best judges of their interests. Post-contract objections to a transaction as unbalanced are simply expressions of regret, which is inadequate to undo a transaction.

A second utilitarian objection to substantive unconscionability goes to the capacity of the courts. How is a judge, some months or even years after the parties contracted, supposed to determine if a deal was substantively unconscionable? By what standard is the court to measure a contract's balance and who's to say that a judge is up to doing the balancing? Better to leave the whole thing to the market to sort out. A few broken eggs to make the omelet of contemporary commodified life is simply the price we have to pay.

But the utilitarian objection invites a political question: is the contemporary commodified life the one to which the law should lend its coercive support? Given the liberal political project, the one in which civil government ostensibly prescinds from addressing questions of the Good and of human nature, the unavoidable answer might seem to be yes. Yet even on liberalism's terms this need not be so.⁶ After all, in England and certainly in America politically liberal regimes coexisted for many years with versions of contract law that took into account the Good of human flourishing.

With the decline of a civic republican version of liberalism over the course of the nineteenth century, with the growth of the "procedural republic,"⁷ and with the replacement of traditional forms of legal education with university-based "empirical" forms of study, comprehension of the possibility of an unbalanced transaction has become difficult. And the standard by which the balance should be calibrated—commutative justice—invokes notions from a dimly-remembered past in which there were moral Goods (and ghosts and goblins). Can a world of moral realism be reconstituted? If so, what would unconscionability look like in such a world?

I. Before . . .

From the world of ideas and the observation of social practices, Alasdair MacIntyre⁸ and Charles Taylor⁹ arrive at a similar conclusion: we live in a secular age. While secularity is a Christian doctrine (distinguishing between this age and the age to come), only since Liberalism has come to dominate the Western political order has the non-existence of an age to come taken root and with it disbelief that there is a human nature that imposes some normative limits on society and its legal order. In other words, both metaphysics and philosophical anthropology have fallen on hard times.

Until well into the nineteenth century, courts and commentators took for granted that there was some normative standard by which to evaluate the fairness of exchange in a contract. By the early decades of the twentieth century, commentators, and later courts, professed an inability to do so and concluded that in fact their forbears either had only imagined a standard or had no justification for applying whatever one they believed they had.

[Discussion of *ius commune*; Gordley and Decock]

[Discussion of selected 17th through 19th century English and American cases.]

⁶ One might, of course, call into question the entire liberal project and seek either a return to a particular version of the pre-liberal past or perhaps something like the personal law systems of India and Israel. *See generally* Jayanth Krishnan & Marc Galanter, *Personal Law and Human Rights in India and Israel* (2000). This paper does not advocate a non-liberal approach.

⁷ Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (1996).

⁸ *Whose Justice? Which Rationality?* (1988).

⁹ *A Secular Age* (2007).

[Discussion of 17th through 19th century commentators and treatises on law of contracts; Helmholz]

[Discussion of 17th through 19th century English and American moral and theological handbooks]

This review of cases and texts suggests that fairness in exchange—commutative justice—framed the moral horizon of lawyers and judges until the end of the nineteenth century. This moral horizon did not trump the law but could be deployed to fill the gaps or limit its application.

II. . . . and After

[Discussion of 20th century American utilitarianism/ law and economics 1.0]

Today the gap-filling and limiting function of commutative justice find little traction in the judicial craft. Fairness may be invoked but often it smacks of mere emotivism.¹⁰ Without a tether to a substantive account of justice, fairness is little more than a judge’s identification of a thing not nice.¹¹

III. And Back Again

Unconscionability is not a free-standing power for courts to rewrite contracts. Any remedy for breach of contract represents a judgment. And not merely a judgment in the technical legal sense but, as Oliver O’Donovan puts it, as “an act of moral discrimination that pronounces upon a preceding act or existing state of affairs to establish a new public context.”¹² O’Donovan observes that the purpose (and not merely the effect) of a judgment, such as one that a particular contract is unconscionable, “is to resolve moral ambiguity and to make the right and wrong in a given historical situation clear to our eyes.”¹³ Of course, such judgment also has an effect not only as between the parties but also for a civil polity as a whole: “the securing of a public moral context, the good order within which we may act and interact as members of a community.”¹⁴ A finding of unconscionability is unavoidably a moral judgment.

O’Donovan’s assertion that legal judgments are moral judgments and that a society should conform to an objective good order are jarring to the contemporary legal ear. After all, aren’t judgments simply the means of securing or vindicating a subjective, individual right? Whatever morality there is in law can be limited to the identification of the rights that should be recognized. One need not subscribe to O’Donovan’s belief that subjective rights are the cause of the disintegration of social life in the contemporary West¹⁵ to recognize that each legal judgment carries a moral one with it. And in contract law, the moral aspect of judgment is nowhere clearer than when unconscionability is at issue. If the moral judgment of unconscionability is to be anything more than the length of the chancellor’s foot, it must be grounded in a moral order including commutative justice. And in this context commutative justice is equality in exchange.

Equality in exchange is not an abstract, brooding concept. In most circumstances it is simply the competitive market price.¹⁶ Focusing on the price of equivalent goods in a regularly functioning market might seem to render a comparison to a particular contract relatively easy. It might also

¹⁰ Alasdair MacIntyre, *After Virtue* (1981)

¹¹ Craig Stern, *Things Not Nice: An Essay on Civil Government* (1997).

¹² Oliver O’Donovan, *The Ways of Judgment* 7 (2005).

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *See*

¹⁶ *See* Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price* (2015).

seem to eliminate the need for judges to engage in a clause-by-clause analysis for which they may be ill-suited.

At one time a straightforward price-to-price comparison was adequate to identify an unequal exchange. This is no longer the case because the inequality in a particular exchange may not be found in the price; it can instead be located in non-salient contract terms.¹⁷ Buyers of commercially produced items make their decision in terms of only a few criteria with price playing the primary role. Sellers thus have an incentive to capture as much gain as possible by adjusting terms other than price.¹⁸ There is—or at least there may be—market failure notwithstanding the market’s provision of a plethora of ostensibly competitive goods. Sellers as a class have an incentive to capture more of the gains of a particular sale by employing non-salient gain-shifting terms.¹⁹ In other words, an individual seller who does not adopt value-shifting non-salient terms will be at a competitive disadvantage. Thus a comparison of the price in transaction *A* for good α to the market price for α is insufficient to measure the (in)equality of that transaction.

Judges are thus forced to consider the sort of detailed factual evaluation for which they are not typically well-suited. In other words, even with the benchmark of equality of exchange, the legal complexity of the seller’s product requires detailed fact-finding on the question of its value and the competitive market price. Both the factual and legal characteristics of α make its valuation difficult. This challenge is not insuperable. With the adoption of UCC § 2-302 the issue of unconscionability was made a question of fact. Courts of equity historically had taken upon themselves to determine unconscionability as a matter of law, which worked in an age of undifferentiated products. A court in the seventeenth century would have known whether a workhorse was worth x or $2x$. To the extent contemporary judges measure the value of intrinsically and legally complex goods, less confidence in their conclusions is warranted. Such complexity, however, simply assigns proof of the factual predicates of substantive unconscionability to the party seeking relief.

¹⁷ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability* (2003).

¹⁸ *Id.* at 1206.

¹⁹ An efficient market is not up to the task policing all such terms: “[Korobkin quote].”

Tales of Commutative Injustice

The early nineteenth century Methodist *Discipline* “forbade haggling, usury, and fraud”²⁰

9. More Bargains²¹

By fourteen I was a connoisseur of a good bargain.
Dad and I went to a farm sale south of Orange City
and we saw Old Graanstra drive the best bargain I have ever seen.
Old Graanstra was bidding against only one opponent
for his choice of one horse out of a team.
It was evident that one horse was much younger and friskier.
We all assumed that Old Graanstra was bidding on the better horse.

It was Old Graanstra’s turn to bid
and he announced he would not raise his bid
unless the auctioneer took a break
so Old Graanstra could inspect the horses again.
Graanstra astounded everyone by inspecting the inferior horse:
opened his mouth to check his teeth
and swatted him on the rump to check his reflexes.
Then, yes, he would raise his bid, reluctantly.

The opponent did not raise the bid.
Why shouldn’t he get the better horse as second choice
if Old Graanstra chose the inferior horse as first choice.
Except, when the auctioneer asked Old Graanstra for his choice,
he decided after all on the superior horse,
not the one he had taken time to inspect.

The Orange City crowd murmured and laughed approval of Old Graanstra
and there was a patter of applause
though the opponent, of course, did not join in.
Dad shook Old Graanstra’s hand.
It was like winning at chess.

A week later we were at a farm sale west of Sioux Center.
We were in the market for a new horse to take Bob’s place
against Prince after Bob died during threshing time.
Dad assumed the same position Old Graanstra was in before.
He called time out to inspect the inferior horse,
the opponent ceased,
Dad was given his choice,
and he chose the superior horse.

But the Sioux Center crowd’s silence was so ominous,
and the murmur that followed was so disapproving,
that Dad reversed his choice.
We ended up with the inferior horse.

A farm sale in Sioux Center is not a chess game.

²⁰ Quoted in Charles Sellers, *The Market Revolution: Jacksonian America 1815-1846* 160 (1991).

²¹ Sietze Buning, *Style and Class* 88-89 (1982).