UNCONSCIONABILITY: CONTESTED VALUES, COMPETING THEORIES AND CHOICE OF RULE IN CONTRACT LAW

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Cet article traite du problème de la légitimité du choix de la règle dans le contexte d'une société pluraliste composée de diverses communautés. Un système juridique doit produire des règles et des doctrines et régler les différends. Le choix de la règle — législative ou judiciaire — doit être justifiable aux yeux de ceux et celles dont l'opinion est rejetée, sinon ce choix sera perçu comme un acte de violence et une utilisation illégitime de pouvoir. La théorie du droit a traditionnellement adopté une approche absolutiste qui fait découler la règle d'une théorie unique qui propose le cadre dans lequel le choix est compréhensible en tant qu'élément d'un récit cohérent. En outre, le droit se fonde surtout sur une théorie de la correspondance, car il prétend décrire avec exactitude le monde tel qu'il est réellement. Ainsi, le choix de la règle est justifiable comme étant la « vérité ». Cependant, il est devenu évident ces dernières années que le projet visant à prouver qu'un cadre théorique est le meilleur a échoué. Les arguments nécessaires à cette preuve n'existent pas, du moins pas encore.

Dans la mesure où les critiques portant sur des règles et des doctrines juridiques particulières découlent de cadres théoriques généraux, l'acceptation de la proposition particulière implique

This article deals with the problem of legitimacy of choice of rule in the context of a pluralist society made up of diverse communities. A legal system must generate rules and doctrines and resolve disputes. The choice of rule — legislative or judicial — must be justifiable to those whose views are rejected or it will be perceived as an act of violence and an illegitimate use of power. Legal theory traditionally adopts an absolutist approach that derives the rule from a single theory which provides the framework within which the choice makes sense as part of a coherent narrative. Moreover, most legal theory is foundationalist in that it purports to accurately describe the world as it really is. Thus, choice of rule is justified as the "truth". However, it has become clear in recent years that the project of proving that one theoretical framework is right has failed. The arguments necessary for such a proof do not (yet) exist.

To the extent that critiques of specific legal rules and doctrines are derived from large-scale theoretical frameworks, the acceptance of the specific proposal entails buying into the large-scale framework. If it is true that the choice of large-scale framework cannot ultimately be justified by neutral reasons, then, to the extent that specific rules and doctrines are derived from such frameworks, they too

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que l'on adhère au cadre théorique général. S'il est vrai que le choix d'un cadre théorique général ne peut pas finalement être justifié par des raisons neutres, alors, dans la mesure où les règles et les doctrines particulières découlent de tels cadres, elles ne peuvent pas, elles non plus, être justifiées, sauf par des raisons qui présument déjà la vérité de ce cadre.

Dans cet article, l'auteur met l'accent sur la doctrine du contrat inique pour illustrer à quel point les propositions concernant le choix de la règle dans le domaine législatif et judiciaire dépendent du cadre théorique général à l'origine de la proposition. La doctrine de l'iniquité fait partie du droit canadien, mais son étendue n'est pas bien définie et son élaboration est controversée. L'auteur se demande comment le système judiciaire peut expliquer la formulation de cette doctrine si chaque choix implique l'acceptation d'un cadre général qui n'est pas justifiable. L'auteur laisse entendre que le problème de la légitimité ne disparaîtra pas, peu importe l'approche adoptée. La seule façon de procéder est de réfléchir à la nature contingente des choix législatifs et judiciaires lorsqu'on évalue des propositions et lorsqu'on prend des décisions.

cannot be justified except by reasons which already assume the truth of that framework.

This article focuses on the doctrine of unconscionability to illustrate the extent to which proposals for both legislative and judicial choice of rule depend on the large-scale framework from which the proposal is derived. The doctrine of unconscionability is part of Canadian contract law but the scope of the doctrine is not yet certain and its development controversial. This article asks how the legal system can explain its formulation of this doctrine if each choice entails the acceptance of a large-scale framework that cannot be justified. This article will suggest that the problem of legitimacy will not disappear regardless of the approach taken. The only way to proceed is to consciously reflect on the contingent nature of legislative and adjudicative choices in the course of evaluating proposals and reaching decisions.

Everyone is aware of the intractable nature of certain socio-legal problems. The debate over abortion, especially in its American version,[1] is one example. The positions are clearly staked out. Those who hold one of the competing points of view believe strongly in their position and there is little common ground for compromise. In the political fora and in the courts where such debates often occur, a victory for one position will seldom have much legitimacy in the eyes of those who reject it. They will perceive the victory as an illegitimate exercise of power[2] rather than an acceptable outcome.

Private law is often believed to be free of the conflict of moral frameworks and deeply-held beliefs. The purpose of this article is to challenge this view. Much of the debate over the appropriate rules and doctrines in contract law reproduces the same dilemmas because legal rules constitute an important dimension of the normative framework within which members of society live their lives. Debate about legal rules and doctrines is always and necessarily a debate about that framework. Private law cannot escape the need to confront issues which require reflection on questions relating to the fundamental ethical frameworks.

In the first part of this article I will present the difficulties this need to address such questions creates for the legal system. Philosophers suggest that there are no arguments which provide a rational and neutral basis for the choice of large-scale theoretical framework[3] which are not already located within such a framework. The dilemma for the law-maker results from the inevitable need to choose between

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[1] *See, e.g.*, L.H. Tribe, ABORTION: THE CLASH OF ABSOLUTES (New York: Norton, 1990) and E. Mensch & A. Freeman, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? (Durham, N.C.: Duke University Press, 1993). *See also* R. Dworkin, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (New York: Knopf, 1993) excerpted in "Feminism and Abortion" *The New York Review of Books* (10 June 1993) 27, and reviewed by T.M. Scanlon, "Partisan for Life" *The New York Review of Books* (15 July 1993) 45.

[2] As Joel Bakan argues, when judges make decisions "they exercise power — they use the power of the court, and therefore the state, to condone or rearrange existing social and legal relations": *see Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought* (1989) 27 OSGOODE HALL L.J. 123 at 124. This use of the term "power" is consistent with a Foucauldian definition of power as the ability to determine the authoritative description of experience. Thus, "scientific" knowledge is not an objective description of a universal truth or of an existing reality but a construct used by experts to constitute their own authority and expertise and to create a realm in which the experts have the power to discipline and control those subject to that expertise. Such power can be professional, as in the case of lawyers or doctors, or bureaucratic, as in the case of government departments or prison administration. Foucault argues that the claim to knowledge is a way of creating and exercising power which oppresses and violates the objects of such knowledge. *See, e.g.*, M. Foucault, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, trans. C. Gordon *et al.* (New York: Pantheon Books, 1980); M. Foucault, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON (Paris: Gallimard, 1975) [hereinafter SURVEILLER ET PUNIR]; and M. Foucault, L'ARCHÉOLOGIE DU SAVOIR (Paris: Gallimard, 1969). *See also* H.L. Dreyfus & P. Rabinow, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, 2d ed. (Chicago: University of Chicago Press, 1983). For a discussion of the relationship between law, power and violence *see* R.F. Devlin, *Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence* (1989) 27 OSGOODE HALL L.J. 219.

[3] In this article I will use the expression "large-scale framework" rather than the word "paradigm" which is perhaps more familiar because of the influential work of Thomas Kuhn. *See*

positions located within such large-scale frameworks if she is to define the legal rules and doctrines and/or apply them in the context of a specific dispute. The legitimacy of any legislative or judicial choice of rule will depend on acceptance of the large-scale theoretical framework. Those who do not share a belief in the framework may perceive the choice of rule or its application as an abuse of power which arbitrarily denies the legitimacy of competing values and frameworks.

In the second part, I will discuss the state of the law governing unconscionability. There will be a short examination of the law of other jurisdictions but the focus of this part will be the unsettled state of Canadian common law. Unconscionability provides a useful device for this discussion for a number of reasons.

First, in any specific case in which the issue of unconscionability is raised, one party is asking the court to recognize and reprove the abuse of economic power. From his or her point of view, the agreement "offends the conscience". The court faced with this argument must choose between two competing frameworks, within which the "ethical value" of the agreement will be determined. A decision to enforce the agreement will be regarded as illegitimate by the party making the unconscionability challenge in a way analogous to the rejection of a legal system by a person whose large-scale normative framework is rejected by the legal system. The choice of legal rule — common law or statutory doctrine of unconscionability

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especially THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, 2d ed. (Chicago: University of Chicago Press, 1970). In my view the use of the latter term promotes the assimilation of the social "sciences" to the natural sciences. Such an assimilation ignores significant distinctions between the two versions of science, one of which is important for my argument. In the natural sciences it is possible to argue that one paradigm supplants another. Thus, for example, it does not make a great deal of sense to work within the paradigm of Newtonian physics when that of Einsteinian physics has replaced it. In the social sciences this is not the case, at least in any simple way. Thus, the "Marxian paradigm" does not replace the "liberal paradigm". The frameworks within which we can think about the problems of social organization are varied. Each asks us to see the social relations of production and consumption in different ways. There is not a single "paradigm" which refutes all others. At least not yet. The other reason for preferring the expression "large-scale framework" is that it leaves room for the considerable debate among those working within the same framework. In contrast, Professor Eisenberg analyzes unconscionability as a competing paradigm to the bargain principle. *See The Bargain Principle and its Limits* (1982) 95 HARV. L. REV. 741 at 751-54. However, as he points out:

> This new paradigm does not replace the bargain principle, which is based on sound sense and continues to govern the normal case. Rather the new paradigm creates a theoretical framework that explains most of the limits that have been placed or should be placed upon that principle, based on the quality of the bargain.

Ibid. at 754. It is precisely because the frameworks co-exist that the borrowing of the term "paradigm" is, in my opinion, inappropriate.

Since the above was written, John Rawls has published POLITICAL LIBERALISM (New York: Columbia University Press, 1993) in which he uses the term "comprehensive doctrine":

> A modern democratic society is characterized not simply by a pluralism of religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.

Ibid. at xvi. The distinction between reasonable and unreasonable comprehensive doctrines is a useful nuance. For an elaboration of his definition of the term *see ibid.* at 11-15. (This book came to the author's attention too late to be given the appropriate consideration.)

or no doctrine — necessitates either acceptance or the denial of the reality of exploitation (whether contextual or systemic) through the abuse of economic power. Either choice risks doing violence to the reality of one of the litigants.

There is, of course, a difference of "level". The microcosmic rejection of an argument does not necessarily and automatically bring the legitimacy of the whole system into question. However, I will argue that one's position on the merits of any particular decision are inevitably derived from one's large-scale normative framework. Thus, particular decisions inevitably involve the explicit or implicit resolution of the issue at the most general level simultaneously with the choice of rule and its application in the circumstances of the particular case.

In addition, the state of the law in the nine Canadian common law jurisdictions is uncertain and controversial. The courts have been moving, however tentatively, towards a clarification of the law. There have been calls for reform. In such a context it is reasonable for the courts and legislators to turn to academic writing for guidance. The academic literature is enormous.[4] However, the analyses turn out to be both very abstract and highly polemical. The concept of unconscionability fits uncomfortably into the typical model of a legal rule and the policy choices involved in the doctrine

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[4] The number of articles dealing with unconscionability is enormous. A sample includes: R. Wisner, *Understanding Unconscionability: An Essay on Kant's Legal Theory* (1993) 51 U. T. FAC. L. REV. 396; D. Vaver, *Unsettling Settlements: Of Unconscionability and Other Things* (1992) 50 ADVOCATE 749; M.H. Ogilvie, *'Reasonable' Commercial Contracts and the Unfair Contract Terms Act 1977* (1991) 19 CAN. BUS. L.J. 357; A. Schwartz, *Unconscionability and Imperfect Information: A Research Agenda* (1991) 19 CAN. BUS. L.J. 437; H. Beale, *Unfair Contracts in Britain and Europe* (1989) 42 CURR. LEGAL PROBS. 197; J.N. Adams & R. Brownsword, *The Unfair Contract Terms Act: A Decade of Discretion* (1988) 104 L.Q. REV. 94; S.N. Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness* (1988) 8 OXFORD J. LEGAL STUD. 17; D. Vaver, *Unconscionability: Panacea, Analgesic or Loose Can(n)on?* (1988) 14 CAN. BUS. L.J. 41 [hereinafter *Loose Can(n)on*]; P.S. Atiyah, *Contract and Fair Exchange* in ESSAYS ON CONTRACT (Oxford: Clarendon Press, 1986) 329; J. Mallor, *Unconscionability in Contracts Between Merchants* (1986) 40 SW. L.J. 1065; D. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power* (1982) 41 MD. L. REV. 563; B.J. Reiter, *The Control of Contract Power* (1981) 1 OXFORD J. LEGAL STUD. 347; Symposium on *Unconscionability in Contract Law* (1979-80) 4 CAN. BUS. L.J. 383; D.B. King, *The Tort of Unconscionability: A New Tort for New Times* (1979) 23 ST. LOUIS U. L.J. 97; L.A. Kornhauser, *Unconscionability in Standard Forms* (1976) 64 CAL. L. REV. 1151; M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords* (1976) 26 U.T.L.J. 359; S.M. Waddams, *Unconscionability in Contracts* (1976) 39 MOD. L. REV. 369; R.A. Epstein, *Unconscionability: A Critical Reappraisal* (1975) 18 J.L. & ECON. 293; A.A. Leff, *Contract as Thing* (1970) 19 AM. U. L. REV. 131; J.E. Murray, Jr., *Unconscionability: Unconscionability* (1970) 31 U. PITT. L. REV. 1; R.B. Braucher, *The Unconscionable Contract or Term* (1970) 31 U. PITT. L. REV. 337; A.A. Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition* (1970) 31 U. PITT. L. REV. 349 [hereinafter *Unconscionability and the Crowd*]; R.E. Speidel, *Unconscionability, Assent and Consumer Protection* (1970) 31 U. PITT. L. REV. 359; M.P. Ellinghaus, *In Defense of Unconscionability* (1969) 78 YALE L.J. 757; J.A. Spanogle, Jr., *Analyzing Unconscionability Problems* (1969) 117 U. PA. L. REV. 931; A.A. Leff, *Unconscionability and the Code — The Emperor's New Clause* (1967) 115 U. PA. L. REV. 485 [hereinafter *Unconscionability and the Code*].

are clearly in the forefront.

Once it is clear that, as the issue is defined in the literature, the choice of legal rule involves a choice of large-scale theoretical framework, we come up against the impossibility, in the current situation, of finding the definitive argument supporting such a choice. In the third part of this article I will examine the debate over the merits of a doctrine of unconscionability as a way of illustrating the link between positions taken and the theoretical frameworks of their proponents.

In the conclusion, I will ask if there is any way of addressing legal issues such as the appropriate definition of unconscionability which would enable the legal system — either the legislative or judicial branch — to reach a conclusion on that particular issue which is not tainted by illegitimacy and perceived by those whose position is rejected as an arbitrary exercise of power. In the absence of a social consensus on the fundamental issues involved — and any argument that such a consensus already exists is itself suspect — this question is particularly difficult. To anticipate, the answer offered in the conclusion is an unsatisfactory "yes and no". If it is true that there are no theory-free positions from which to attack problems, perhaps the only way to continue the discussion of legal issues is an intellectual stance of far greater humility which acknowledges the difficulties of one's own theory as well as pointing out those of competing theories.

I. Legal Theory and Large-Scale Frameworks

A. *Competing Frameworks*

Traditional legal theories assume that there is one right answer to questions of law and justice. In making this assumption, legal theory shares a premise with the philosophy, ethics and human sciences of modernity.[5] Modelling itself on the natural sciences, traditional theory argues that if the right question is asked and if a "scientific" method, which takes the right principles as its starting point, is used, theory will provide the one right answer.[6] If the reasoning is rigorous everyone will

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[5] This is true of all of the large-scale conceptual schemes developed in Enlightenment cultures:

> For whereas it was a tenet of Enlightenment cultures that every point of view, whatever its source, could be brought into rational debate with every other, this tenet has as its counterpart a belief that such rational debate could always, if adequately conducted, have a conclusive outcome.

A. MacIntyre, Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy and Tradition (London: Duckworth, 1990) at 172 [hereinafter Moral Inquiry]. This is true of natural law theories, social contract theories, utilitarianism, Marxism and all their contemporary variants. *See generally*, A. MacIntyre, *ibid.*; R. Rorty, Contingency, Irony, and Solidarity (Cambridge: Cambridge University Press, 1989); R. Rorty, Objectivity, Relativism and Truth (Cambridge: Cambridge University Press, 1991); C. Taylor, Sources of the Self: The Making of Modern Identity (Cambridge, Mass.: Harvard University Press, 1990); and S. Toulmin, Cosmopolis: The Hidden Agenda of Modernity (New York: Free Press, 1990).

[6] Stephen Toulmin describes the intellectual outlook of what he calls modernity in the following terms:

be compelled to agree with the conclusion because the conclusion will be rational, objective and true. And if protagonists refuse to agree either there is something wrong with them — that is they are irrational — or the arguments need to be refined.[7] Regardless of the source of disagreement, the ultimate goal is universal agreement.[8]

A growing number of authors now reject the claim that it is possible through rational argument to reach a single, compelling, objective truth. This is true in

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> The quest for certainty, the dream of the clean slate, and the equation of rationality with formal logic, all played their interdependent parts in the program of 17th-century philosophical theory. Descartes saw the logical necessity of geometry as an exemplar of certainty, and so equated the rationality of science with its readiness to form a logical system. In turn, since systematicity was essential to rationality, his theory had no room for given ideas or practices to *change continuously* into other ideas or practices. Once one questioned the claims of any given social or intellectual system, the only thing left to do was to raze it, and construct another, different system in its place.

Ibid. at 178. One finds expressions of the view that once one finds the right method, one will be able to develop a complete theoretical system that will enable one to refute all the competitors and get the right answers to questions of morality and justice in the philosophers of the Enlightenment whose systems of thought have dominated legal philosophy. For example, E. Kant expresses the view that an ethical system cannot result in conflicting duties in his MÉTAPHYSIQUE DES MOEURS, PREMIÈRE PARTIE, DOCTRINE DU DROIT, 3d ed., trans. A. Philonenko (Paris: J. Vrin, 1986) at 98:

> Mais comme le devoir et l'obligation en général sont des concepts, qui expriment la *nécessité* objective pratique de certaines actions et comme deux règles opposées ne peuvent être en même temps nécessaires, et que si c'est un devoir d'agir suivant une règle, non seulement ce ne peut être un devoir d'agir suivant l'autre règle, mais cela serait même contraire au devoir: il s'ensuit qu'une *collision des devoirs* et des obligations n'est pas pensable.

The hierarchy of duties must always give clear answers.

[7] *See* D.N. McCloskey, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE (Chicago: University of Chicago Press, 1990) at 37, where he states:

> If reading were so free from difficulties as this then naturally the only way our readers could fail to agree with us, after we have reamed out the pipes, would be on account of their dimness or their ill-will....It's sitting right there in black and white. Don't be a dunce.

[8] *See* D.N. McCloskey, *The Rhetoric of Law and Economics* (1988) 86 MICH. L. REV. 752, where he argues that the logicians' argument is that of formal logic for the purposes of which the only acceptable argument must have the following characteristics: the proof is on the basis of premises; conclusions are independent of what reliable witnesses say; society or culture does not matter for the argument; and the characteristics of the author of the argument do not matter. He describes this form of argument: The rhetoric of 'compelling' proof is not gently 'persuasive'.... On the contrary, it is authoritarian, browbeating, shaming, anything but sweet. *Ibid.*

philosophy,[9] linguistics,[10] history,[11] anthropology,[12] sociology,[13] political theory[14] and even the theory of the natural sciences.[15] Feminist theory, which cuts across, and questions, all of these categories, has powerfully critiqued the concepts of objectivity and truth, arguing that such claims to speak universal truths objectively are made from a particular (male) point of view.[16] Scholars dealing with the history of race and racial discrimination have also challenged the ability of disembodied discourse to deal with the experience of targets of historical and systemic discrimination.[17] Legal

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[9] *See, e.g.*, CONTINGENY, IRONY AND SOLIDARITY, *supra* note 5; R. Rorty, PHILOSOPHY AND THE MIRROR OF NATURE (Princeton, N.J.: Princeton University Press, 1979); MORAL INQUIRY, *supra* note 5; A. MacIntyre, WHOSE JUSTICE? WHICH RATIONALITY? (Notre Dame: University of Notre Dame Press, 1988); A. MacIntyre, AFTER VIRTUE: A STUDY IN MORAL THEORY (Notre Dame: University of Notre Dame Press, 1981); Taylor, *supra* note 5.

[10] *See* C. Norris, THE CONTEST OF THE FACULTIES: PHILOSOPHY AND THEORY AFTER DECONSTRUCTION (London: Methuen, 1985).

[11] *See, e.g.*, SURVEILLER ET PUNIR, *supra* note 2.

[12] C. Geertz, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (New York: Basic Books, 1983), M. Douglas, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO (New York: Praeger, 1966).

[13] *See, e.g.*, A. Giddens, SOCIAL THEORY AND MODERN SOCIOLOGY (Stanford, Calf.: Stanford University Press, 1987); A. Giddens, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (Cambridge: Polity Press, 1984).

[14] *See, e.g.*, J. Habermas, LEGITIMATION CRISIS, trans. T. McCarthy (Boston: Beacon Press, 1975); J. Habermas, THE THEORY OF COMMUNICATIVE ACTION, vol. 1 (REASON AND THE RATIONALIZATION OF SOCIETY), trans. T. McCarthy (Boston: Beacon Press, 1984). *See also* S.K. White, THE RECENT WORK OF JÜRGEN HABERMAS: REASON, JUSTICE AND MODERNITY (Cambridge: Cambridge University Press, 1988).

[15] The work of Thomas Kuhn brings into question the image of scientific inquiry purely rational, logical and linear. He argues that scientific progress requires shifts of paradigm which alter the framework within which the inquiry takes place. On this view, scientific explanation is better conceived of as the best available theory rather than the objective truth. Of course, it does *not* follow from this theory that accuracy in scientific explanation is illusory or that there are no standards from which the results of scientific research can be judged. *See* Kuhn, *supra* note 3, and T. Kuhn, THE ESSENTIAL TENSION (Chicago: University of Chicago Press, 1977). *See also* PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 9, for a discussion of the debate concerning the nature of scientific inquiry.

[16] Simone de Beauvoir argued that: "Representation of the world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with absolute truth." THE SECOND SEX, trans. H.M. Parshley (New York: Knopf, 1971) at 143. For analyses of the problem of truth claims *see, e.g.*, A.M. Jagger, FEMINIST POLITICS AND HUMAN NATURE (Totowa, N.J.: Rowman & Allenheld, 1983); C. Smart, FEMINISM AND THE POWER OF LAW (London: Routledge, 1989); B. Hooks, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (Boston: South End Press, 1981); C. MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Cambridge, Mass.: Harvard University Press, 1987).

[17] *See, e.g.*, B. Hooks, TALKING BACK: THINKING FEMINIST, THINKING BLACK (Toronto: Between the Lines, 1988); D. Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RADICAL JUSTICE (New York: Basic Books, 1987); P. Williams, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (Cambridge, Mass.: Harvard University Press, 1991).

theory is now beginning to come to grips with this argument and its implications for law.[18]

The critique of traditional theory argues that competing theories of right and justice involve different and incompatible visions of social relations. Thus, such theories constitute large-scale frameworks within which the proponents of different positions formulate their analyses. Within any particular framework, authors will engage in a conversation about the conclusions to be derived from the premises of the framework. Within their shared framework, they may well reach conflicting conclusions.[19] Authors will also engage in debate with others offering competing theories derived from frameworks with different premises. Each will strive to convince the audience of the merits of his or her own position.

These intra- and inter-framework debates enable us to better understand the different frameworks. However, there exists at this moment no argument which will compel agreement among the advocates of the competing viewpoints:

> Universalizability theorists, utilitarians, existentialists, contractarians, those who assert the possibility of deriving morality from rational self-interest and those who deny it, those who uphold the overriding character of an impersonal standpoint and those who insist upon the prerogatives of the self, disagree not only with each other but among themselves, and the certitude of those who maintain each point of view is matched only by their inability to produce rational arguments capable of securing agreement from their adversaries.[20]

This inability is not the result of mistakes or irrationality:

> What would be required....for a conclusive termination of rational debate would be appeal to a standard or set of standards such that no adequately rational person could fail to acknowledge its authority. But such a standard or standards, since it would have to provide criteria for the rational acceptability or otherwise of any theoretical or conceptual scheme, would itself have to be formulable and defensible independently of any such scheme. But ... there can be no such standard; any standard adequate to discharge such functions will itself be embedded in, supported by, and articulated in terms of some set of theoretical and conceptual structures. Thus since, so far as large-scale theoretical and conceptual structures are concerned, each rival theoretical standpoint

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[18] *See, e.g.*, M. Minow, Making All The Difference: Inclusion, Exclusion and American Law (Ithaca: Cornell University Press, 1990); J.B. White, Justice as Translation: An Essay in Cultural and Legal Criticism (Chicago: University of Chicago Press, 1990); M. Kelman, A Guide to Critical Legal Studies (Cambridge, Mass.: Harvard University Press, 1987); R.M. Unger, Knowledge and Politics (New York: Free Press, 1975). A perhaps surprising contribution to the literature comes from Judge Richard Posner in The Problems of Jurisprudence (Cambridge, Mass.: Harvard University Press, 1990). *See also* P. Schlag, *Normative and Nowhere to Go* (1990) 43 Stan. L. Rev. 167. For a recent analysis of contract law in light of more recent theory *see* A. Brudner, *Recontructing Contracts* (1993) 43 U.T.L.J. 1.

[19] Both John Rawls and Robert Nozick work within the social-contractarian framework but they reach very different and incompatible conclusions. *See* J. Rawls, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971); and R. Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974).

[20] Moral Inquiry, *supra* note 5 at 189.

> provides from within itself and in its own terms the standards by which, so its adherents claim, it should be evaluated, rivalry between such contending standpoints includes rivalry over standards.[21]

Thus, the rivalry between frameworks involves debate over the criteria of choice of the appropriate framework.

The absence of such criteria raises a second, more subtle, difficulty for those theories described as liberal. While claiming to speak objectively, liberal theory also proclaims its neutrality on issues of the good life.[22] It is up to each individual to determine his or her life plan. The state must respect the liberty of each individual. However, this ostensible neutrality suppresses the extent to which the basic concepts of any liberal theory privilege one view of the good life over other competing views.[23] Thus, liberal theory, in claiming to speak the truth, asks the state to privilege with the force of state power one vision of the good which, in the case of liberal theory, is precisely what the same theory says the state is not to do.

This argument about the nature of truth claims has particular relevance to law given the proliferation of theory in recent years. More and more, legal theorists claim to provide clear answers to legal issues on the basis of analytical tools found in other disciplines. Economic analysis is one example. However, as legal theory makes use of competing analytical frameworks from outside law, the debate within law reproduces the problem of competing claims to speak the truth. Everyone believes fiercely in what they are saying[24] but no one can provide an argument which will resolve the debate. But the legal system — the legislatures and courts — must reach decisions. Otherwise, it is not working. How can legislators and judges proceed in the absence of neutral criteria?

The rejection of the traditional concepts of objectivity and truth is obviously controversial. Those who disagree with the argument that we lack such standards do not contest the point that most post-Enlightenment theory purports to speak the truth

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[21] *Ibid.* at 172-73.

[22] *See, e.g.*, D. Dyzenhaus, *Regulating Free Speech* (1991) 23 OTTAWA L. REV. 289 at 301, where he summarizes the liberal position as follows:

> Liberals are committed to an ideal of individual autonomy, according to which individuals should be left to decide for themselves both what the good life is and how to pursue it. So liberals require that the state remain neutral on questions of how individuals should live their lives, at least to the extent of refraining from coercively imposing any conception of good on individuals.

See also R. Dworkin, *Liberalism* in A MATTER OF PRINCIPLE (Cambridge, Mass.: Harvard University Press, 1985) at 181. For a recent discussion of this issue of neutrality see C. Taylor, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" (Princeton, N.J.: Princeton University Press, 1992).

[23] *See* C. Taylor, *The Diversity of Goods* in PHILOSOPHY AND HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2 (Cambridge: Cambridge University Press, 1985) at 230, and Taylor, *supra* note 5.

[24] No illusion is more powerful than that of the inevitability and propriety of one's own beliefs and judgments. The conviction of the necessity of one's convictions survives the most strenuous opposition and extensive contradiction. B.H. Smith, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (Cambridge, Mass.: Harvard University Press, 1988) at 54.

objectively. They retain their belief in the possibility of a neutral viewpoint from which objective and universal truths can be derived.[25] They argue that it is dangerous to jettison the concept of objective truth because of the relativist conclusions that seem to follow from this argument. They argue that relativism is self-refuting because it purports to state a universal truth — that *all* truths are relative — which cannot be true by its own premises.[26]

Many theorists, who acknowledge the problematic character of truth claims, are very critical of the purely relativist conception of truth which some authors propose in the place of absolute and objective truth.[27] Alisdair MacIntyre argues that the loss of standards undermines our sense of community.[28] Others are willing to embrace the relativist conclusions. Richard Rorty argues that we should cheerfully accept that our beliefs cannot be objectively grounded. He advocates what he calls ethnocentrism which brackets the discussion of foundations in favour of a politics that works within its own tradition to reduce human suffering and increase the opportunities for individual self-definition.[29] Clifford Geertz argues that there is no reason to believe that the only way to avoid pure subjectivism and nihilism is to place knowledge, philosophy or ethics beyond culture and history.[30] Even if one finds these arguments unpersuasive, the rejection of relativist moralities does not, in itself, provide the criteria for choice between frameworks.[31]

The argument presented in this article does not require a relativist conception of truth and morality if relativism is defined as a belief that anything goes because there are no standards from which to criticize any particular position. According to such an extreme relativism, human sacrifice to placate the gods would be beyond criticism because it is just a morality like any other with its own internal logic and integrity. The discussion here is based on the view that the argument or arguments which will convince those who believe in competing large-scale theoretical frameworks that they are mistaken have not yet been formulated. It is possible that such arguments will be found. Modesty about the accomplishments of philosophy and theory at this point in history does not necessarily mean the abandonment of all hope for social change or improvement in the human condition.

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[25] For both a defense of objectivity and a critique, *see* T. Nagel, THE VIEW FROM NOWHERE (New York: Oxford University Press, 1986).

[26] *See, e.g.*, B. Williams, ETHICS AND THE LIMITS OF PHILOSOPHY (London: Fontana Press, 1985). For a discussion of this debate, *see* J. Waldron, *On the Objectivity of Morals: Thoughts on Gilbert's* Democratic Individuality (1992) 80 CAL. L. REV. 1361.

[27] Authors such as MacIntyre, *supra* note 9; Taylor, *supra* note 5; Norris, *supra* note 10; Habermas, *supra* note 14; and Minow, *supra* note 18 warn against the dangers of relativism.

[28] *See* MORAL INQUIRY, *supra* note 5.

[29] *See* CONTINGENCY, IRONY AND SOLIDARITY, *supra* note 5.

[30] *See* C. Geertz, *Anti-Anti-Relativism* (1984) 86 AM. ANTHROPOLOGIST 263.

[31] For further discussion of relativism, *see, e.g.*, M. Hollis & S. Lukes, eds., RATIONALITY AND RELATIVISM (Oxford: Basil Blackwell, 1982). For a critique of Richard Rorty's work from a number of different perspectives *see* A. Malachowski, ed., READING RORTY: CRITICAL RESPONSES TO PHILOSOPHY AND THE MIRROR OF NATURE (AND BEYOND) (Cambridge, Mass.: Basil Blackwell, 1990).

The resolution of particular legal issues, such as that of the role of a doctrine of unconscionability in contract law, is inevitably tied to choices about large-scale theoretical frameworks. All the positions taken on the issue of the merits and need for such a doctrine entail a theory of society which, if adopted, would impose a single vision of the good life on society and "legislate certain goods out of existence".[32] The choice of legal rule or doctrine cannot be made without taking into account whose views are being enshrined in law and for what reasons.

As well, all choices entail costs. The legal system must also take into consideration the costs of its choices for those whose framework or vision has been rejected. They will need to be convinced that their humanity is not being denied when their vision is denied the force of law. Otherwise, they will perceive the choice as an exercise of power by those whose easy access to levers of power makes it possible to use the legal system for their own purposes.

If, as the critique of traditional theory outlined above suggests, there is no argument or set of arguments capable of justifying such a choice, the dilemma of how the legal system should proceed with law-making and application becomes quite perplexing. Richard Rorty's proposed ethnocentrism does not resolve the problem because the need for choice of framework is present in all political debate and, in the absence of a clear and unambiguous political consensus on the choice of large-scale framework, the retreat to one's own culture does not eliminate the need for choice in spite of the lack of criteria.

It should be obvious that the argument presented in this section participates in the very dilemma it is describing. That is, this argument itself is located within the kind of framework which it is trying to bring to the forefront. This is inevitable for there are no "theory-free" positions in any debate. But, unlike the critique of relativism as self-refuting because it claims to state a universally valid truth, the recognition of the inevitability of large-scale frameworks does not prove the premise of the argument wrong. The only way to refute it is to propose an argument which will define the criteria for choice of large-scale framework from outside of such a framework. Until this project is successfully completed, the need will remain for a method to resolve issues related to law-making and law application which is viewed as legitimate by those affected regardless of their framework.

B. *The Relationship Between Large-Scale Frameworks and Legal Decision-Making*

In this section I want to anticipate a challenge to the premise of this article. The argument that legal decision-making involves choices between large-scale frameworks of the type discussed by philosophers questions the distinction between law and politics.[33] The argument that the formulation of legal rules implies a choice of large-scale framework can be particularly disturbing because it suggests that

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[32] Taylor, *supra* note 5 at 240.

[33] For a useful overview of the relationship between law and politics in various theories of law *see* R. Cotterrell, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL

decisions made in the course of both legislation and adjudication cannot ultimately be justified by the giving of reasons. Some fear that the acceptance of this argument makes the very project of a legal system an impossibility. All law would simply be the arbitrary exercise of power cloaked in a dissembling rhetoric of rights, equality, fairness and individual freedom.[34] Therefore, it is important to maintain a clear distinction between law and politics.

One of the ambitions of post-Enlightenment legal theory was to develop a legal language which was so transparent and exact that the role of the judge would be limited to the mechanical application of rules to facts without any intrusion of judicial interpretation. Thus, law-making would be the clear reserve of the legislator and law application the responsibility of the judicial system.[35] Legislating would be carried out according to a clear calculus, such as utility, leading to precise results and the judicial system would apply the resulting legal rules as if they were mathematical formulae.

According to this view, it is possible to make a sharp distinction between policy which involves controversial political choices and law which involves bounded and rational decision-making. Any choice of policy must be made by the legislative assembly. The courts must simply work with the policies as defined by the legislators. The legislative choices define the framework within which the courts reason. Legal decisions are justified on the basis of reasons supported by authority. Thus, legal reasoning is bounded and rational. If it had been possible to achieve this ambition, law would have been a purely positivistic and rational discipline.

This project proved illusory.[36] In reality it is not possible to build an impermeable barrier between law-making and law application. The application of the law always involves innovation because the decision maker must formulate or choose the relevant statutory or jurisprudential rule, to be applied. Once the relevant rule is chosen, the rule applier must interpret the rule defining the criteria of its application. Once a set of criteria is defined, the rule applier must decide the facts of the particular

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PHILOSOPHY (Philadelphia: University of Pennsylvania Press, 1992). Jeremy Bentham was one of the more influential advocates of a codified legal system promoting security and certainty. For a thoughtful examination of judicial decision-making in his theory of law *see* G. Postema, BENTHAM AND THE COMMON LAW TRADITION (Oxford: Clarendon Press, 1986).

[34] The claim that judges decide cases on the basis of what they ate that morning is a claim that legal reasoning is nothing more than whim. *See* J. Frank, LAW AND THE MODERN MIND (New York: Tudor, 1936).

[35] This ideology of separation of law from politics was strongest in civilian jurisdictions where the ambition was to draft a code sufficiently complete and unambiguous to eliminate all judicial discretion. *See generally* J.H. Merryman, THE CIVIL LAW TRADITION, 2d ed. (Stanford, Cal.: Stanford University Press, 1985). This ideal was carried to a logical but ridiculous extreme by the Prussian Landsrecht which adopted a code that contained some 17,000 sections covering specific fact situations: *Ibid.* at 29. For a further discussion of codification and judicial discretion *see* Postema, *supra* note 33.

[36] Positivist theories of law attempted this project but failed. H.L.A. Hart's theory of law allows unconstrained discretion for judges in cases in which there are no precedents or statutes: *See* THE CONCEPT OF LAW (Oxford: Clarendon Press, 1970). *See also*, Cotterrell, *supra* note 3, c. 4 and R. Dworkin, LAW'S EMPIRE (Cambridge, Mass.: Harvard University Press, 1986) at 33-43.

situation and how these particular facts fit within the criteria described. Sometimes this exercise will be relatively mechanical. If the facts are not disputed and the rules are clearly set out in a single unambiguous authoritative text, rule application may not be arduous.[37] If the facts are contentious, if the set of possible rules is large or if the relevant rules are vague or controversial, rule application will require careful analysis. The conclusion will not be dictated by any authoritative source. In this case, the rule applier will necessarily have to innovate.[38]

In cases where there is a real dispute about facts and law, the rationality of decision-making is less clearly bounded and, hence, more problematic because such decision-making involves choices which are not dictated in any mechanical way. To the extent that such choices will have consequences for significant portions of society, the legal dispute is about the kind of society in which we live, its collective norms, the boundaries of individual freedom, and the obligations and duties owed by all citizens to one another and the state. These norms, freedoms, obligations and duties are never given. In democratic and pluralistic societies, they are constantly debated, redefined and disputed. They are the essence of political debate.

The rigid distinction between politics and law which assigns debate about policy to the political realm attempts to bracket the discussion of goals in legal disputes. Policies are to be taken as already given. When in the realm of the legal, rules are set out in authoritative texts — precedents or statutes — by institutions organized in a hierarchic fashion so that contradictory texts are assigned clear weights in the legal debate. They are to be applied through the operation of objective and neutral reason according to the established criteria. If social policies have changed, according to this story about the law, it is the responsibility of the political realm (or institutions) to embody the new policies in authoritative texts which will then be applied by the decision makers. The rule appliers are subordinate to policy makers (or political actors) who have the power to alter authoritative texts. This

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[37] There are cases in which it turns out that there is no real dispute. It is hard to know what the incentive to litigate would be in such circumstances. Perhaps there is some personal animosity between the parties or the litigation is a tactic in a negotiating strategy. In cases where there is no dispute, decision making appears to be purely mechanical.

[38] The steps described — choice of rule, description of rule, description of facts and application of rule — can only be starkly distinguished in theory. In any actual exercise of rule application, they will occur simultaneously and sometimes unconsciously. As evidence is introduced in order to tell the conflicting stories of events which led up to the dispute, the rule applier will already be thinking about the relevant rules, their criteria of application, and the possible applications to the facts as she is beginning to see them. The rule applier will always already have a theory of law and an understanding of the rules that will shape her understanding of the facts which will in turn influence her interpretation and application of the law. Sometimes the rule applier will reach a conclusion that she considers the most just and then find a supporting rule and construct a justification. Hence, the taxonomy of intellectual operations set out here is not an empirical description. For a more detailed discussion of decision-making, *see, e.g.*, D. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* (1986) 36 J. LEGAL EDUC. 518. For a discussion of the ways in which the legal text constrains the decision-maker in the civil law tradition *see* G. Timsit, LES NOMS DE LA LOI (Paris: Presses Universitaires de France, 1991).

theory argues that those charged with the application of rules must be neutral, passive and mechanical. They are bureaucrats, not innovators.

The bracketing of the discussion of policies in the context of legal disputes appears at first to be profoundly democratic but, under scrutiny, the distinction between law and politics proves artificial and problematic. Policies are always multiple and sometimes contradictory. The political process does not result in a set of clearly defined, coherent policies which the decision maker can take as given. Policies change from time to time, from situation to situation as the political debate proceeds in changing economic and social conditions. The dominant policies change as governments are elected and defeated. The governing consensus is fluid and ephemeral. The bracketing of the discussion of policies within the legal system results in the freezing of goals at a point in time. Unless these policies are subject to constant revision, the policies taken as given will come with time to constitute obstacles to the redefinition of policies in new economic and social contexts.[39] This danger is greatest when the legal realm assumes a limited set of social policies which form a coherent but restricted whole. In such circumstances, the bracketing of the discussion of social policy in the context of legal dispute which, at first glance, appeared democratic becomes exactly the opposite.

This is even more obvious when we take into account the fact that, in common law systems, the courts act as independent sources of law. For a long time, judicial law-making was hidden behind a veil of natural law. The courts did not make law, the story went. They merely declared the law as it always already existed. This story is no longer persuasive. The courts now acknowledge that they make new law. The highest courts openly overrule their own decisions.[40] There is, of course, a strong institutional bias against innovation, but the common law was always judge-made law and it evolves through often incremental judicial creativity. As long as the courts are an authoritative source of new law, it is clear that litigation will always be about the definition, balancing, and implementation of social policies. The courts cannot refuse to discuss policy or simply bracket a set of them as given.

Even if the courts insist on maintaining the fiction of a strict demarcation of politics from law as a rhetorical device for legitimizing their role, the controversy over goals will not disappear. The courts will have to enunciate the relevant set of

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[39] Judicial attitudes to unions and to the rights of women are two examples of the freezing of policies which results from the refusal to subject the bracketed policies to critical scrutiny. For a discussion, *see* J.A.G. Griffith, THE POLITICS OF THE JUDICIARY, 3d ed. (London: Fontana Press, 1985). The use of constitutional law in the U.S. to oppose unionism is another example: *See* K.E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41* (1978) 62 MINN. L. REV. 265. The Canadian history is similar: *See* J.A. Manwaring, *Legitimacy in Labour Relations: The Courts, The British Columbia Labour Board and Secondary Picketing* (1982) 20 OSGOODE HALL L.J. 274.

[40] The House of Lords issued a practice statement allowing it to depart from a previous decision in the appropriate circumstances. *See Note*, [1966] 3 ALL E.R. 77, or *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234. In Canada, the Supreme Court has gradually accepted that, while it will normally adhere to prior decisions, it can overrule when required: *See* P. Hogg, CONSTITUTIONAL LAW OF CANADA, 3d ed. (Toronto: Carswell, 1992) at 219-21.

policies to be taken as given. This process of describing will itself involve choices. The political process does not result in a set of policies which can be taken as given and insulated from all controversy. Thus, in any given litigation, there will be controversy, debate and argument over the policies to be included in the bracketed set. The ideology which places the judicial system above politics may hide the debate about policy from view. It will not, however, go away.

Thus, rule application cannot be reduced to the mechanical application of criteria to facts. All decision making or rule application at least potentially involves policy choices and innovation. The refusal to innovate is itself a choice about the policies to be applied. The conditions of choice may be constrained by institutional rules such as *stare decisis* and precedent but decision makers are always confronted with choices that have to be made. Institutional rules simply reframe the inevitable choices in other vocabularies.[41]

If it is true that litigation inevitably requires the courts to make policy choices then the problem created by the lack of standards for the choice of large-scale theoretical frameworks and for the choice of conclusions within any single large-scale framework becomes more urgent for law. Policies are derived from these frameworks. The choice of a particular policy will involve buying into a large-scale framework which, if embodied in law, will preclude competing policies derived from competing frameworks. Buying into one framework will result in its transformation into a "court-imposed" official ideology which enshrines one framework at the expense of other frameworks. If one framework is given preference over the others, this choice must be supported by reasons. But if, as the philosophers tell us, no standards for such a choice exist, no reasons can be given other than justifications from within the large-scale framework. If no independent reasons can be given, then the choice of the legal rule is, at its foundations, experienced by those who do not share the large-scale framework as the arbitrary exercise of power through ideological domination disguised in the rhetorical cloak of legal rationality.

II. Unconscionability As A Legal Issue

The legal issue which provides the focus for the discussion of the inevitability of large-scale theoretical frameworks is the need for a doctrine of unconscionability in the Canadian common law relating to contracts. The debate over the doctrine of unconscionability concerns the move to regulate contract because of substantive unfairness in price or other terms. Can such regulation be justified? If yes, what are the best means of regulating price and terms? As will be seen in subsequent sections

[41] This is, in my opinion, the most meaningful interpretation of the assertion that law is politics. This does not mean that litigation is identical to political debate. Litigation always takes place within an institutional framework that defines the vocabulary of discussion in such a way that alters the debate about policies. Political debate is less constrained, open to multiple points of view, less tradition bound, less institutionally conservative and open to more creative, multi-dimensional solutions. In a constitutional democracy, political debate should take priority over litigation in the definition of policy. But none of these points refutes the argument that litigation is inevitably political.

of this article, the answers to these questions are inevitably derived from large-scale theoretical frameworks which define the moral universe of the person proposing the solution.

In this section, I will examine the current state of the common and statute law concerning unfair contracts and contract terms. The purpose of this section is not to provide a detailed analysis of the jurisprudence. Rather, this section will show how the logic of unconscionability permeates the regulation of contracts. This point will be made through an analysis of statutes based on notions of unconscionability and through a discussion of cases in which one of the parties challenges either an entire contract or an exemption clause. In adopting statutes which limit contractual freedom, the legislators have decided that some contracts offend society's conceptions of fairness. In the case law, the party contesting the contract asks the courts to regulate the substance of the agreement. The language of unconscionability is encountered often in the case law and statutes. However, the attitude of the Canadian courts of the common law provinces to the regulation of contract fairness is ambiguous and the availability of challenges to contract on the basis of unfairness is unclear. The uncertainty of Canadian common law is especially evident when compared with the evolution of the law in both the United States and England.

A. *The Definition of the Term "Unconscionable"*

When one examines the evolution of the meaning of the word "unconscionable", the issue of large-scale theoretical frameworks moves quickly to the forefront. The word is rooted in Christian theology and morality. In Christian doctrine, the conscience is the "seat" of the soul. The Oxford English Dictionary[42] (OED) says that, when used to describe a person, the word means "having no conscience; not controlled by conscience" which can be translated in religious terms as meaning that the individual has no soul. Such language involves strong condemnation, for a person having no soul would do the work of the devil.

Since the Enlightenment, Christian morality has lost its dominance as the single large-scale framework defining the moral universe in which members of societies evolving within the European tradition live their lives. From the fifteenth century to the nineteenth century, in parallel with the fragmentation of the church, the moral universe defined by the Judeo-Christian tradition was first supplemented, and then supplanted, by a competing moral universe defined by the ideals of reason and science.[43] Thus, the moral value of acts came to be measured by the degree to which those acts adhered to the dictates of reason. The second definition of unconscionable found in the OED refers to deeds rather than to persons. It says "Of actions, etc.: Showing no regard for conscience; not in accordance with what is right or reasonable" and "unreasonably excessive".

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[42] COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, vol. 2 (Oxford: Oxford University Press, 1971).

[43] *See generally*, N. Hampson, THE ENLIGHTENMENT: AN EVALUATION OF ITS ASSUMPTIONS, ATTITUDES AND VALUES (London: Penguin, 1968) for an overview of this period and the transition to the ideals of reason and science.

As long as the taken-for-granted moral universe within which the legal system operated was not challenged the problem of the meaning of a word such as "unconscionable" would not arise. In the medieval societies of Europe, in which there was a strong consensus on morality, the idea of a just price and the unconscionability of deals which varied greatly from that price would not have seemed absurd to most people.[44] When issues of unconscionability arose, the church could act as the final authoritative arbiter of the meaning of the term.

When reason supplanted religion as the large-scale theoretical framework, the ideal of unanimity remained but the role of final arbiter was not clearly assigned. In the twentieth century, the reality of competing frameworks and competing rationalities has become evident and words like "unconscionable" and "unconscionability", while still used often, no longer can call upon a shared moral universe to provide meaning. What shocks one individual's conscience may not be the least shocking to another.

In some instances words acquire a precise legal significance through use in legal discourse so that legal meaning is insulated entirely (or to a large extent) from the uncertainties of ordinary usage.[45] However, the words "unconscionable" and "unconscionability" are not, as yet, legal terms of art. They do not have a precise legal meaning established by case law which would free the word from the confines of this religious and moral framework.

Extrapolating from the definitions found in the OED, one could define an unconscionable contract as one which deviates unreasonably or excessively from that which is right. This reformulation of the dictionary definition does not assist in the identification of contracts which could be included in the category covered by the expression "unconscionable contract". It describes a conclusion rather than the reasoning whereby the conclusion is reached. No secularized dictionary meaning of the word "unconscionable" establishes a core of meaning which can guide subsequent application or analysis. The abstracted and decontextualized definition of "unconscionable" does not tell us what criteria are used to distinguish the "conscionable" from the unconscionable, reasonable or fair contracts from those that are unreasonable or unfair.

However, the basic structure of the unconscionability argument does become clearer. The argument always involves the following logic. A contract cannot be enforced because it would be immoral or offensive to notions of fairness or reasonableness to allow one party to take advantage of or exploit the other through enforcement of an onerous contract. This reformulation does not resolve the question of criteria because terms such as fairness and reasonableness suffer from the same uncertainties as the word "unconscionable".

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[44] For a discussion of Medieval views of just price *see* P.S. Atiyah, THE RISE AND FALL OF THE LAW OF CONTRACT (Oxford: Oxford University Press, 1979) at 167-80.

[45] A good example of a word having a legal definition quite distinct from ordinary usage is the term "condition". *See L. Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235, [1973] 2 ALL E.R. 39 (H.L.), aff'g [1972] 2 ALL E.R. 1173, [1972] 1 W.L.R. 840 for a discussion of the distinction between ordinary usage and the legal meaning of this word.

The case law, however, enables us to identify sources of secular unconscionability. Unfairness can arise because one party has imposed a disadvantageous bargain through negotiating tactics or unscrupulous dealings which create unequal bargaining power. It can also arise because the contract terms have not been set by a mechanism which can be regarded as fair. In a market in which one party has no bargaining power and must accept the terms as defined by the other party, the mechanism for the determination of the contract terms would not be considered fair. As well, a contract which contains unreasonably harsh or onerous terms would be unconscionable. But many cases will involve both procedural and substantive unfairness.

B. *Legislation Affecting Contract Law in the Common Law Jurisdictions of Canada: The Omnipresence of Unconscionability*

There is no legislation creating a doctrine of unconscionability applicable to all types of contracts, commercial or consumer, in any Canadian common law jurisdiction. However, exchange is extensively regulated by statute and much of the legislation regulates the substance of specific categories of contract. While these statutes seldom use the language of unconscionability, the legislation cannot be understood except in terms of an implicit theory of unconscionability. For example, the interest rates charged in financing contracts cannot be unconscionable.[46] Other legislation prohibits certain types of clauses in identified contracts.[47]

One of the most extensively regulated agreements is the employment contract. No employee can contract to work for wages or in conditions which are less than the minimums set by employment standards legislation.[48] The justification for the establishing of minimum standards and the prohibition of contracting out of the statute derives from an assessment of the substance of employment contracts which result in an unregulated market. Legislators have been convinced by the argument that employees, especially those at the bottom of the job hierarchy, lack bargaining power and are unable to force employers to contract on conditions above the minimum which society can tolerate. Notions of basic human dignity and the equal moral worth of all individuals including those at the lowest echelons of society make the definition of minimum standards imperative without providing a precise calculus of those standards.[49]

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[46] *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U-2.

[47] *Landlord and Tenant Act*, R.S.O. 1990, c. L-7, s. 82(1) (prohibition of security deposits exceeding one month's rent); and *Insurance Act*, R.S.O. 1990, c. I-8, s. 234(1) (prohibiting the variation and omission of statutory conditions for certain categories of persons). *See also Criminal Code*, R.S.C. 1985, c. C-46, s. 347 (regulating interest rates) and *Tax Rebate Discounting Act*, R.S.C. 1985, c. T-3.

[48] *Employment Standards Act*, R.S.O. 1990, c. E-14.

[49] For a discussion of these issues, *see, e.g.*, D.M. Beatty, LABOUR IS NOT A COMMODITY in B.J. Reiter & J. Swan, eds., STUDIES IN CONTRACT LAW (Toronto: Butterworths, 1980) 313; and D.M. Beatty, *Ideology, Politics and Unionism* in K.P. Swan & K.E. Swinton, eds., STUDIES IN LABOUR LAW (Toronto: Butterworths, 1983) 299. *See also* M.E. McCallum, *Keeping Women in Their Place: The Minimum Wage in Canada, 1910-1925* (1986) 17 LABOUR/LE TRAVAIL 29 (for

Labour relations legislation[50] also seeks to correct what is perceived as the imbalance of bargaining power which favours the employer by allowing employees to form unions and negotiate collectively with their employer. Rather than imposing just terms, this legislation uses the strategy of market correction.[51] In theory at least, it redistributes power between the parties so as to create a new market in which the two parties can negotiate on an equal basis. The purpose of this strategy is to permit employees organized into unions to negotiate substantively better terms and conditions of employment. Thus, concerns of substantive fairness and inequality of bargaining power are the basis of legislation governing the employment contract.

Another example of legislation intended to correct imbalances in bargaining power is consumer protection legislation. All of the laws currently in force are premised on the view that consumer contracts are systematically biased against consumers because consumers do not have the bargaining power to influence the terms of such contracts.[52] Regulation takes many forms including prohibition of terms as well as the mandatory inclusion of terms. Thus, some laws require sellers to include certain types of clauses in consumer contracts.[53] They also require the divulging of information such as the cost of borrowing.[54] Some laws prohibit disclaimer clauses completely.[55] In New Brunswick the legislative assembly opted for the test of fairness and reasonability.[56]

Itinerant sellers are notorious for the use of unfair pressure tactics to persuade consumers to purchase goods and services at prices significantly higher than those

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a critical discussion of the ideology underlying minimum wage legislation and the impact on women); E. B. Akyeampong, *Working For Minimum Wage* (1989) 1:3 PERSPECTIVES ON LABOUR AND INCOME 8; and R.J. Adams, *Employment Standards in Ontario: An Industrial Systems Analysis* (1987) 42 INDUS. REL. 46.

[50] *Labour Relations Act*, R.S.O. 1990, c. L-2.

[51] For discussions of the justification of labour legislation *see* Swan & Swinton, *supra* note 49; P. Weiler, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (Toronto: Carswell, 1980); and L. Panitch & D. Swartz, THE ASSAULT ON TRADE UNION FREEDOMS: FROM CONSENT TO COERCION REVISITED (Toronto: Garamond Press, 1988).

[52] *See* I. Ramsay, *Consumer Law and the Search for Empowerment* (1991) 19 CAN. BUS. L.J. 397.

[53] *Consumer Protection Act*, R.S.O. 1990, c. C-31, s. 19 [hereinafter *Ontario CPA*]; *Insurance Act*, R.S.O. 1990, c. I-8, ss. 148 & 234.

[54] *Ontario CPA*, *ibid.*, s. 24.
[hereinafter *Warranty and Liability Act*].

[55] *See Ontario CPA*, *ibid.*; *Consumer Protection Act*, R.S.B.C. 1979, c. 65 [hereinafter *B.C. CPA*]; *Consumer Protection Act*, R.S.M. 1987 c. C200 [hereinafter *Manitoba CPA*]; *Consumer Protection Act*, R.S.N. 1990, c. C-31; *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17 [hereinafter *N.W.T. CPA*]; *Consumer Protection Act*, R.S.N.S. 1989, c. 92; *Consumer Protection Act*, R.S.P.E.I. 1988, c. C-19; *The Consumer Products Warranties Act*, R.S.S. 1978, c. C-30; *Consumers Protection Act*, R.S.Y.T. 1986, c. 31 [hereinafter *Yukon CPA*]. *See also* s. 20 of *Sale of Goods Act*, R.S.B.C. 1979, c. 370 which prohibits contracting out of conditions and warranties in consumer sales.

[56] *Consumer Product Warranty and Liability Act*, S.N.B. 1978 c. C-18.1, ss. 24-26 [hereinafter *Warranty and Liability Act*].

at which the same goods are available elsewhere.[57] Because of the types of pressure and the onerous contracts that result, legislators have regulated contracts resulting from door-to-door selling. One form of regulation is the requirement of a permit to sell from door-to-door.[58] Consumers also have the right to cancel the contract for any reason by notice within a specified "cooling-off" period.[59]

Several provinces have also adopted legislation regulating business practices.[60] This legislation regulates the tactics which a seller can use when negotiating with consumers with a view to protecting consumers from abusive pressure which would deprive them of the ability to assess the merits of a transaction. In the Ontario legislation, for example, the list of unconscionable consumer representations includes situations where:

> S. 2(2)(ii)the price grossly exceeds the price at which similar goods or services are readily available to like consumers,
>
> S. 2(2)(iii)the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,

and

> S. 2(2)(vi)that the terms and conditions of the proposed transaction are so adverse to the consumer as to be inequitable.

This legislation gives the consumer the right to rescind a contract entered into after an unfair consumer representation.[61]

There are, however, considerable gaps in the protection provided to consumers. For example, most provincial consumer protection legislation does not regulate

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[57] *See, e.g., Trans-Canada Credit Corp. Ltd.* v. *Zaluski* (1969), 2 O.R. 496, 5 D.L.R. (3d) 702 (Co. Ct.); and *W.W. Distributors & Co.* v. *Thorsteinson* (1960), 26 D.L.R. (2d) 365, 33 W.W.R. 669 (Man. C.A.) for cases predating the adoption of consumer protection legislation.

[58] *See, e.g.*, the *Ontario CPA*, *supra* note 53, s. 4(1).

[59] *See B.C. CPA*, *supra* note 55, s. 13; *Manitoba CPA*, *supra* note 55, s. 61(1); *N.W.T. CPA*, *supra* note 55, ss. 75 & 76; *Ontario CPA*, *supra* note 55, s. 21(1); and *Yukon CPA*, *supra* note 55, ss. 61 & 62. *See also* the *Direct Sellers Act*, R.S.N.B. 1973, c. D-10, s. 17, as am. S.N.B. 1984 c. 41, s. 1; *Direct Sellers Act*, R.S.N. 1990, c. D-24, s. 22: *Direct Sellers Act*, R.S.P.E.I. 1988, c. D-11, s. 9; *The Direct Sellers Act*, R.S.S. 1978, c. D-28, s. 22, as am. by S.S. 1986, c.29, s. 6; *Direct Sales Cancellation Act*, R.S.A. 1980, c. D-35, s. 6, as am. by S.A. 1981, c. 44, s. 2(4); *Direct Sellers' Licensing and Regulation Act*, S.N.S. 1989, c. 129, ss. 20 & 21.

[60] *See, e.g., Business Practices Act*, R.S.O. 1990, c. B-18; *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3; *Trade Practices Act*, R.S.B.C. 1979, c. 406; *The Trade Practices Inquiry Act*, C.C.S.M. c. T110; *Trade Practices Act*, R.S.N. 1990, c. T-7; *Business Practices Act*, R.S.P.E.I. 1988, c. B-7.

[61] For an interpretation of these provisions in the context of a prosecution under this legislation *see Memorial Gardens Ontario Ltd.* v. *Ontario* (1992), 6 O.R. (3d) 720, 54 O.A.C. 298 (C.A.) [hereinafter *Memorial*], in which the Ontario Court of Appeal held that a finding that the price grossly exceeded the price at which similar goods were readily available cannot simply be equated with proof of an offence under the Act.

disclaimers of liability for negligence in tort.[62] Nor does it enable the consumer to challenge entire contracts solely on the basis of substantive unconscionability.[63] In the commercial context,[64] there is no legislative basis for a general doctrine of unconscionability of contracts as a whole or specific terms.

C. *Canadian Common Law of Contract*

Classical contract law provided no space for an explicit doctrine of unconscionability but nonetheless the courts did regulate the substance of exchange relations. As the classical model went into decline, however, deference to the negotiated deal also declined. Because of the legislative gaps and the absence of a clear judicial or statutory rule prohibiting challenges to contracts or contract terms, the courts are more and more often asked to deal with unconscionability arguments in the context of contract litigation. The cases can be divided into two categories: those in which the entire contract is alleged to be unfair and those dealing specifically with exemption and limitation clauses. In this section I will examine the classical model and then the cases in which contracts are challenged on the basis of a form of the unconscionability argument.

1. *Classical Contract Law*

Classical contract law, in its purest form, denied the legal relevance of economic power. It was extremely reluctant to evaluate the merits of an exchange. Traditionally, the issue of contract enforceability was framed in purely formal terms: is there a contract? According to classical law, there are three criteria for the formation of a contract: offer, acceptance and consideration. If these three elements are present in the facts before the court, there is a contract which the court must enforce. Enforcement entails the description of the rights and obligations created by the contract agreed to by the parties. If one of the parties has violated the agreement, the court will grant a remedy.[65] Issues of relative economic power have no place in such a scheme.

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[62] *But see Warranty and Liability Act, supra* note 56, which makes the supplier of a consumer product which is unreasonably dangerous liable to anyone who suffers a consumer loss.

[63] *See Memorial, supra* note 61.

[64] The *Warranty and Liability Act, supra* note 56, does apply to commercial contracts to the extent that it gives the dealer found liable for a consumer loss recourse against its supplier. *See Sirois* v. *Centennial Pontiac Buick and General Motors of Canada Ltd.* (1988), 89 N.B.R. (2d) 244, 51 D.L.R. (4th) 470 (C.A.) interpreting the term "consumer loss" in s. 1(1). This legislation contains many innovations. For an overview, *see* K.J. Dore, *The Consumer Product Warranty and Liability Act* (1982) 31 U.N.B.L.J. 161; I.F. Ivankovich, *Consumer Products in New Brunswick — Fidem Habeat Emptor Part I: The C.P.W.L.A. — Its Scope and Warranties* (1983) 32 U.N.B.L.J. 123; and I.F. Ivankovich, *Consumer Products in New Brunswick — Fidem Habeat Emptor Part II: The C.P.W.L.A. Consumer Remedial Regime* (1984) 33 U.N.B.L.J. 43.

[65] Professor Anthony Kronman describes the consensus underlying the classical core of contract law in the following terms:

> Among contract scholars, there is nearly universal agreement that the law of contracts, the tangled mass of legal rules that regulate the process of private exchange, has three

Classical contract law sharply distinguished substantive issues from procedural concerns.[66] The court cannot and should not evaluate the adequacy of the consideration provided by the parties.[67] It is the responsibility of the parties to the contract to negotiate an agreement which is to their advantage. The parties cannot question the validity of the agreement once the deal is concluded.

However, the parties must freely consent to the exchange. Rules governing capacity to contract ensure that baseline ability to consent is present. Classical doctrines such as fraud, duress, undue influence and misrepresentation police the negotiating tactics which the contracting parties can use during discussions leading up to agreement. They are intended to ensure that both parties consent freely and voluntarily to the contract. The common law, however, imposes no general duty of good faith or disclosure.[68] As long as there is nothing in the case to invalidate the consent of the parties, they must respect their promises. Thus, the common law rules provide the framework within which formally equal contracting parties can exercise their freedom to contract.

It is questionable to what extent the classical theory of contract law accurately describes judicial attitudes, particularly at the height of judicial liberalism at the end of the nineteenth century. At that time, the courts regularly applied rules which prevented parties from including certain types of clauses in their contracts. For example, the courts refused to enforce penalty clauses even though there was no

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> legitimate functions: first, to specify which agreements are legally binding and which are not; second, to define the rights and duties created by enforceable but otherwise ambiguous agreements; and finally, to indicate the consequences of an unexcused breach.

Contract Law and Distributive Justice (1980) 89 YALE L.J. 472 at 472.

[66] However, classical contract law did not use this language. The distinction between substantive and procedural unconscionability is generally attributed to Professor A.A. Leff in his influential article *Unconscionability and the Crowd*, *supra* note 4.

[67] *See, e.g., Chappell & Co. Ltd.* v. *Nestle Co.* (1959), [1960] A.C. 87, [1959] 2 ALL E.R. 701 (H.L.); and *Loranger* v. *Haines* (1921), 50 O.L.R. 268, 64 D.L.R. 364 (C.A.). *See also* G.H. Treitel, THE LAW OF CONTRACT, 6th ed. (London: Stevens & Sons, 1983) at 57-58. W.N.R. Lucy, in his article *Contract as a Mechanism of Distributive Justice* (1989) 9 OXFORD J. LEGAL STUD. 132 at 132, says:

> [T]he traditional view holds that contract adjudication must be based essentially upon considerations relevant to the parties: contractual disputes do not provide an arena for the disputation of wider political and moral issues which are not necessarily of immediate concern to the parties in dispute. Moreover, the traditional view seems to entail that all that matters for contractual adjudication is what the parties have done in the past.

[68] *See* M.G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?* (1984) 9 CAN. BUS. L.J. 385; and R.E. Hawkins, *LAC and the Emerging Obligation to Bargain in Good Faith* (1990) 15 QUEEN'S L.J. 65 for a discussion of the obligation to bargain in good faith. *See also* A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts* (1978) 7 J.LEGAL STUD. 1; E.A. Farnsworth, *Comments on Professor Waddams' 'Precontractual Duties of Disclosure'* (1991) 19 CAN. BUS. L.J. 351; and the comments of Lord Ackner in *Walford* v. *Miles*, [1992] 2 W.L.R. 174 at 181-82, [1992] 1 ALL E.R. 453 at 461, where he argues that:

evidence that consent was not freely given.[69] The judicial regulation of such clauses is justified by the argument that it would be improper to allow a party to recover damages in excess of what a court would normally allow for breach of contract because this would amount to a form of oppression. Thus, a judicial policy against oppression overrides the voluntary consent of the parties.

Another example of such a judicial override is the doctrine of restraint of trade.[70] If a contract or a contract clause unreasonably restrains the ability of an individual to sell his or her labour or skills and earn a living, the courts will strike down either the contract in its entirety or specific offending clauses. Once again, the courts regulate the substance of the agreement regardless of the consent of the parties in order to prevent the oppression of one of the contracting parties.

The courts also policed agreements in which one party takes advantage of a pressing or urgent need.[71] Impecunious heirs were protected against predatory lenders who exploited immediate need so as to deprive the heir of long-term prospects.[72] Sailors were also protected against disadvantageous contracts. Finally, salvage contracts had to be reasonable if they were to be enforced.[73]

Thus, even within classical contract law, there are examples of legal doctrines regulating the substance of contracts. These doctrines contradict the orthodoxy of contractual freedom as expressed in the rule that the substance of the contract should be left entirely to the discretion of the parties. However, because doctrines focusing on contract substance were relatively marginal, the issue of a general doctrine of unconscionability was not central in classical contract law.

> A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party....[W]hile negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw.

This view must be nuanced. In some contexts, there is a duty to provide information. *See, e.g., Fletcher* v. *Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, 74 D.L.R. (4th) 636.

[69] *See H.F. Clarke Ltd.* v. *Thermidaire Corp.* (1974), [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385; and *Elsley* v. *J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1 for recent discussions of penalty clauses.

[70] *See* M.J. Trebilcock, THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS (Toronto: Carswell, 1986) c. 1 for a discussion of the evolution of the doctrine of restraint of trade. *See also Doerner* v. *Bliss & Laughlin Industries*, [1980] 2 S.C.R. 865, 117 D.L.R. (3d) 547.

[71] *See generally Lloyds Bank Ltd.* v. *Bundy* (1974), [1975] Q.B. 326, [1974] 3 ALL E.R. 757 (C.A.) [hereinafter *Bundy* cited to Q.B.], per Lord Denning who reviews these cases and classifies them as examples of abuse of bargaining power. His doctrine of unequal bargaining power was subsequently criticized by the House of Lords in *National Westminster Bank* v. *Morgan*, [1985] 2 W.L.R. 588, [1985] 1 ALL E.R. 821 [hereinafter *National Westminster* cited to ALL E.R.].

[72] For a discussion of the relevant case law *see* R.W. Clark, INEQUALITY OF BARGAINING POWER (Toronto: Carswell, 1987) at 4-23.

[73] *See, e.g., The Port Caledonia & the Ann*, [1903] P. 184 at p. 189-90.

2. *Challenges to Entire Contracts*

The voluminous case law shows that lower courts are often asked to determine if a contract is unconscionable and relieve the vulnerable from unfair or unequal exchanges. The doctrine of unconscionability is encountered in cases involving separation agreements,[74] contracts for sale of land[75] and disputes involving transactions between family members or people in personal relationships.[76] The courts are vigilant in cases dealing with out-of-court settlements which provide low compensation for injuries incurred in accidents.[77] Unlike the United States,[78] there are very few cases involving challenges to entire commercial contracts that do not include some element which distinguishes the exchange from the prototypical arms-length market relationship.[79]

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[74] *See, e.g., Lindsay* v. *Lindsay* (1989), 59 MAN. R. (2d) 186, 21 R.F.L. (3d) 34 (Q.B.) (agreement upheld); *Black* v. *Black* (1989), 96 N.B.R. (2d) 211, 243 A.P.R. 211 (Q.B. (Fam. Div.)) (agreement unconscionable); *Crouse* v. *Crouse* (1988), 88 N.S.R. (2d) 199, 225 A.P.R. 199 (S.C.T.D.) (agreement set aside); *Gedak* v. *Gedak* (1988), 18 R.F.L. (3d) 131 (B.C.S.C.) (agreement upheld); *Pelech* v. *Pelech*, [1987] 1 S.C.R. 801, 38 D.L.R. (4th) 641 (agreement upheld); *Webster* v. *Webster* (1986), 4 R.F.L. (3d) 225 (B.C.S.C.) (agreement upheld).

[75] *See, e.g., Boulter (Turner Estate)* v. *Baschuk (Bonli Estate)*, 77 SASK. R. 49, [1989] 5 W.W.R. 730 (Q.B.), *aff'd* 86 SASK. R. 235, [1990] 5 W.W.R. 685 (C.A.) (specific performance refused); *O'Neil* v. *Arnew* (1976), 16 O.R. (2d) 549, 78 D.L.R. (3d) 671 (H.C.J.) (specific performance granted); *Stewart* v. *Ambrosina* (1975), 10 O.R. (2d) 483, 63 D.L.R. (3d) 595 (H.C.J.), *aff'd* (1977), 16 O.R. (2d) 221 (C.A.) (specific performance awarded); *Huttges* v. *Verner* (1975), 12 N.B.R. (2d) 473, 64 D.L.R. (3d) 374 (S.C.A.D.).

[76] *See, e.g., Shoppers Trust Co.* v. *Dynamic Homes Ltd.* (1992), 10 O.R. (3d) 361 (Gen. Div.) (motion for summary judgment dismissed); *Taylor* v. *Armstrong* (1979), 24 O.R. (2d) 614, 99 D.L.R. (3d) 547 (H.C.J.) [hereinafter *Taylor*] (agreement set aside); *Junkin* v. *Junkin* (1978), 20 O.R. (2d) 118, 86 D.L.R. (3d) 751 (H.C.J.) [hereinafter *Junkin*] (agreement set aside); *Laderoute* v. *Laderoute* (1978), 17 O.R. (2d) 700, 81 D.L.R. (3d) 433 (H.C.J.) (contract upheld).

[77] *See, e.g., Smyth* v. *Szep*, [1992] 2 W.W.R. 673, 63 B.C.L.R. (2d) 52 (C.A.) [hereinafter *Smyth* cited to B.C.L.R.]; *Towers* v. *Affleck*, [1974] 1 W.W.R. 714 (B.C.S.C.); and *Chilliback* v. *Pawliuk* (1956), 1 D.L.R. (2d) 611, [1955-56] 17 W.W.R. 534 (Alta. S.C.) (dealing with a contract under seal for which there was no consideration).

[78] Examples of such litigation from the United States include cases such as *McEntire* v. *Hart Cotton*, 511 S.W. 2d 179 (Ark. Sup. Ct. 1974) [hereinafter *McEntire*]; *Bolin Farms* v. *American Cotton Shippers*, 370 F. Supp. 1353 (Dist. Ct. 1974) [hereinafter *Bolin Farms*]; and *Bradford* v. *Plains Cotton Coop Assn.*, 539 F. 2d 1249 (10th Cir. 1976) in which cotton growers unsuccessfully tried to avoid contractual obligations to sell cotton after sharp price increases; and *United States* v. *Bethlehem Steel Corporation*, 62 S. Ct. 581 (1942) [hereinafter *Bethlehem Steel*], in which the U.S. government unsuccessfully challenged a contract on the basis of unconscionable profits. However, the unconscionability argument has been successful in the commercial context. *See generally* Mallor, *supra* note 4, and cases such as *Johnson* v. *Mobil Oil Corp.*, 415 F. Supp. 264 (Mich. 1976), and *Shell Oil Co.* v. *Marinello*, 307 A. 2d 598 (N.J. Sup. Ct. 1973). In the consumer context, cases such as *Williams* v. *Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965); *Jones* v. *Star Credit Corp.*, 298 N.Y.S. 2d 264 (Sup. Ct. 1969); and *Toker* v. *Westerman*, 274 A. 2d 78 (N.J. Dist. Ct. 1970) are examples of successful challenges to contracts on the basis of substantive unfairness.

[79] In the commercial context, unconscionability is argued in relation to specific terms such as exemption clauses rather than the exchange as a whole, although it is clear that when a court

The authoritative statement of the doctrine of unconscionability is found in the decision of Mr Justice Davey in *Morrison* v. *Coast Finance Ltd.*:

> [A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.[80]

This test was reformulated by Mr Justice Lambert in *Harry* v. *Kreutziger*:

> [Q]uestions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison*[81] case and the *Bundy*[82] case, are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.[83]

The analysis was recently summarized by Mr Justice La Forest in *Norberg* v. *Wynrib*:

> [I]n the law of contracts proof of an unconscionable transaction involves a two-step process: (1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain. Similarly, a two-step process is involved in determining whether or not there has been legally effective consent to a sexual assault. The first step is undoubtedly proof of an inequality between the parties which, as already noted, will ordinarily occur within the context of a special "power dependency" relationship. The second step, I suggest, is proof of exploitation. A consideration of the type of relationship at issue may provide a strong indication of exploitation. Community standards of conduct may also be of some assistance.[84]

This restatement of the doctrine of unconscionability occurs in the context of a suit alleging battery arising out of sexual relations between a doctor and an addicted patient to whom he was providing drugs. In his defence, the doctor argued consent. Mr Justice La Forest used the analogy between unconscionability in contract to support his conclusion that the consent to sexual relations was not legally effective in this case because of the inequality of the parties and the exploitation of that

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sets aside an exemption clause it is recalibrating the entire transaction, in the interests of the weaker party, because the price is set in light of the clause. *But see Ridge Brokers Ltd.* v. *Mosher Limestone* (1990), 100 N.S.R. (2d) 7 (S.C.T.D.) where a challenge to a commercial contract was rejected.

[80] (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 at 259 (B.C.C.A.) [hereinafter *Morrison*].

[81] *Ibid.*

[82] *Bundy*, *supra* note 71.

[83] (1978), 9 B.C.L.R. 166 at 177, 95 D.L.R. (3d) 231 at 241 (C.A.) [hereinafter *Kreutziger*].

[84] [1992] 2 S.C.R. 224 at 256, 92 D.L.R. (4th) 449 at 464.

inequality by the doctor. Both Madame Justice McLachlin and Mr Justice Sopinka disputed the relevance of the doctrine of unconscionability to the issue of consent but neither denied its existence as part of contract law nor challenged Mr Justice La Forest's formulation of that doctrine.

This approach, which requires proof of inequality and exploitation of that inequality by the stronger party, has been followed extensively in the lower courts. Sometimes the argument is successful[85] but often it is not.[86] The courts are clearly reluctant to ride roughshod over contractual arrangements. The courts give priority to policies of certainty and individual responsibility. Madame Justice Wilson summarized these concerns in *Pelech* v. *Pelech*:

> People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration.[87]

In some cases "unconscionability" is treated as a synonym for "unequal bargaining power"[88] although, as defined by Mr Justice La Forest, inequality is only one element of the doctrine. The inequality of bargaining power can result from the ignorance, need or distress of the weaker party and domination, undue pressure or misrepresentation on the part of the stronger party.[89] In other cases, inequality of

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[85] *See Smyth, supra* note 77; *Stephenson* v. *Hilti (Canada) Ltd.* (1989), 63 D.L.R. (4th) 573, 29 C.C.E.L. 80 (N.S.S.C.T.D.) [hereinafter *Stephenson*]; *Nordland* v. *Calvert* (1982), 40 A.R. 286 (Q.B.); *Tweedie* v. *Geib* (1982), 19 SASK. R. 48, 138 D.L.R. (3d) 311 (Q.B.) [hereinafter *Tweedie*]; *Kreutziger, supra* note 83; *Davidson* v. *Three Spruces Realty Ltd.* (1977), 79 D.L.R. (3d) 481, [1977] 6 W.W.R. 460 (B.C.S.C.); *Morrison, supra* note 80. Older cases where the term "unconscionability" is not used include *Hrynyk* v. *Hrynyk* (1931), [1932] 1 D.L.R. 672, [1932] 1 W.W.R. 82 (Man. C.A.); and *Waters* v. *Donnelly* (1884), [1885] 9 O.R. 391 (Ch. D.) [hereinafter *Waters*].

[86] *Bank of Montreal* v. *Featherstone* (1989), 68 O.R. (2d) 541, 58 D.L.R. (4th) 567 (C.A.) [hereinafter *Featherstone*]; *McCormack Estate* v. *Feehan Estate* (1986), 59 NFLD. & P.E.I.R. 215, 178 A.P.R. 215 (P.E.I.S.C.); *Sebastian* v. *Bonitatibus* (1988), 31 C.C.L.I. 80 (Ont. Dist. Ct.) [hereinafter *Sebastian*]; *DeWolfe* v. *Mansour* (1986), 73 N.S.R. (2d) 110, 33 B.L.R. 135 (T.D.); *Chrispen* v. *Topham* (1986), 48 SASK. R. 106, 28 D.L.R. (4th) 754 (Q.B.), *aff'd on other grounds* (1987), 59 SASK. R. 145, 39 D.L.R. (4th) 637 (C.A.) [hereinafter *Chrispen*]; *McArthur* v. *McArthur Estate* (1982), 45 N.B.R. (2d) 10, 118 A.P.R. 10 (Q.B.); *Gillis* v. *McDonald* (1980), 44 N.S.R. (2d) 60, 83 A.P.R. 60 (T.D.); *Lott* v. *Angelucci* (1982), 36 B.C.L.R. 273 (C.A.) [hereinafter *Lott*].

[87] [1987] 1 S.C.R. 801 at 850, 38 D.L.R. (4th) 641 at 676.

[88] *See Ahone* v. *Holloway* (1988), 30 B.C.L.R. (2d) 368 (C.A.) [hereinafter *Ahone*]; *Principal Investments Ltd.* v. *Thiele Estate* (1987), 12 B.C.L.R. (2d) 258, 37 D.L.R. (4th) 398 (C.A.) [hereinafter *Principal Investments*]; *Commerce Leasing Ltd.* v. *Marusiak Bros. Backhoe Services Ltd.* (1985), 60 A.R. 344 (Q.B.) [hereinafter *Commerce Leasing*]; *Chrispen, supra* note 86. This appears to be true in the employment context. *See, e.g., Nardocchio* v. *C.I.B.C.* (1979), 41 N.S.R. (2d) 26 (S.C.T.D.), followed in *Lyonde* v. *Canadian Acceptance Corp.* (1983), 3 C.C.E.L. 220 (Ont. H.C.J.); and *Collins* v. *Kappele, Wright & MacLeod Ltd.* (1983), 3 C.C.E.L. 228 (Ont. Co. Ct.). *But see Wallace* v. *Toronto Dominion Bank* (1983), 41 O.R. (2d) 161, 145 D.L.R. (3d) 431 (C.A.); and *Stacey* v. *Consolidated Foods Corp. of Canada* (1987), 76 N.S.R. (2d) 91 (S.C.).

[89] *See Ahone, ibid.*; *Boisonault* v. *Block Bros. Realty Ltd.* (1987), 47 MAN. R. (2d) 148 (Q.B.); *Principal Investments, ibid.*; *Lott, supra* note 86; *Junkin, supra* note 76; *Black* v. *Wilcox*

bargaining power is closely related to questions of undue influence.[90] Thus, the term "unconscionability" is used to describe contracts between sophisticated business people and less-experienced parties who agree without the benefit of independent advice.[91]

But inequality is not in itself sufficient. There must also be proof of substantial unfairness of the bargain.[92] In turn, while substantial unfairness is required to justify setting aside a bargain, the mere fact of improvidence is not sufficient. Thus, both substantive and procedural unconscionability must be proven in order to convince a court to set aside a contract. In a minority of cases, the agreement is set aside in spite of the absence of factors such as undue influence, misrepresentation or illegitimate bargaining pressure. In these cases, the setting aside of the agreement can only be explained by the substantial unfairness of the bargain.[93]

The doctrine of unconscionability is an established part of the law of contracts. It is applied extensively by the lower courts and has been approved by the Supreme Court of Canada. If one uses the criteria of replicability of the argument and usefulness in planning, the doctrine remains uncertain. The cases turn on their particular facts and it is difficult to generalize guidelines for the application of the doctrine from those facts. The two-step process outlined by Mr Justice La Forest accurately summarizes the case law but his formulation does not include criteria which would enable one to identify unconscionable transactions in subsequent cases. Words such as inequality, improvident and exploitation describe the conclusions which a court must reach in order to justify the application of the doctrine but they do not tell either lawyers or judges how to distinguish binding from unconscionable transactions. The moral framework of the judge often appears to be the determining factor in the decision.[94] Thus, replicability and planning are both undermined.

(1976), 12 O.R. (2d) 759, 70 D.L.R. (3d) 192 (C.A.). The Ontario Court of Appeal has held that the fact that an individual is unemployed at the time of negotiating his or her employment contract is not a ground for holding that there is inequality of bargaining power. There must be oppressive or unconscionable acts. *See Matthewson* v. *Aiton Power Ltd.* (1985), 11 O.A.C. 76, 8 C.C.E.L. 312.

[90] *Commerce Leasing*, *supra* note 88; *Taylor*, *supra* note 76.

[91] *See Smyth*, *supra* note 77; *Doan* v. *Insurance Corp. of B.C.* (1987), 18 B.C.L.R. (2d) 286 (S.C.); *Bertolo* v. *Bank of Montreal* (1986), 57 O.R. (2d) 577, 33 D.L.R. (4th) 610 (C.A.); *Bomek* v. *Bomek* (1982), 24 R.P.R. 176 (Man. Q.B.), *aff'd* [1983] 3 W.W.R. 634, 146 D.L.R. (3d) 139 (C.A.); *Tweedie*, *supra* note 85; *Canadian Kawasaki Motors Ltd.* v. *McKenzie* (1981), 126 D.L.R. (3d) 253 (Ont. Co. Ct.). Nevertheless, there is case law stating that there is no duty to ensure that other parties obtain independent legal advice. *See, e.g.*, *Featherstone*, *supra* note 86; *T.D. Bank* v. *Wong* (1985), 65 B.C.L.R. 243 (C.A.), *leave to appeal refused* (1985), 67 B.C.L.R. xin, (*sub nom. Lim* v. *T.D. Bank*) 64 N.R. 155n (S.C.C.); and the decision of the House of Lords in *National Westminster*, *supra* note 71.

[92] *Eagle Construction Ltd.* v. *Chaytor* (1986), 58 NFLD. & P.E.I.R. 23, 174 A.P.R. 23 (Nfld. S.C.T.D.); *Sebastian*, *supra* note 86; *Hall* v. *Grassie Estate* (1982), 16 MAN. R. (2d) 399 (Q.B.).

[93] *Stephenson*, *supra* note 85; *Tweedie*, *supra* note 85; *Moore* v. *Fed. Bus. Dev. Bank* (1981), 30 NFLD. & P.E.I.R. 91, 84 A.P.R. 91 (P.E.I.S.C.); *Waters*, *supra* note 85.

[94] *Compare, e.g.*, the majority and dissenting judgements in *Smyth*, *supra* note 77 at 72. The dissenting judge argues that the majority are taking into account "Undesirable considerations of a morally subjective nature" rather than engaging in judicial fact-finding but it is obvious that his

However, it is also clear that the courts will not intervene lightly in contractual arrangements and the impact of this case law on the typical commercial exchange has not been great.

3. *Exemption and Limitation Clauses*

Canadian courts have always viewed exemption clauses with suspicion. Many judges accept the argument that there is something wrong with promising to do X and using an obscure[95] contractual term to relieve oneself of liability for breach of the promise.[96] There must be some essential (or fundamental) obligations in every contract, the breach of which gives rise to liability regardless of the terms of the contract.

The courts use different strategies to provide remedies regardless of the terms of the contract. Sometimes the courts prefer to avoid the issue of substantive regulation of contract terms entirely while, in effect, treating the onerous contract term as unconscionable. In these cases legalistic reasoning functions as a decoy which distracts attention from the fact the courts are doing what their own discourse denies that they are doing. There are two approaches to exemption clauses which enable the courts to accomplish this sleight of hand.

First, if the court deems the term unacceptable, the clause can be excluded from the contract. In cases involving unsigned contractual documents including unusual and onerous terms, the courts have long held that the terms are only binding when the party seeking to enforce them has made reasonable efforts to bring them to the attention of the other.[97] In the case of signed documents, however, the signature was viewed as conclusive proof of consent.[98] The courts have, in recent years, reinterpreted the meaning of a signature. Now, especially in cases involving consumers and standard form contracts, the signature is viewed as creating a rebuttable presumption of consent. Proof that the term is unusual or deprives the signing party of a benefit or protection that he would ordinarily expect to receive and that no reasonable efforts were made to bring the unusual term to the attention of the signing party, can result

view of the facts is determined by his own view of commercial morality. This is a curious case because it deals with an appeal from a decision on a preliminary motion decided on the basis of affidavit evidence.

[95] Obscure in two senses: first, because the term is printed in small characters as part of a long and detailed contract so that it is difficult to find and, second, because the clause is drafted in language which is incomprehensible to the ordinary person so that even if the reader finds the clause in the document she is unlikely to understand it.

[96] This view is expressed by Lord Denning in *Karsales (Harrow) Ltd.* v. *Wallis*, [1956] 2 ALL E.R. 866, [1956] 1 W.L.R. 936 (C.A.) [hereinafter *Karsales* cited to ALL E.R.] where he states:

> [I]t is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations.

Ibid. at 868.

[97] *See, e.g., McCutcheon* v. *David MacBrayne Ltd.*, [1964] 1 W.L.R. 125, [1964] 1 ALL. E.R. 430 (H.L.).

[98] *L'Estrange* v. *F. Graucob, Ltd.*, [1934] 2 K.B. 394 (C.A.).

in the enforcement of the contract without the onerous term.[99]

Second, the contract can be interpreted so as to avoid the onerous clause. An exemption clause will be strictly construed. The party relying on the exemption must prove that the particular loss suffered by the other party falls within the scope of the exempting clause. If ambiguous, exemption clauses will be interpreted strictly against the interests of the party seeking to enforce them.[100] The courts will exclude negligence from the ambit of the clause unless express words are used to include it or negligence is the only possible ground for liability arising from a breach of the contract.[101]

Canadian judges have also been willing to supplement these legalistic approaches relying on notice and strict construction with more radical intervention without much reluctance or concern for the niceties of legal doctrine. Thus, the doctrine of fundamental breach has enjoyed considerable success in Canadian courts.[102] When a contracting party is in breach of her or his core obligations, the courts will override

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[99] *Tilden Rent-A-Car Co.* v. *Clendenning* (1978), 18 O.R. (2d) 601, 83 D.L.R. (3d) 400 (C.A.), applied in *Trigg* v. *MI Movers International Transport Services Ltd.* (1991), 4 O.R. (3d) 562, 84 D.L.R. (4th) 504 (C.A.); *Reed Stenhouse Ltd.* v. *Learning* (1990), 87 NFLD. & P.E.I.R. 271 (Nfld. S.C.T.D.); *Hoffman* v. *Sportsman Yachts Inc.* (1990), 47 B.L.R. 101 (Ont. Dist. Ct.); *Household Movers and Shippers Ltd.* v. *Fitzhugh* (1989), 79 NFLD. & P.E.I.R. 171 (Nfld. S.C.T.D.); *Atomic Interprovincial Transport (Eastern) Ltd.* v. *Paul Geiger Trucking Ltd.* (1987), 47 MAN. R. (2d) 42 (Q.B.); *City Motors (Nfld.) Ltd.* v. *Alton* (1987), 64 NFLD. & P.E.I.R. 52 (Nfld. S.C.T.D.); *Reaume* v. *Caisse Populaire Windsor Ltée.* (1987), 25 C.C.L.I. 20 (Ont. H.C.J.); *Royal Garage Ltd.* v. *East Coast Holdings Ltd.* (1983), 41 NFLD. & P.E.I.R. 297 (Nfld. Dist. Ct.); *Tilden Rent-A-Car Co.* v. *Chandra* (1983), 150 D.L.R. (3d) 685 (B.C. Co. Ct.); *Nikkel* v. *Standard Group Ltd.* (1982), 16 MAN. R. (2d) 71 (Q.B.), and cited with approval by the Supreme Court of Canada in *H.W. Liebig & Company* v. *Leading Investments Ltd.*, [1986] 1 S.C.R. 70, 25 D.L.R. (4th) 161. There has been academic criticism of this decision but the courts do not seem to be persuaded that the rule as formulated is without merit. *See also Toronto Blue Jays Baseball Club* v. *John Doe* (1992), 9 O.R. (3d) 622 (Gen. Div.), applying the reasonable notice requirement to conditions on ticket stipulating forfeiture of ticket in case of resale at a premium.

[100] *See, e.g., St. Lawrence Cement Inc.* v. *Wakeham & Sons Ltd.* (1992), 8 O.R. (3d) 340 (Gen. Div.); *Monte Arbre Farms* v. *Inter-Traffic (1983) Ltd.* (1989), 64 D.L.R. (4th) 533 (Ont. C.A.); *Westcoast Transmission Co.* v. *Cullen Detroit Diesel* (1990), 70 D.L.R. (4th) 503 (B.C.C.A.); *Cathcart Inspection Services Ltd.* v. *Purolator Courier Ltd.* (1982), 39 O.R. (2d) 656, 139 D.L.R. (3d) 371 (Ont. C.A.); *Chabot* v. *Ford Motor Co. of Canada* (1982), 39 O.R. (2d) 162, 138 D.L.R. (3d) 417 (Ont. H.C.J.); *Borg-Wagner Acceptance Corp.* v. *Wyonzek*, [1981] 4 W.W.R. 193, 122 D.L.R. (3d) 737 (Sask. Q.B.); *Aita* v. *Silverstone Towers Ltd.* (1978), 19 O.R. (2d) 681, 86 D.L.R. (3d) 439 (C.A.); *Falcon Lumber Ltd.* v. *Canada Wood Specialty Co.* (1978), 23 O.R. (2d) 345, 95 D.L.R. (3d) 503 (H.C.J.); *B.G. Linton Construction Ltd.* v. *C.N.R. Co.* (1974), [1975] 2 S.C.R. 678, 49 D.L.R. (3d) 548; *Canso Chemicals Ltd.* v. *Canadian Westinghouse Co.* (1974), 54 D.L.R. (3d) 517 (N.S. S.C.A.D.).

[101] *See, e.g., Photo Production Ltd.* v. *Securicor Transport Ltd.*, [1980] 1 A.C. 827, [1980] 1 ALL E.R. 556 (H.L.) [hereinafter *Photo Production*]; *Hollier* v. *Rambler Motors (A.M.C.) Ltd.* (1971), [1972] 2 Q.B. 71, [1972] 1 ALL E.R. 399 (C.A.); *Canada Steamship Lines* v. *R.*, [1952] 5 W.W.R. 609, [1952] 1 ALL E.R. 305 (P.C.); *Olley* v. *Marlborough Court Ltd.* (1948), [1949] 1 K.B. 532, [1949] 1 ALL E.R. 127 (C.A.); *Rutter* v. *Palmer*, [1922] 2 K.B. 87, [1922] ALL E.R. Rep. 367 (C.A.).

[102] *See, e.g., Heffron* v. *Imperial Parking Co.* (1974), 3 O.R. (2d) 722 at 731, 46 D.L.R. (3d) 642 at 651 (C.A.) where Estey J.A. stated:

the exempting clause in order to grant a remedy regardless of the wording of the clause. The setting aside of the contract can only be justified by a theory which holds that an agreement must impose some essential obligations which cannot be excluded without destroying the agreement itself. The doctrine of fundamental breach can be described as a judicial minimum standards law out of which the parties cannot contract. The hostility of the House of Lords[103] to the doctrine of fundamental breach did little to stem its strong influence on the Canadian common law of contract.

In England, the conflict between those who wanted to regulate contractual terms and those who felt that the role of the courts should be limited to the interpretation of the contract was resolved by legislative intervention.[104] The adoption of the *Unfair Contract Terms Act 1977*[105] altered the basis for judicial intervention, providing statutory authority for the examination of the reasonableness of exemption clauses where they were not prohibited. In light of this legislative intervention, the House of Lords was able to clearly establish that the doctrine of fundamental breach was no longer good law (if it ever was).[106] It was, however, forced to admit that the legislation gave the courts the power to regulate the reasonableness of contractual terms that Lord Denning had been claiming.[107] Since the adoption of the *UCTA*, the evolution of English contract law has diverged from that of its Canadian counterpart.

There is no equivalent legislation granting the courts clear authority to examine the reasonableness of contractual terms in Canadian common law jurisdictions.[108] Thus, Canadian courts have been torn between their traditional deference to the authority of the British courts and their desire to provide adequate protection against

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> Whether this result [the striking down of the exemption clause] is obtained by applying the doctrine of fundamental breach as a matter of contract construction or as an independent principle of law, it is clear that the phenomenon is alive and prospering in the law of this Province.

See also R.G. McLean Ltd. v. *Canadian Vickers Ltd.*, [1969] 2 O.R. 249, 5 D.L.R. (3d) 100 (H.C.), *rev'd* (1970), [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.); *Rose* v. *Borisko Brothers Ltd.* (1981), 33 O.R. (2d) 685, 125 D.L.R. (3d) 671 (H.C.), *aff'd* (1983), 41 O.R. (2d) 606n, 147 D.L.R. (3d) 191n.

[103] *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* (1966), [1967] 1 A.C. 361, [1966] 2 W.L.R. 944 (H.L.); approved by the Supreme Court of Canada in *B.G. Linton Construction Ltd.* v. *Canadian National Railway* (1974), [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, *aff'g* [1972] 3 W.W.R. 321, 24 D.L.R. (3d) 410 (Alta. C.A.). *See also Beaufort Realties (1964) Inc.* v. *Chomedy Aluminum Co.*, [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193 [hereinafter *Beaufort Realties*]; *Hayward* v. *Mellick* (1984), 45 O.R. (2d) 110, 5 D.L.R. (4th) 740 (C.A.).

[104] This does not mean that this legislation is without critics. *See, e.g.*, Beale, *supra* note 4 and Ogilvie, *supra* note 4.

[105] *Unfair Contract Terms Act, 1977*, (U.K.), 1977, c. 50 [hereinafter *UCTA*]. *See also* the discussion at *infra* note 130.

[106] *Photo Production, supra* note 101; *Ailsa Craig Fishing Co.* v. *Malvern Fishing Co.* (1981), [1983] 1 All E.R. 101, [1983] 1 W.L.R. 964 (H.L.).

[107] *See George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.*, [1983] 2 A.C. 803, [1983] 2 All E.R. 737 (H.L.).

[108] The New Brunswick legislation, *supra* note 56, is limited to exemption clauses in consumer contracts.

unfair contracts. Because of this tension, the Canadian courts have reacted to the decisions of the House of Lords with considerable ambiguity.

The Supreme Court of Canada specifically approved the reasoning of the House of Lords in *Beaufort Realties (1964) Inc. and Belcourt Construction (Ottawa) Ltd.* v. *Chomedey Aluminium Co. Ltd.*[109] but, in that case, the court did precisely the opposite. That is, it treated the clause in the contract as inapplicable in spite of its clear wording because of an intention imputed to the parties by the court. It is difficult to reconcile the result in the case with the reasoning of the House of Lords.[110]

In subsequent decisions, the Supreme Court has continued to approve the decision in *Photo Production*, but it has suggested that it will examine the reasonableness of both exemption clauses and entire contracts in the appropriate circumstances. Thus, in *Dyck* v. *Manitoba Snowmobile Assoc.*, Chief Justice Dickson stated:

> Nor does the relationship of Dyck and the Association fall within the class of cases, notable among which are contracts made on dissolution of marriage, where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other. The appellant freely joined and participated in activities organized by an association. The Association neither exercised pressure on the appellant nor unfairly took advantage of social or economic pressures on him to get him to participate in its activities. As already mentioned, the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers. It follows from this that there are no grounds of public policy on which the waiver clause should be struck down, an issue also raised on behalf of the appellant.[111]

In *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*[112] Chief Justice Dickson reformulated the test for the validity of exemption clauses using the terminology of unconscionability.[113] With the concurrence of Mr Justice La Forest, he stated:

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[109] *Beaufort Realties*, *supra* note 103.

[110] Subsequent cases citing this decision as authority for the proposition that the effect of the clause is a matter of interpretation include *Kordas* v. *Stokes Seeds Ltd.* (1992), 11 O.R. (3d) 129, 96 D.L.R. (4th) 129 (C.A.) [hereinafter *Kordas*]; *Cathcart Inspection Services Ltd.* v. *Purolator Courier Ltd.* (1981), [1982] 34 O.R. (2d) 187, 128 D.L.R. (3d) 227 (H.C.), *aff'd* (1982), 39 O.R. (2d) 656, 139 D.L.R. (3d) 371 (C.A.); *Thomas Equipment* v. *Sperry Rand Canada* (1981), 34 N.B.R. (2d) 663, 85 A.P.R. 663 (Q.B.), *aff'd* (1982), 40 N.B.R. (2d) 271, 135 D.L.R. (3d) 197 (C.A.); *Peter Cortesis Jeweller Ltd.* v. *Purolator Courier Ltd.* (1981), 35 O.R. (2d) 39 (Co. Ct.).

[111] [1985] 1 S.C.R. 589 at 593, [1985] 4 W.W.R. 319 at 322-23.

[112] [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385 [hereinafter *Hunter Engineering* cited to S.C.R.].

[113] For useful discussions of this case see R. Flannigan, *Hunter Engineering: The Judicial Regulation of Exculpatory Clauses* (1990) 69 CAN. BAR REV. 514; and M.H. Ogilvie, *Fundamental Breach Excluded But Not Extinguished: Hunter Engineering v. Syncrude Canada* (1990) 17 CAN. BUS. L.J. 75.

> In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability....There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness....Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not blindly enforce harsh or unconscionable bargains and, as Professor Waddams has argued, the doctrine of "fundamental breach" may best be understood as but one manifestation of a general underlying principle which explains judicial intervention in a variety of contractual settings. Explicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to be agreed to by the parties.[114]

The Chief Justice concluded:

> I have no doubt that unconscionability is not an issue in this case. Both Allis-Chambers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. There is no suggestion that Syncrude was pressured in any way to agree to terms to which it did not wish to assent. I am therefore of the view that the parties should be held to the terms of their bargain....[115]

In the same decision, Madame Justice Wilson, with the support of Madame Justice L'Heureux-Dubé, contested the merits of a doctrine of unconscionability which, in her opinion, could create considerable uncertainty in commercial affairs. She held that the doctrine of fundamental breach had not been rejected in Canadian law.[116] She suggested that this doctrine is a better, more effective tool for dealing with exclusion clauses.[117] The issue in any particular case is whether, in the context of the fundamental breach depriving the innocent party of substantially the whole benefit of the contract,[118] it is fair and reasonable that the breaching party have the benefit of the exemption clause.[119] The question of fairness and reasonableness is one of public policy to be decided apart from the interests of the parties by balancing contractual freedom and "the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves".[120]

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[114] *Supra* note 112 at 462.

[115] *Ibid.* at 464.

[116] *Ibid.* at 506.

[117] *Ibid.* at 513-17.

[118] *Ibid.* at 501. Madame Justice Wilson adopts the expression Lord Diplock employed in his judgment in *Photo Production*, *supra* note 101.

[119] *Hunter Engineering*, *ibid.* at 510.

[120] *Ibid.*

While there is no majority point of view in the case of *Hunter Engineering*[121] on the issue of exemption clauses, both judges who wrote opinions shared the view that the validity of such clauses does not depend solely on consent and interpretation. Thus, the Supreme Court has not limited the judicial role to the task of strict construction of exemption clauses. The doctrine of fundamental breach is well-established in Canadian jurisprudence and the Supreme Court has not definitively rejected it. In addition, the Supreme Court of Canada has given indications that it is willing to innovate in this area through the creation of a doctrine of reasonability.

These declarations are, of course, *obiter* and the doctrine has not yet been applied at the highest level. Lower courts have, however, interpreted the decision in *Hunter Engineering* as supporting a doctrine of unconscionability even in commercial contexts.[122] Parties also continue to argue the doctrine of fundamental breach with varying degrees of success.[123] Thus, the state of the law in Canada remains uncertain.

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[121] Mr Justice McIntyre concurred in the conclusion of Madame Justice Wilson on the contractual issue but he refused to consider the merits of the doctrine of fundamental breach. He concurred with the Chief Justice on the trust issue. *See ibid.* at 481.

[122] *See, e.g., Atlas Supply Co. of Canada Ltd.* v. *Yarmouth Equipment Ltd.* (1991), 103 N.S.R. (2d) 1, 37 C.P.R. (3d) 38 (C.A.), *leave to appeal to S.C.C. granted* (1991), 108 N.S.R. (2d) 270n, 137 N.R. 78n, *notice of discontinuance of appeal filed* April 1, 1992, [1991] S.C.C.A. No. 256. It is unfortunate that this case will not be heard by the Supreme Court of Canada because it involves a commercial contract. The Court of Appeal set aside the "whole contract" clause of the franchise agreement on the grounds of unconscionability because the franchiser provided misleading information about market studies to the franchisee, hence causing him to think the franchise was viable. The franchisee was an experienced business person but he had no retail experience and he reasonably relied on the information provided by the other party, a large corporation. In this case the clause itself is not unconscionable, but the conduct of the franchiser prior to the contract was. Other cases include *Cudmore Estates* v. *Deep Three Enterprises*, [1991] O.J. No 1453 (QL) (exemption clause unconscionable); *Knowles* v. *Whistler Mountain Ski Corp.*, [1991] B.C.J. No 61 (QL) (exemption upheld); *Waldron* v. *Royal Bank* (1989), 73 C.B.R. (N.S.) 99 (B.C.S.C.) (clause struck down on grounds of unconscionability), *rev'd* (1991), 4 C.B.R. (3d) 53, 53 B.C.L.R. (2d) 294 (C.A.); *Williamson Bros. Construction Ltd.* v. *British Columbia* (1990), 41 C.L.R. 192 (B.C.S.C.) [hereinafter *Williamson Bros.*] (clause unconscionable); *Gateway Realty Ltd.* v. *Arton Holdings Ltd. (No. 2)* (1991), 106 N.S.R. (2d) 163, 288 A.P.R. 180 (T.D.), *aff'd (sub nom. Gateway Realty Ltd.* v. *Arton Holdings Ltd. (No. 3))* (1992), 112 N.S.R. (2d) 180, 307 A.P.R. 180 (C.A.); *D. Thomas Furs Ltd.* v. *Wackenhut of Canada Ltd.*, [1989] O.J. No 1758 (QL) (exemption clause fair and reasonable); *Catre Industries Ltd.* v. *Alberta* (1989), 36 C.L.R. 169, 63 D.L.R. (4th) 74 (C.A.) (exemption clause upheld), *rev'g* (1987), 97 A.C. 1 (Q.B.), *leave to appeal to S.C.C. refused* (1990), 105 A.R. 209n, 108 N.R. 170n; *Graham Construction and Engineering (1985) Ltd.* v. *Alberta* (1989), 101 A.R. 209, 37 C.L.R. 125 (Q.B.) (clause upheld).

[123] *See, e.g., Kordas, supra* note 110 (argument rejected); *M & M Investments Ltd.* v. *Edwin Investments Ltd.* (1991), 60 B.C.L.R. (2d) 181, 4 B.C.A.C. 226 (argument accepted); *Idriss Family Enterprises* v. *Hasty Market Inc.*, [1991] O.J. No 2204 (QL) (argument rejected); *Willow Tree Holdings Ltd.* v. *Sims* (1991), 100 N.S.R. (2d) 216, 15 R.P.R. (2d) 277 (T.D.) (breach of several minor clauses deemed fundamental); *Magnetic Marketing Ltd.* v. *Print Three Franchising Corp.* (1991), [1992] 4 B.L.R. (2d) 8, [1992] 38 C.P.R. (3d) 540 (S.C.) (breach of several minor clauses not deemed fundamental); *Williamson Bros., ibid.* (fundamental breach nullifies exemption clause); *Lalonde* v. *Coleman* (1990), 67 MAN. R. (2d) 187 (Q.B.) (contract void for fundamental

The Ontario Law Reform Commission analyzed this situation in its REPORT ON AMENDMENT OF THE LAW OF CONTRACT.[124] The report proposed the adoption of legislation in Ontario modelled on the English law. The legislation would authorize the courts to intervene, either at the request of the parties or on their own initiative, in order to determine the reasonableness of entire contracts or contractual terms. The legislation would include a list of criteria which would include factors such as the relative bargaining power of the parties, the state of the market, the ability of the weaker party to defend his or her own interests, the availability of choices in the marketplace and the equivalence of the benefits exchanged. The courts would have broad remedial powers to declare all or part of the contract void, to amend the contract, or to enforce it to the extent required by justice.

This examination of the law in Canada shows that the courts have been interventionist in their approach to the regulation of contracts. However, the basis of their intervention is not clear. In *dicta*, the Supreme Court of Canada has recognized the doctrine of unconscionability but the Court has not yet applied it and its scope remains to be defined. The legislatures have extensively regulated specific types of contract, particularly consumer transactions, but often the legislation leaves gaps in the protection provided. There is considerable pressure on the courts to fill the gaps in existing common and statutory law. Finally, there is one proposal for the adoption of legislation that would clarify the state of the law.

Given this situation, it is not unreasonable to turn to legal theory in order to decide the merits of this proposal or to formulate other possible solutions. Before doing so, a brief glance at the evolving approaches to unconscionability of other jurisdictions shows the extent to which Canadian ambivalence has prevented our legal system from either following experiments elsewhere or decisively rejecting the need for such regulation.

4. *The Evolution of Contract Law in Other Jurisdictions.*

Legislation dealing either with unconscionability in general or, more specifically, with disclaimer clauses has been widely adopted throughout the world. The legislative measures differ from one jurisdiction to another. In the United States, section 2-302 of the *Uniform Commercial Code*[125] is in force in almost all states. It grants the courts a broad discretion to regulate unconscionable contracts. There is no definition of the term "unconscionable" in this section. The section does not

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breach and for statutory reasons); *Wesbild Enterprises Ltd.* v. *Pacific Stationers Ltd.* (1990), 14 R.P.R. (2d) 25, 52 B.C.L.R. (2d) 317 (C.A.) (breach of lease was fundamental and justified vacating the premises); *Air Transit Ltd.* v. *Innotech Aviation of Nfld. Ltd.* (1989), [1990] 78 NFLD. & P.E.I.R. 24 (Nfld. T.D.) (claim based on fundamental breach rejected).

[124] (Toronto: Ministry of the Attorney General, 1987).

[125] (St. Paul, Minn.: West Publishing, 1977) [hereinafter *UCC*]. Section 2-302 of the *UCC* reads:

> This section provides as follows:
>
> (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

include a list of criteria to be used by the courts although the court must allow the parties to present evidence concerning the commercial setting. The RESTATEMENT (SECOND) OF CONTRACT[126] includes a similar disposition. These sections have been used extensively in litigation and the courts are slowly developing criteria for the exercise of their discretion.[127] Not surprisingly, the American courts profess reluctance to upset deals which result from a free play of market forces.[128] But the case law indicates that they will indeed intervene.[129]

The English Parliament adopted the *UCTA*.[130] This legislation does not use the term "unconscionable". This legislation is a complex code. It prohibits disclaimers

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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.

[126] (St. Paul, Minn.: American Law Institute Publishers, 1981). Section 208 of the RESTATEMENT provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

[127] *See* Mallor, *supra* note 4.

[128] *See, e.g., McEntire, supra* note 78; *Bolin Farms, supra* note 78 (dealing with contracts for the purchase of cotton from farmers, which were challenged after significant price increases); *Bethlehem Steel, supra* note 78. *See also* R. Hasson, *Unconscionability in Contract Law and in the New Sales Act — Confessions of a Doubting Thomas* (1979-80) 4 CAN. BUS. L.J. 383.

[129] The case law is too large to discuss in any detail. *See generally* Eisenberg, *supra* note 3, and Mellor, *supra* note 4 for two overviews of this jurisprudence.

[130] This law makes a distinction between consumer contracts and commercial contracts. In s. 6(2) the law prohibits the disclaiming of the obligations imposed on the seller by ss. 13, 14 and 15 of the *Sale of Goods Act, 1893* (U.K.), 1893, c. 71, and ss. 9, 10 and 11 of the *Supply of Goods (Implied Terms) Act, 1973* (U.K.), 1973, c. 13, in the context of consumer sales. In ss. 6(3), 7(3) and 7(4) which apply to commercial contracts, the legislation uses the terminology of that which is just and reasonable. Schedule 2 of the law provides a detailed list of the criteria to be used in deciding whether or not a contractual term is reasonable:

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21 are any of the following which appear to be relevant —

(a)the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b)whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c)whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

(d)where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

of liability for negligence resulting in personal injury or death. It also forbids the use of exclusion clauses in consumer contracts. In the commercial context, disclaimers are allowed but they must be "reasonable". Rather than relying on the courts to develop criteria for the exercise of the broad power to regulate contractual terms, the legislation provides a list of such criteria. The English courts have applied these sections in a number of cases. It is fair to say that the English courts have demonstrated similar reluctance to substitute their judgment of reasonableness for that of the parties in the commercial setting.[131] The Australian state of New South Wales has adopted similar legislation.[132]

Civil law jurisdictions have had to address this issue as well, even though civil law does not traditionally include a general doctrine of unconscionability. As in common law jurisdictions, the civil law of obligations polices the market through doctrines of fraud, misrepresentation and other rules intended to ensure that consent is voluntary and not coerced. The doctrines of the "contrat léonin" and lesion allow the courts to examine the capacity of the contracting parties.[133] As well, civil law

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(e)whether the goods were manufactured, processed or adapted to the special order of the customer.

[131] For a discussion of this legislation *see* P.S. Atiyah, AN INTRODUCTION TO THE LAW OF CONTRACT, 4th ed. (Oxford: Clarendon Press, 1989) at 322-31.

[132] *Contracts Review Act, 1980*, N.S.W., 1980, No. 16. Section 9 includes a list of criteria which the court must take into account in determining the reasonableness of the contract or contract term. For a discussion of this legislation *see* N. Chin, *Unconscionable Contracts in Anglo-Australian Law* (1985) 16 WESTERN AUST. L. REV. 162 and S.R. Enman, *Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law* (1987) 16 ANGLO-AM. L. REV. 191.

[133] *See* J. Ghestin, TRAITÉ DE DROIT CIVIL, TOME II: LES OBLIGATIONS [.] LE CONTRAT, 2d ed. (Paris: L.G.D.J., 1989) paragraphs 540 to 578 at pages 621 to 658 and paragraphs 587 to 628 at pages 670 to 740 for a general discussion of the civil law approach to these questions as well as a discussion of French legislation dealing with onerous contractual terms especially in the consumer context. *See* J-L Beaudouin, LES OBLIGATIONS, 3d ed. (Cowansville: Les éditions Yvon Blais inc., 1989) for a discussion of the civil law of Québec. He discusses traditional contract defenses such as fraud and duress at para. 154 to 186. He also traces the evolution of Québec law away from the traditional concept of lesion which applied only to minors and adults lacking capacity. *See infra* note 110. Articles 1405 to 1408 of the revised Civil Code of Québec (Cowansville: Les éditions Yvon Blais inc., 1992) deal with the doctrine of lesion. Article 1405 specifies that:

> Except in cases expressly provided by law, lesion vitiates consent only in respect of minors and persons of full age under protective supervision.

There are exceptions to the Civil Law rule that the doctrine of lesion applies in cases involving incapacity. The *Chilean Civil Code* (Edicion Oficial, Editorial Juridica de Chile, 1964) uses the concept of "lesion enorme" in Articles 1888 to 1896. They read as follows:

> Article 1888:El contrato de compraventa podra rescindirse por lesion enorme.
>
> [The contract of sale may be rescinded for reasons of major lesion.]
>
> Article 1889:El vendedor sufre lesion enorme, cuando el precio que recibe es inferior a la mitad del justo precio de la cosa que vende; y el comprador a su vez sufre lesion enorme, cuando el justo precio de la cosa que compra es inferior a la mitad del precio que paga por elle.
>
> El justo precio se refiere al tiempo del contrato.
>
> [The seller suffers major lesion when the price received is less than half of the just

jurisdictions have legislated extensively in this area, especially regarding consumer protection.[134] The reformed Québec *Civil Code* contains provisions which protect both the consumer and a party to an adhesion or standard form contract from abusive clauses.[135] These new sections may apply to many commercial contracts given the wide-spread use of adhesion contracts.

In both Germany and Israel, legislators have adopted a regulatory approach to the problem of standard form contracts. The laws in both countries create procedures whereby standard form contracts can be approved prior to their use. Thus, the issue of unfairness can be decided without waiting for a problem to arise.[136]

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price of the object sold; the buyer suffers major lesion when the just price is less than half of the price paid for the object.

The just price is determined at the date of the contract.]

(Translation by the author with the help of Ms. Ofelia Mesa.)

Similar provisions are found in articles 1946 to 1958 of the *Colombian Civil Code* (Bogota: Editorial Temis Libreria, 1983) and in arts. 1855 to 1863 of the *Civil Code of Ecuador* (Quito: Corporacion de estudios y publicaciones, 1990).

[134] *See, e.g.*, the *Loi sur la protection du consommateur*, R.S.Q. 1985, c. P-40. Mr Justice Beaudouin says of this law:

> La seconde loi sur la protection du consommateur adoptée le 22 décembre 1978, va encore plus loin en permettant au consommateur de se plaindre du contrat disproportionné, le déséquilibre dans les prestations faisant présumer son exploitation par le commerçant.

Ibid. at p. 147. For a discussion of the proposed reform of the Québec *Civil Code* which will integrate consumer protection into the provisions governing contractual obligations *see* C. Masse, *L'Avant-projet de loi et la protection des consommateurs* (1989) 30 C. DE D. 827.

[135] The revised Civil Code of Québec includes articles which provide special protection to the consumer and to parties to contracts of adhesion. This latter category potentially includes the signatories of most commercial contracts:

> Article 1435:An external clause referred to in a contract is binding on the parties.
>
> In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.
>
> Article 1436:In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party.
>
> Article 1437:An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.
>
> An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

This last article echoes the common law doctrine of fundamental breach in defining an abusive clause with reference to the fundamental obligations and a change in the nature of the contract.

[136] For discussions of the regulatory approach to the problem of unconscionability in the context of standard form contracts *see* A.L. Diamond, *The Israeli Standard Contracts Act* (1965) 14 I.C.L.Q. 1410; K.F. Berg, *The Israeli Standard Contracts Law 1964: Judicial Controls of Standard Form Contracts* (1979) 28 I.C.L.Q. 560; O. Sandrock, *The Standard Terms Act 1976*

III. UNCONSCIONABILITY AND LARGE-SCALE FRAMEWORKS

In this part of the article I will examine the theoretical frameworks underlying a sample of the analyses of the doctrine of unconscionability. In discussing each argument I will not attempt a complete critique. Such a project would be far too ambitious for the scope of this article. Rather, I will do three things: provide a description of a coherent version of the argument presented; show that the coherence depends on prior acceptance of the argument's premises; and highlight certain difficulties that would be encountered if the judicial system adopted the theoretical framework to the exclusion of the competing theories. The difficulties support the view that the theory alone is unlikely to provide, on its own, a satisfactory framework for legal decision-making because, even if the premises of the argument are accepted, application of the theory is fraught with problems. Consistent with the starting point of my analysis, I will not claim that the arguments discussed are wrong. Nor will I propose an alternative theory which would provide the "right answer".

There is some risk that, in summarizing arguments that have been developed at considerable length, one will oversimplify or attribute views to authors which they do not hold. Such is not my intention but the best of intentions are often insufficient. If any misattribution occurs, the authors will undoubtedly point it out. What is important, in my view, is to understand the coherence of each position.

A. *Classical Legal Theory and Unconscionability*

Classical contract law purports to be positivist.[137] When arguing that there is no doctrine of unconscionability, the authors claim to describe the current state of the law. In the common law, the courts formulate the rules on the basis of a few fundamental principles. These principles are individual freedom and individual responsibility. Positive law consists of those rules applied by the courts. To know the positive law it is necessary to read the judgments. Obviously, some judgments can come into conflict but the hierarchy of legal institutions determines the value of any particular judgment as a precedent. The courts cannot innovate. If the rules result in an injustice, it is the responsibility of the legislator to correct the injustice through legislation.[138]

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of West Germany (1978) 26 AM J. COMP. LAW 551 and S. Deutch, *Controlling Standard Contracts — The Israeli Version* (1985) 30 McGILL L. J. 458.

[137] The positivist tradition continues to dominate in England. *See* P. Goodrich, LEGAL DISCOURSE (London: Macmillan, 1987) at 32-62 and P.S. Atiyah & R. Summers, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW, (Oxford: Clarendon Press, 1987) at 1-35 & 240-66. *See also* Lucy, *supra* note 67 at 138, where he argues that a legal theory is valid only to the extent that it explains the rules actually applied by the courts.

[138] This is the view taken by the House of Lords in cases such as *Suisse Atlantique*, *supra* note 103, and *Photo-Production*, *supra* note 101, in which it held that the common law of contract does not authorize the courts to do anything but read the contract and give effect to the intentions of the parties. Any reform of the law to allow the regulation of the substance of the contract must come from the legislature. *See also National Westminster*, *supra* note 71, where the court rejected Lord Denning's doctrine of unequal bargaining power outlined in *Bundy*, *supra* note 71.

The classical theory does not resolve the issue of whether existing contract law would be improved through the creation of a doctrine of unconscionability. It argues solely that the doctrine does not exist in the common law and that the courts cannot create such a doctrine. There is nothing in any purely positivistic account of the existing law which prevents the legislator from taking such a measure. In a parliamentary system the legislator must act within the bounds of the constitution, but the substance of legislation adopted according to established procedures is up to the legislator. Thus, the classical analysis of the issue of unfairness in exchange, to the extent that it purports to be purely positivist, has nothing to say about the merits of a doctrine of unconscionability, a political issue which must be resolved by the legislator.

Nonetheless, classical theory influences the debate about unconscionability. Certain authors argue that both the courts and the legislators should reject the proposed doctrine because it is difficult if not impossible to describe *a priori* an unconscionable contract with any degree of certainty.[139] This argument has as its premise the view that law is, and must be, made up of rules which the courts apply without interpretation. For example, Professor Vaver states that the controversy concerning unconscionability has its roots in the fact that the concept is not "self-defining".[140] Thus, the doctrine of unconscionability should be rejected because it lacks one of the essential characteristics of a legal rule.[141] This argument presupposes, first, that there are legal rules which are self-defining and, second, that this characteristic is essential to any legal rule.

This argument uses the formalist ideal as a criterion of substantive law. Hence, the argument leaves the realm of positivist description. The form dictates the substance. It is difficult to imagine a rule formulated in terms so clear and precise that no interpretation is possible[142] and the role of the court is limited to its application

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[139] The problem of the indeterminacy of the concept of unconscionability is a theme which recurs continually in the literature. *See, e.g.*, the articles by Leff, *supra* note 4, by Vaver, *supra* note 4, and by Hasson, *supra* note 128.

[140] *See Loose Can(n)on*, *supra* note 4 at 40-41 where the author states:

> An unconscionable contract or term should not be enforced. The sentence runs trippingly off the tongue. But few other propositions have so spurred writers on the law of contracts either to rapturous approval or vehement denunciation. Some remain profoundly sceptical.
>
> The reason why such a statement attracts this range of opinion is that it is not self-defining.

Professor Vaver uses other arguments against the doctrine of unconscionability so his critique is not limited to a purely formalist argument but, nonetheless, it is important to analyze the possible meaning of his assertion.

[141] Otherwise, this statement would merely be a description of the essential indeterminacy and ambiguity of all legal rules and would provide no insight into the controversy surrounding this particular doctrine.

[142] Professor Leff observes that the apparent clarity of the rules governing contract formation is illusory and quotes a remark of the American poet Robert Frost:

> Robert Frost once remarked (at a 'saying' of his poetry): "e equals mc squared; what's so hard about that? Of course, what e, m, and c are is harder."

Unconscionability and the Code, *supra* note 4 at 486.

by a syllogistic logic of mathematical precision. There are obviously cases in which there is no dispute and the application of the rules appears self-evident, but this does not mean that the rules are self-defining. The rules which govern the formation of the contractual relationship are perhaps the closest to such an ideal[143] but even they cannot be applied without interpretation.

A statute could perhaps conform to this model. Laws are drafted with enormous care. The application of a statutory provision which prohibits rather than regulates is relatively simple. However, there can be no statutory text which excludes all interpretation. Even in the case of the clearest piece of legislation, there is always the issue of the relevance of the law to the case before the courts.

This ideal of the legal text which is perfectly autonomous of the institution which must apply it is difficult to defend today because we are increasingly conscious of the ambiguities of language.[144] Thus, the argument that rules must be self-defining is seldom explicit in contemporary analysis. However, to the extent that authors assume that unambiguous rules can be applied without any interpretation the influence of classical formalism is still felt.

B. *Arguments Supporting Unconscionability*

1. *The Standard Justification*

The arguments used to support the doctrine of unconscionability do not share the premises of classical theory. They are grounded in the critique of formalism by the American Legal Realists.[145] While it is wrong to treat the realists as adhering to a single set of beliefs, they shared the view that the classical view of law as autonomous, formal and abstract is not an accurate description of the actual

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[143] The "perhaps" is inserted here because even these rules pose important problems of interpretation especially in cases where an issue comes before the courts for the first time. The issue of the moment at which the contract is concluded in a self-service store is controversial. *See, e.g., Phamaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.* (1951), [1952] 2 Q.B. 795, [1952] 2 ALL E.R. 456, *aff'd* [1953] 1 Q.B. 401 (C.A.); *Regina* v. *Dawood* (1976), 27 C.C.C. (2d) 300, [1976] 1 W.W.R. 262 (Alta. C.A.). Many authors argue that the consideration requirement is a quasi-religious mystery. *See* P.S. Atiyah, CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT (Canberra: Australian National University Press, 1971); J. Swan, *Consideration and the Reasons For Enforcing Contracts* (1976) 15 U.W.O.L. REV. 83 and B.J. Reiter, *Courts, Consideration and Common Sense* (1977) 27 U.T.L.J. 439.

[144] *See* Goodrich, *supra* note 137 and J.B. White, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (Chicago: University of Chicago Press, 1990), for two discussions of language and the relevance of linguistics to law.

[145] Much has been written about legal realism. *See* Minow, *supra* note 18 at 279-83 for a brief summary. *See also* Atiyah & Summers, *supra* note 137 at 251-57; J.W. Singer, *Legal Realism Now: Review Essay of Laura Kelman*, Legal realism at Yale: 1927 — 1960 by Laura Kalman (1988) 76 CAL. L. REV. 467; and J.H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience* (1979) 28 BUFFALO L. REV. 459 and *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore* (1980) 29 BUFFALO L. REV. 195. For more detailed discussions, *see* L. Kelman, LEGAL REALISM AT YALE, 1927-1960 (Chapel Hill: University of North Carolina Press, 1986) and W. Twining, KARL LLEWELLYN AND THE REALIST MOVEMENT (London: Weidenfeld and Nicholson, 1973).

functioning of the courts and legal system. They aimed to demonstrate that law is actually an instrument of social engineering to be judged on the basis of the effects of the rules and doctrines applied in the context of actual cases.[146]

According to this view of law, it is impossible to distinguish sharply between the role of the courts and the role of the legislator. The rules and doctrines created and applied by the courts are as open to controversy and critique as those adopted by the legislature. It is essential to evaluate the pros and cons of each and every rule in light of the socio-economic policy which is its underpinning. If a rule is outdated because the policy is no longer valid, it should be modified. Thus, court-made rules are as political as legislated rules. So the courts, as well as the legislators, have the duty to ensure that law reflects contemporary conditions.

The Realists paid considerable attention to contract law.[147] According to their analysis, contract law is not a neutral instrument of the will of the parties. A decision by a court to enforce an agreement gives to one of the contracting parties coercive power. In the case in which no agreement is found, one party can refuse to execute the promised performance or force the other party to renegotiate the unenforceable agreement. In the case of an enforceable agreement, one party can now require the other, who no longer wants to perform, to do that which he or she does not wish to do or pay the money equivalent of the promised performance. A contract implies the absence of freedom as much as its presence. In choosing which agreements will be

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[146] Karl Llewellyn summarizes the views of the realists as follows:

> They want the law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles — not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life. This is a question in first instance of fact: what does law *do*, to people, or for people? In the second instance, it is a question of ends: what *ought* law to do to people, or for them? But there is no reaching a judgment as to whether any specific part of present law does what it ought, until you can first answer what it is doing now. To see this, and to be ignorant of the answer, is to start fermenting, is to start trying to find out.

Some Realism About Realism — Responding to Dean Pound (1931) 44 HARV. L. REV. 1222 at 1223.

[147] The influence of Karl Llewellyn on the evolution of contract and commercial law was enormous. *See* Twining, *supra* note 145. Articles which address contract law issues include K. Llewellyn, *A Realistic Jurisprudence — The Next Step* (1930) 30 COLUM. L. REV. 431; K. Llewellyn, *What Price Contract? — An Essay in Perspective* (1931) 40 YALE L.J. 704; K. Llewellyn, *The Rule of Law in our Case-Law of Contract* (1938) 47 YALE L.J. 1243; M. Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553; F. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COLUM. L. REV. 809; R. Pound, *Liberty of Contract* (1909) 18 YALE L.J. 454; R. Hale, *Law Making by Unofficial Minorities* (1920) 20 COLUM. L. REV. 451; R. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State* (1923) 38 POL. SCI. Q. 470; R. Hale, *Bargaining, Duress, and Economic Liberty* (1943) 43 COLUM. L. REV. 603; J. Dawson, *Economic Duress — An Essay in Perspective* (1947) 45 MICH. L. REV. 253.

enforced, the state legitimizes certain inequalities in economic power. Thus, the legal system is directly implicated in the creation of inequality. The inequalities created can only be justified to the extent that they are in the general interest.[148]

This analysis denies the autonomy of law. The coherence of the formal logic is not, in itself, sufficient justification for any particular decision. It is necessary to evaluate the merits of the legal rule or doctrine in light of the socio-economic policy of which it is the instrument. This pragmatic approach requires an analysis of social conditions. Thus, the realists tended to view inequality of economic power as a fact which the law could not simply ignore.

The Realists were not radicals. They did not reject the capitalist economic system or parliamentary democracy. They wanted to reform contract law in order to correct what they saw as its negative social effects. It is perhaps fair to describe them as the legal theorists of the welfare state. Some of them played a crucial role in the drafting of the *UCC* which in turn became one of the important sources of the unconscionability doctrine.[149]

The argument in support of the doctrine of unconscionability has evolved a great deal since the drafting of the *UCC*. One of the incentives to the refinement of the argument was the hostile reaction to section 2-302. In spite of this refinement the premises of the argument in favour of the doctrine remain those of the realist analysis. It begins with the hybrid nature of the existing economic system. While we rely on the market to organize the production and distribution of goods and services, the market is regulated in order to reduce the social costs of this choice of economic organization.[150] Legislators have adopted statutes designed to protect the general interest. The common law has also participated in this regulation of the market. Thus, one can conclude that, while the freedom to contract is an important value in our society, it is not overriding.[151] Other values such as the protection of the disadvantaged are also important. The legal system must balance the competing goals and values for which contract law is the vehicle.

The argument then turns to the existing law in order to show that the classical version of contract law no longer reflects what the courts are actually doing.[152] In

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[148] Robert Hale and Morris Cohen both make this argument in their articles cited *ibid.* *See also* F. Kessler, *Contract of Adhesion — Some Thoughts About Freedom of Contract* (1943) 43 COLUM. L. REV. 629.

[149] *See Unconscionability and the Code*, *supra* note 4, for a brief history of s. 2-302 of the *UCC*. *See also* Twining, *supra* note 145, for a discussion of the role of Karl Llewellyn.

[150] *See* S.M. Waddams, THE LAW OF CONTRACTS, 3d ed. (Toronto: Canada Law Book, 1993) c. 1 & 14; B.J. Reiter, *Unconscionability: Is There A Choice?: A Reply to Professor Hasson* (1980) 4 CAN. BUS. L.J. 403 at 405-06. *See generally* H. Collins, THE LAW OF CONTRACT (London: Weidenfeld & Nicolson, 1986) for a discussion of contract law in the welfare state. The Ontario Law Reform Commission uses this reasoning to support its proposed legislation which would give the judges the discretion to void or modify contracts that are, in their opinion, unconscionable. *See* REPORT ON AMENDMENT OF THE LAW OF CONTRACT, *supra* note 124.

[151] *See, e.g.*, Collins, *ibid.* at page 137 where he states:

> The modern law insists that the legitimacy of market relations depends upon the fairness of the terms and their distributive consequences.

[152] *See* Waddams, *supra* note 150, c. 14, where he states that:

reality, the courts already refuse to enforce contracts which are viewed as unconscionable. To do this they make use of existing rules and doctrine. There are equitable doctrines such as those against fraud, duress, undue influence and abuse of trust. The doctrine of restraint of trade allows courts to void contracts considered unreasonable. There are also specific categories of contracts which are subject to particular regulation in order to prevent abuse of contractual power. Insurance contracts, mortgages and contracts of bailment are examples. The rules which govern penalty clauses permit the courts to examine the substance of the exchange agreed to by the parties. There are also rules of interpretation which permit the courts to limit the effects of contractual terms which are thought to be unreasonable. Implied clauses are another means of achieving this end. In some instances, the consideration requirement itself can be used by the courts to avoid results which they perceive to be unjust.[153]

The frequency of legal intervention is an important component of the argument in favour of the doctrine of unconscionability. If the courts are already regulating the substance of exchange, the doctrine is not an innovation. It would merely confirm and clarify the existing law and practice of the courts.[154] Why is it necessary to

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> relief from contractual obligations is in fact widely and frequently given on the ground of unfairness, and ....general recognition of this ground of relief is an essential step in the development of the law....
>
> Despite lip service to the notion of absolute freedom of contract, relief is given every day against agreements that are unfair, inequitable, unreasonable or oppressive.

Ibid. at 295 & 361. *See also* Reiter, *supra* note 150 at 407:

> In respect of each of these "hived off" areas of law, the courts have said that although they are talking about contracts, special rules limit the power of the parties to plan their own affairs. It is remarkable to note the expanse of this field of judicial intervention. Its presence alone gives the lie to Professor Hasson's comment that the courts have never expressed any willingness to get involved in controlling the fairness of the contracting process.

See generally Contract and Fair Exchange, *supra* note 4, and Collins, *supra* note 150.

[153] Consider, for example, the question of the validity of long-term or requirements contracts. Often the courts hold that there is no consideration in order to avoid enforcing an onerous contract: *Tobias* v. *Dick & T. Eaton Co.*, [1937] D.L.R. 546 (Man. K.B.). *See also* J.N. Adams, *Consideration for Requirement Contracts* (1978) 94 LAW Q. REV. 73. Another situation in which the courts use the consideration requirement in order to restrain the use of economic power is that of the renegotiation of existing agreements where one party may be highly dependent on the other for its economic survival. *See Gilbert Steel Ltd.* v. *University Construction Ltd.*, [1973] 3 O.R. 268, 36 D.L.R. (3d) 496 (H.C.J.), *am.* 12 O.R. (2d) 25n., 67 D.L.R. 612n, *aff'd* (1976) 12 O.R. (2d) 19, 67 D.L.R. (3d) 606 (C.A.) and *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.*, [1979] Q.B. 705, [1978] 3 ALL E.R. 1170.

[154] Thus, Professor Collins states:

> At present the law is in a period of transition, where the principle of fairness is treated as an exception to the normal rule of freedom of contract. But....the exceptions are now so numerous that it makes sense to treat them as the general principle.

Supra note 150 at 143. The Ontario Law Reform Commission argues that given extensive judicial and legislative intervention, "the emergence of the modern doctrine of unconscionability does not signal a radical break with the past.": *see* REPORT ON AMENDMENT OF THE LAW OF CONTRACT, *supra* note 124 at 119.

confirm the existing law? In spite of the number of decisions, the legal reasoning is often obscure. The courts can easily make mistakes. The existing law is, in other words, unclear and the ambiguity of existing case law creates uncertainty because the courts make mistakes. They sometimes void perfectly reasonable contracts and sometimes they refuse to intervene even though the agreement is clearly unconscionable. This uncertainty prevents the legal system from achieving its goals and undermines its reputation amongst the population in general. Thus, it is necessary to clarify the state of the law in order to clearly formulate the socio-economic policies which underlie the doctrine. This will permit the courts to state the reasons for their decisions which will, in turn, increase the certainty of law essential for business planning.[155]

Some judges, such as Lord Denning, appear to be of the view that, in the absence of legislative intervention, the courts can formulate a doctrine of unconscionability using the legal concepts established by the case law.[156] However, the consensus of

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[155] The Ontario Law Reform Commission argues that:

> [S]tatutory affirmation of the doctrine.... ought also to encourage the courts to abandon such anachronistic tools as the doctrine of fundamental breach and adverse construction. Fictitious techniques of this kind do harm to the law, because they conceal the reasons for judicial decisions and prevent the development of clear principles. Statutory recognition of a generalized doctrine of unconscionability would fill the gaps in legislative intervention, and enable judges to direct their minds to the truly relevant criteria for decisions.

REPORT ON THE AMENDMENT OF THE LAW OF CONTRACT, *ibid.* at 127.

[156] See the judgment of Lord Denning in *Bundy*, *supra* note 71 at 339 where he states:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be solely moved by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.

The other judges did not adopt the same reasoning and Lord Denning's analysis is not the majority position in this case. The House of Lords criticized the doctrine of unequal bargaining power in *National Westminster*, *supra* note 71 (per Lord Scarman at 830). *But see also Hart* v. *O'Connor*, [1985] A.C. 1000, [1985] 2 ALL E.R. 880 [hereinafter cited to A.C.], where Lord Brightman, speaking for the Court, states at 1017-18:

> If a contract is stigmatised as "unfair", it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this "procedural unfairness." It may also, in some contexts, be described (accurately or inaccurately) as "unfair" by reason of the fact that the terms of the contract are more

commentators supporting the doctrine appears to be that legislative intervention is necessary to clarify the state of the law. The adversary system can take years to resolve a legal issue. The evolution of the common law depends on a number of factors such as the fact situations which are litigated, the talent of the lawyers and the legal philosophy of the judge who hears the case. It is preferable to adopt a law which states without ambiguity that the courts have the power to void or modify contracts in cases of unconscionability. It is possible to include a list of criteria which the courts would have to consider when exercising this new discretion.[157] Such a list

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> favourable to one party than to the other. In order to distinguish this "unfairness" from procedural unfairness, it will be convenient to call it "contractual imbalance." The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation. Equity will relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract only on the grounds that there is contractual imbalance not amounting to unconscionable dealing.

and later in his judgment at 1023-24:

> In the opinion of their Lordships it is perfectly plain that historically a court of equity did not restrain a suit of law on the ground of "unfairness" unless the conscience of the plaintiff was in some way affected. This might be because of actual fraud (which the courts of common law would equally have remedied) or constructive fraud, i.e. conduct which falls below the standards demanded of equity, traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power. ... An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. "Fraud" in its equitable context does not mean, or is not confined to deceit; "it means an unconscientious use of the power arising out of these circumstances and conditions" of the contracting parties....It is victimisation, which can consist of either active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

The use of the term "unconscionable" in these passages suggests that the doctrine of unconscionability already exists and that legislative intervention authorizing the courts to examine the substance of the exchange is not required. The House of Lords appears to adopt the position that it is impossible to distinguish sharply between problems of procedure and problems of substance. Professor Atiyah defends this position in his article *Contract and Fair Exchange*, *supra* note 152. He states at 354 that:

> [O]nce the law takes an interest, as it always has, and must, in the procedures themselves, it is of necessity compelled to take an interest in the substantive justice of contracts.

The inequality of the exchange can create a presumption of abuse of power. In addition, in the absence of proof that the contract is unreasonable, the courts will normally enforce the agreement in spite of procedural problems in the negotiations leading up to its conclusion. The case which remains undecided is that in which the exchange is unequal but there is no proof of procedural abuse.

[157] For examples of this type of proposal, see Ontario Law Reform Commission, REPORT ON SALE OF GOODS (Toronto: Ministry of the Attorney General, 1979) and REPORT ON AMENDMENT OF THE LAW OF CONTRACT, *supra* note 124; Reiter, *supra* note 150; Waddams, *supra* note 150. The Law Reform Commission used the English legislation, *UCTA*, *supra* note 105, as a model.

would reduce any uncertainty created by the legislation and facilitate both business planning and the presentation of arguments in case of litigation.

A law giving the courts a discretionary power would also combine the respective strengths of both the legislative and judicial branches of government. A law would be debated before the legislature. If adopted, it would have the legitimacy that such a debate confers. At the same time, the courts would continue to do what they do best, the protection of individual rights in the context of a particular case.

Such a reform would not resolve all problems of inequality of economic power. There are systemic problems which can only be attacked through regulatory measures.[158] However, it is impossible to foresee and regulate all potential abuses.[159] The legislative process itself can sometimes be very slow and does not always deal effectively with all socio-economic problems. The individual who finds herself a victim of injustice should not be without a remedy simply because the legislature has not yet found a global solution to her problem.

The judicial power to intervene in cases of unconscionability will ensure that individual cases do not fall through the gaps in the regulation of the marketplace. With time, the courts will develop a coherent case law that will reduce uncertainty to a strict minimum. In addition, experience in other jurisdictions indicates that the adoption of a statutory doctrine of unconscionability will not result in a huge volume of litigation which could increase uncertainty.[160] This solution to the problem of contractual unfairness is more respectful of the spirit of our mixed economy which gives considerable liberty to private actors to conclude contracts in the private market as long as they exercise their freedom according to the collective commercial ethic.

This argument in support of the doctrine of unconscionability is an example of an instrumental theory of law. The merits of a rule or doctrine are defined by its usefulness in solving a particular problem. Thus, the argument assumes a consensus on an instrumental morality which rejects competing rights-based moralities. The difficulty with this approach is that, in addition to providing no justification for the choice of moral framework, it provides little explanation of how the instrumental justification is to be determined. Instrumental justification suggests that there must be a calculus of the costs and benefits of any rule or doctrine. However, this analysis is never done. Costs and benefits are dealt with through vague generalities. It is assumed that everyone agrees that there is a problem and that the doctrine is the appropriate solution. This weakness makes the argument particularly vulnerable to competing versions of instrumental analysis which reject the doctrine because of its economic costs.[161]

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[158] *See, e.g.*, Reiter, *ibid.* at 404 and 408-09 for an acknowledgment of the limits of judicial intervention.

[159] *See* REPORT ON AMENDMENT OF THE LAW OF CONTRACT, *supra* note 124 at 135.

[160] *See ibid.* at 127.

[161] *See* the discussions of the utilitarian and economic critiques of the doctrine of unconscionability, below.

This argument could be characterized as a version of complacent pragmatism.[162] It accepts that existing social arrangements are basically just and need neither right-wing reform to free the marketplace from government regulation nor progressive reform to increase economic equality. Thus, any regulation of contractual fairness is by definition exceptional. Everyone knows what an unconscionable contract looks like and the courts will have no difficulty identifying and correcting the problem. Finally, it assumes that the courts may legitimately regulate the substance of deals. All of these assumptions are controversial.

2. *Alternative Justifications of the Doctrine*

It is possible to argue that there is a feminist argument in support of the doctrine of unconscionability. A feminist analysis is one which takes as given the fact of the oppression of women by existing social arrangements and proposes legal reforms (or more radical change) to remedy that oppression. Thus, the merits of a legal doctrine will be determined by the contribution it makes to the promotion of equality by ridding the law of legal barriers and ideological constructs which prevent women from exercising their full autonomy. Like all theoretical frameworks, feminism is characterized by competing schools of thought.[163] Thus, any feminist justification of the doctrine will not necessarily invoke universal support.

Professor Diana Majury uses the concept of unconscionability in her analysis of domestic contracts.[164] Statistics show that women are seriously impoverished after separation from their spouse. They most often have custody of the children. However, property settlements and support payments are seldom adequate to provide for the needs of the now "fatherless" family. In addition, male spouses often do not make the promised support payments.

Thus, it is important for the courts to override the agreements negotiated by the parties in order to ensure that the woman and her children are not left in poverty. Consent cannot be the determining criterion for the validity of separation agreements for two reasons. First, women do not have equal bargaining power in a sexist society. They are conditioned to adopt a self-sacrificing stance. They must care for others rather than themselves. They have less access to education and are likely to leave the job market to have and care for children. Thus, their economic prospects are diminished. As well, they lack the experience of business and career which would provide them with the tools for effective negotiation. They are not trained to take an adversarial stance.

Second, separation agreements systematically undercompensate women for the losses caused by the end of the marriage. Thus, women are left in poverty. The

[162] The distinction between complacent pragmatism and enlightened or critical pragmatism is developed by Margaret Radin in *The Pragmatist and the Feminist* (1990) 63 S. CAL. L. REV. 1699.

[163] The literature on feminism is enormous. For an excellent bibliography identifying different versions of feminism *see* S. Boyd & E. Sheehy, *Feminist Perspectives on Law: Canadian Theory and Practice* (1986) 2 C.J.W.L. 1. *See also* A. Jagger, FEMINIST POLITICS AND HUMAN NATURE (Sussex: Harvester Press, 1983).

[164] *Unconscionability in an Equality Context* (1991) 7 CAN. FAM. L.Q. 123.

agreements are substantively unfair. The courts should intervene on the basis of unconscionability to ensure an equitable division of property and sufficient support for the women and children. The doctrine of unconscionability is one means by which the courts can contribute to the promotion of gender equality.

This argument takes as its starting point the oppression of women. It argues that the courts should analyze domestic contracts from the viewpoint of women. The legal doctrine becomes a tool for the acknowledgment and remedying of women's oppression by the legal system. This view, which I find persuasive, is obviously not universally accepted. A rights-based legal theory would find the pragmatic nature of the justification of the doctrine offensive. Those who hold that legal rules must be justified on the basis of *a priori* principles will find the focus on viewpoint unacceptable.

C. *The Arguments Against Unconscionability*

The arguments sketched out in the preceding section have been subject to considerable criticism. It is possible to divide the opponents of the doctrine of unconscionability into two categories. There are those who argue that such a doctrine would be bad both for the economy and for the law of contracts. These jurists argue that it would be preferable to maintain the classical rule which forbids the courts from examining the substance of an exchange. In addition, the legislature should not regulate the market. The justifications provided for this position are rights-based, utilitarian, and economic. The second category includes those authors who accept the proposition that contracts can be unconscionable, but argue that it is inappropriate to assign the task of regulating the market to the courts even through legislation. The courts will not provide real protection against the abuse of contract power. There are more effective ways of attacking the socio-economic problems which are categorized under the heading of unconscionability.

1. *There Is No Need for Such A Doctrine*

As we have already seen the classical law of contract was both formalist and positivist. It drew a sharp distinction between law and social policy. Law was the domain of the courts; politics was the responsibility of the legislature. The courts, according to this view, must formulate and apply the legal rules which can be deduced from certain fundamental principles. A rule is legal in nature precisely because of the institutional framework within which it is stated and its relationship to those fundamental principles. The legislature can adopt laws. If these laws are constitutionally valid, the courts must apply the laws. The courts cannot determine the merits of the legislation. This theory cannot provide any arguments against legislation creating some form of the unconscionability doctrine. The jurists who defend the classical rule of enforcement regardless of the substantive terms of the agreement have to use arguments to support their position that a strictly positivist

approach would exclude because they confuse the "is" with the "ought". The arguments made are rights-based, utilitarian and economic.[165]

(a) *Contract as Promise*

The rights-based analysis of the issue of unconscionability takes as its starting point the Kantian principle of individual autonomy. Each individual merits respect *qua* free and rational being. The only way to show such respect is to allow each individual to adopt her own life-plan and define her own interests, ambitions and concept of the good.[166] The freedom of each individual to choose necessarily entails a procedure whereby she can create binding obligations.[167] Once an individual has made a binding promise using the appropriate procedure, she must take responsibility for her decision. Freedom entails responsibility. No one can impose her vision of the good life on anyone else but equally no one can force another to aid her when her choices prove disappointing or badly made. Where there is an obligation to share, there is tyranny because this obligation violates the freedom of those who are thus constrained to share.[168]

When one takes the principle of individual liberty as the only ethical foundation of contract law, the conclusion that the doctrine of unconscionability has no place in contract law follows inexorably.[169] This doctrine questions the autonomy of the

[165] In this respect, the claim that we are all realists now is accurate. *See* Singer, *supra* note 145.

[166] *See* C. Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981) at 20 where he states that:

> [H]olding people to their obligations is a way of taking them seriously....respect for others as free and rational requires taking seriously their capacity to determine their own values...The right defines the concept of the self as choosing its own conception of the good. Others must respect our capacity as free and rational persons to choose our own good, and that respect means allowing persons to take responsibility for the good they choose."

For a general discussion of the ethic of individual responsibility and its relation to law *see* F. Ewald, L'ÉTAT PROVIDENCE (Paris: Grasset, 1986).

[167] *See* Fried, *ibid.* at 13 where he states:

> In order that I be as free as possible, that my will have the greatest possible range consistent with the similar will of others, it is necessary that there be a way in which I may commit myself.

[168] *See ibid.* at 90 where Fried states: "Where sharing is mandated by a higher authority it becomes despotism."

And at 91 where he affirms:

> The disposition to view one another with kindness and forbearance is an affirmative good, which liberalism is in no way committed to deny. But, just as in the family, the enforcement of such a posture itself tends to tyranny.

[169] This obviously does not preclude the courts from policing consent as classical law has always done. Professor Fried views rules relating to fraud, duress, and undue influence as consistent with his fundamental principle. The courts must ensure that consent is voluntary. *See ibid.* at 98-99 where he states:

> [A] promise procured by a threat to do wrong to the promisor, a threat to violate his rights, is without moral force. It is such threats that constitute the legal category of duress.

individual because consent is no longer proof of a binding promise. The individual can change his assessment of the merits of an exchange. Such a doctrine would encourage irresponsibility and whim. There would no longer be any presumption that the decision to make a promise in the form dictated by the law results from a serious weighing of the merits of the agreement. The courts would be able to remake the decision of the individuals involved because the individuals are no longer the best judges of their own interests. It is precisely the possibility of judging the interests of another which is precluded by the principle.[170] For these reasons, the concept of unconscionability lacks any intellectual rigour. It is designed to assuage vague feelings of liberal guilt. It has no solid and generally accepted ethical foundation.

This argument is simple and elegant. Its persuasiveness depends entirely on its point of departure. There is no attempt to analyze the actual behaviour of contracting parties in any particular context in order to identify the real problems that arise in the marketplace. The costs and benefits of the "no intervention" rule proposed are not considered. The method used entails the formulation of rules which define the binding nature of promises on the basis of an *a priori* principle which, for ethical reasons, excludes any evaluation of the substance of the exchange. There is no need to consider the issue of institutional competence because neither the courts nor the legislatures should violate this individualist morality. Thus, the distinction between law and ethics is abolished not to create opportunities for legislative creativity but to constrain legislative powers. The law of contract must conform to this ethic and any reform which does not respect the fundamental principle is illegitimate.[171]

This argument assumes a single moral framework which is both highly abstract and dogmatically individualistic. The argument then claims to speak authoritatively knowing what is in the best interests of all groups in society. It asks that the courts

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[170] Professor Fried does not believe that his principle excludes all redistribution of wealth in favour of the disadvantaged. He says that this project of social justice is:

> [O]ne to be pursued by the collectivity as a whole funded by the general contributions of all citizens. Redistribution is not a burden to be born in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves.

See ibid. at 106. Thus, his principle of individual freedom prevents both the courts and the legislature from creating a doctrine of unconscionability.

[171] Professor Fried acknowledges that there are competing ethical principles in law but he excludes these principles from contract law. He says that: "I never argued that promise is the *only* basis of reliance or that contract is the only basis of responsibility.": *see ibid.* at 24. This concession weakens his argument because the presence of competing moral principles forces us to balance the autonomy principle against its competitors. If such a balancing is possible, there may well be valid reasons that justify a choice to give greater weight to the fairness of contractual exchange at the expense of his individualist principle. It is possible that we may be forced to classify the issue of unconscionability as a tort problem rather than a contractual problem but such a categorization would maintain the purity of the contract law and the sanctity of the principle only in form. To the extent that Fried wants to exclude such formalism and the kind of compromise that balancing requires (he rejects utilitarianism, *ibid.* at 15), he has to deny the existence of competing moral principles of equal value to the principle of individual autonomy. Simply confining them to other areas of law is not sufficient.

operate within a moral universe which many members of Canadian society find inimical. But the denial of the need to take into account competing frameworks is never justified.

(b) *The Utilitarian Analysis*

It is possible to use a utilitarian analysis to support the rule which prohibits any examination of the sufficiency of consideration.[172] This analysis accepts the classical version of contract law. Contract law is said to consist of formal rules that enable parties to conclude agreements and rules which ensure that consent is voluntary.[173] The common law does not allow the judge to evaluate the sufficiency of consideration and does not include a doctrine of unconscionability. The only question is whether the parties have done that which is necessary to create a binding contractual obligation.

The utilitarian justification for the limited role of the courts in contract adjudication has as its premise the hypothesis that the role of contract law is to promote the certainty necessary to business planning.[174] Certainty is only a subsidiary value, a means to achieve other ends. The purpose of contract law is to maximize the utility of the population in general. Voluntary agreement in the market is the most effective means of achieving this goal. Uncertainty about the enforceability of agreements would discourage such utility maximizing exchanges. Hence, contract law must reduce uncertainty by enforcing all contracts. The knowledge that a promise which is made in the form required by the common law, will be enforced facilitates business planning. The parties involved know that, from the date of contracting, they will have the right to insist on the execution of the promise at the date agreed upon. If the promises are not executed, they will be able to obtain a remedy which is the equivalent of execution.

Thus, the binding nature of contracts ensures the certainty necessary to functioning of the economy. The purchaser of raw materials for the manufacturing

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[172] For a general discussion of the utilitarian view of contract *see* P.S. Atiyah, PROMISES, MORALS, AND LAW (Oxford: Clarendon Press, 1981) c. 2. *See also* Atiyah & Summers, *supra* note 137 at 224-27, for a discussion of the influence of utilitarianism on the evolution of English law especially during the nineteenth century. Philosophers distinguish between rule utilitarianism which justifies rules according to the benefits which they produce for society as a whole and act utilitarianism which justifies acts in a particular context according to the utility of the individuals involved. The analysis discussed in this section is a version of rule utilitarianism. As such, it is subject to the same criticisms as any rule utilitarianism. *See* PROMISES, MORALS, AND LAW, *ibid.* at 79-86 for a discussion of the criticisms of rule utilitarianism.

[173] *See* the discussion of classical contract law in Part II.C.1, above.

[174] The argument presented in this section is not based on one text. Many authors discuss the importance of clear and definite rules for business planning. *See, e.g.*, B. Rudden, *Le domaine du contrat — rapport anglais* in D. Tallon & D. Harris, eds., LE CONTRAT AUJOURD'HUI: COMPARAISONS FRANCO-ANGLAISES (Paris: L.G.D.J., 1987); Vaver, *supra* note 4; Hasson, *supra* note 128; Thal, *supra* note 4; and Beale, *supra* note 4. Professors Vaver and Hasson both insist that if the proposed unconscionability doctrine became law it would be impossible for a lawyer to advise a client either at the stage of business planning or in the case of litigation.

of a product which will be sold at a later date cannot know for certain that there will be purchasers for her product but she can, at least, calculate her costs of production. It is possible to be mistaken in the market analysis but the contract for the purchase of raw materials reduces the uncertainty of the enterprise. Without this certainty, it would be much more difficult to plan production.[175] In addition, the contract itself can become an object of exchange. For example, conditional sales contracts are transferred from sellers to financial institutions all the time. These exchanges constitute an important dimension of the financial markets and the financing of sales.[176]

The interdependence of all sectors of the economy means that it is in the interests of everyone to adopt clear and unambiguous rules. Such rules permit each participant in the production and distribution of goods and services to know in advance the legal significance of his words and acts. It is true that some people will be disadvantaged by such a formalist approach to legal obligation. Those without education, experience, resources and negotiating talent will be the losers. Those who are mistaken in their evaluation of the merits of a particular exchange or the tendencies in the market will suffer the consequences of strict rules which require execution of contracts regardless of the circumstances. But, the social benefits in terms of wealth produced by a market in which the certainty of obligation is clearly established outweigh by far the costs to individuals who cannot compete equally with the strong, the intelligent and the talented.

One version of the utilitarian analysis might argue that contracting parties actually do know the law and plan their dealings in light of the existing rules. Clearly, a good number of people are advised by lawyers. For this part of the population, the rules do influence their behaviour. However, it is far from certain that they constitute the majority of the population. The little sociological research on the role of law on

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[175] Professor Rudden gives an excellent example of the importance of contract in the planning of the manufacture and sale of a product:

> les acheteurs de coton qui emploient cette matière dans leurs usines ont de nombreux choix à effectuer quant à leur production; ils achètent aussi d'autres matières. Pour fabriquer une bonne paire de jeans il faut (en dehors du coton) des rivets (donc du cuivre), des fermetures éclair (les meilleures sont en laiton), du fil (souvent en lin), de la teinture, un équipement, des machines et de la main-d'oeuvre; aucun bouton n'est nécessaire mais il faut 172 ouvriers différents pour une paire de jeans. La demande saisonnière pour tous ces facteurs avec pour conséquence un ajustement de la production, dépend en partie du prix du coton américain sur le marché à terme; si celui-ci est élevé la demande (et donc le prix) des rivets (cuivre) et des fermetures éclair (laiton) peut diminuer, alors que le contraire peut arriver aux boutons et au polyester. En résumé, l'achat d'une paire de Lewis (sic) dépend d'innombrables contrats en amont dont un grand nombre peuvent ne pas être exécutés pendant des mois, mais tous sont mis en corrélation par l'information transmise, quant aux prix à terme dans les différents secteurs, qui peuvent être reliés entre eux de manières diverses.

Ibid. at 133.

[176] *See* Rudden, *ibid.* at 130-33, where he discusses the cotton trade and the importance of contracts concluded by farmers and purchasers before the sowing of the cotton for the futures market.

commerce suggests that, in reality, economic actors do not pay a great deal of attention to the legal aspects of their dealings. They are primarily interested in the deal not the rules.[177] They assume that they will be able to solve all problems which arise during the execution of the contract without recourse to the courts.[178]

If it is true that economic actors do not plan their dealings in light of the legal framework provided by contract law, it is difficult to argue that certainty of obligation trumps contractual fairness because of the benefits that certainty brings to society in general. Undoubtedly, everyone benefits from the productivity of the economy but this is not necessarily due to the certainty provided by legal rules. The relationship of cause and effect essential to the utilitarian analysis is absent. The productivity of the economy is perhaps due to other factors.[179]

It is possible to revise the utilitarian argument to reduce the importance of the relationship between the binding nature of contracts and the behaviour of the parties. Even if those involved in commerce do not actually take the law into account in their planning, certainty of obligation is essential to the functioning of sectors of the economy such as the futures market. The profitability of exchanges in these markets depends on the possibility of purchasing today a product which does not exist at the time of contracting in order to profit from the variations between the contract price at purchase and the market value of the goods at the time the goods arrive on the

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[177] *See, e.g.*, H. Beale & T. Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies* (1975) 2 BRIT. J. LAW & SOC. 45 (*see especially* at 48-51, where the authors discuss the problems of contractual formation); S. Macauley, *Elegant Models, Empirical Pictures, and the Complexities of Contract* (1977) 11 LAW & SOC'Y REV. 507 [hereinafter *Elegant Models*]; S. Macauley, *Non-Contractual Relations in Business: A Preliminary Study* (1963) 28 AM. SOC. REV. 45 [hereinafter *Non-Contractual Relations*]; and I. Macneil, THE NEW SOCIAL CONTRACT (New Haven: Yale University Press, 1980).

[178] There are different possible explanations of this attitude. First, many people do not have the financial means to consult a lawyer prior to every deal. Second, many people may have done a cost-benefit analysis and concluded that the risk of non-performance was too low to justify the investment of resources in the legal aspects of their dealings. Third, there are informal procedures of dispute resolution and commercial practices which mean that the legal system is not the actual framework of their negotiations. Finally, it is possible that, because many exchanges are carried out on standard form contracts and the parties must simply accept or reject the terms proposed, those involved know that they have to rely on the good faith of the party who drafted the terms because there is no negotiation or variation of the contractual terms. Undoubtedly, other factors influence the lack of attention to the legal dimensions of exchange.

[179] Professor Ian Macneil argues that the formation of a contract initiates a long-term relationship between the contracting parties. This relationship gives birth to a cooperative ethic that leads the parties to do what is necessary to maintain their joint enterprise. In place of insistence on strict rights and formality, one finds flexible cooperation which permits the adjustment of rights and obligations in light of the changing needs of the parties and the changing economic conditions. According to this theory, the certainty of obligation is less important than the spirit of cooperation. The productivity of the economy depends on the ability of the parties to resolve their disputes without recourse to the courts. If this analysis describes the typical commercial relationship, the utilitarian argument against the doctrine of unconscionability loses much of its persuasiveness because the feeling of participation in a joint enterprise and the cooperative ethic requires that both parties feel that they are being treated by the other with respect. Deals perceived as unfair would not contribute to such an ethic. *See generally* Macneil, *supra* note 177.

market. The seller of the goods is able to finance their production and the buyer of the as yet non-existent goods assumes the risk of price fluctuations.[180] As well, it would be more difficult to finance purchases, whether commercial or consumer, if the courts questioned the validity of financing agreements. Thus, it is in the interests of society as a whole to maintain the viability of those sectors of the economy that rely on the certainty of contractual obligation.

This argument does not resolve all the difficulties of the utilitarian analysis. It is not obvious why it is necessary to have a general rule when contractual certainty is only important for those sectors of the economy in which the contracts themselves become objects of commerce. It is possible to formulate different rules that take into account the nature of the contract in question. A more refined contract law could provide protection for the disadvantaged without undermining the market system.

In addition, there is the important problem of the calculation of the utility created by a legal rule. The utilitarian has difficulty showing that the benefits produced by a contract law without an unconscionability doctrine are greater than those produced by a contract law including such a doctrine. It is true that certain persons benefit from the existing law but there is no measure of utility which would permit us to compare the benefits of the winners to the costs of the losers. The problem of measure is even greater when one tries to compare the costs and benefits of the existing state of the law with those of a reformed contract law which does not yet exist. The absence of an objective measure of utility transforms the analysis into pure speculation that exploits the fear of change to prevent reform.[181]

Even if the problems of the causal relation and the calculation of utility are resolved, two fundamental problems remain. First, the theory does not provide any criteria for the distribution of the utility. It is not obvious why those disadvantaged by a formalist contract law must pay the cost of increasing the utility of those who benefit from such a law. Second, utilitarianism cannot justify its definition of justice.[182] The utilitarian lives in a moral universe where the only criteria of the desirability of an individual or collective act is the happiness which it produces.

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[180] The best example of this kind of market is the commerce in agricultural futures such as coffee, meat, or cotton.

[181] For a discussion of the difficulties of the utilitarian analysis *see* J. Rawls, A THEORY OF JUSTICE (Cambridge, Mass.: Harvard University Press, 1971); A. Sen & B. Williams, eds., UTILITARIANISM AND BEYOND (Cambridge: Cambridge University Press, 1982); J.J.C. Smart & B. Williams, UTILITARIANISM: FOR AND AGAINST (Cambridge: Cambridge University Press, 1973); and PROMISES, MORALS, AND LAW, *supra* note 172.

[182] *See* Taylor, *supra* note 5 at 31-32 where he argues that the utilitarian:

> is a person who has decided that he ought not to accept the traditional frameworks distinguishing higher and lower ends, that what he ought to do is calculate rationally about happiness, that this life is more admirable, or reflects a higher moral benevolence, than following the traditional definitions of virtue, piety, and the like....But this person doesn't lack a framework. On the contrary, he has a strong commitment to a certain idea of rationality and benevolence. He admires people who live up to this ideal, condemns those who fail or who are too confused even to accept it, feels wrong when he himself falls below it. The utilitarian lives within a moral horizon which cannot be explicated by his own moral theory. This is one of the great weaknesses of utilitarianism.

Justice consists in maximizing the utility of the population in general. In order to justify this definition of morality and justice one must use non-utilitarian arguments. But it is precisely the possibility of such arguments that the utilitarian rejects.

The utilitarian arguments outlined above define the primary purpose of contract law as the creation of the certainty of obligation essential to the market. Certainty, not a value in itself, is a means to increase the utility or happiness of society in general. The legal system should reject any doctrine of unconscionability because it would undermine or weaken certainty of obligation through unpredictable *ex post facto* judicial intervention. It would inevitably complicate business planning and diminish utility. Therefore both judicial and legislative intervention should be rejected.[183]

The moral universe of the utilitarian is essentially individualistic and instrumental. It assumes a consensus on the ends of society. Society exists to maximize welfare or utility. Other visions of the purposes of society, be they religious, rights-based or egalitarian are excluded. Rules and doctrines are assessed on an instrumental basis: Do they promote welfare or utility? However, the definition of ends is precisely what much of the debate is about. Given the difficulties in giving concepts of utility and welfare any operative content, the assumption of consensus on ends is particularly unpersuasive.

(c) *Economic Analysis*

Economic analysis reaches the same conclusion: the doctrine of unconscionability has no place in contract law. However, the reasoning differs because this approach uses economic concepts in an attempt to avoid the problem of the grounding of its moral framework through the use of a "scientific" methodology.[184] A contract which results from negotiation in a competitive market cannot be unconscionable. The individual participates in the exchange of goods and services to increase his welfare. The market is the mechanism which permits the individual to make choices in function of his own definition of the value of the goods and services which are available. When the individual agrees to pay X dollars for a good, this choice shows that the good in question is worth more than X dollars to that individual. The value of a good or service is always subjective because the individual consumer must decide how much he is willing to pay. There is no way of calculating the value of

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[183] For discussions of the consequences of legislative intervention which stress the costs of uncertainty *see, e.g.*, Adams & Brownsword, *supra* note 4; Beale, *supra* note 4; and Vaver, *supra* note 4.

[184] *See* R. Posner, THE ECONOMICS OF JUSTICE (Cambridge, Mass.: Harvard University Press, 1981) c. 3-4 for his criticism of Kantian rights-based analysis and utilitarianism. Posner argues that his principle — wealth maximization — explains more clearly the common law and the limits of law. He argues that the calculation of wealth maximization does not pose the same difficulties as the calculation of utility because wealth maximization is measured by what one is willing to pay, and one can know the prices of goods and services. On the other hand, it is impossible tomeasure happiness. Kantian analysis leads to moral squeamishness. He prefers the scientific approach of economic analysis.

a good or service independently of the subjective evaluation of the person who offers to pay a sum of money in exchange for a good or service.

In the model of a competitive market used in economic analysis, all individuals are free to accept or refuse a contract. All individuals are rational. They calculate the advantages and disadvantages of a proposed exchange in light of the market price. Consent to an exchange is proof that the exchange is in the interests of the contracting parties. If the exchange is in both parties' interests, it increases the wealth of society. By definition, a contract to which both parties have freely consented, in the absence of any constraint or fraud, cannot be an unconscionable contract.[185]

Economic analysis of the issue of unequal bargaining power accepts the need for legal rules which ensure that the decision to conclude a contract reflects a real consent to the proposed exchange. All fraud must be prohibited. Duress will render the contract void. A contract resulting from undue influence does not bind. Each party to the contract must have the capacity to understand the significance of his acts. One party cannot be allowed to hide important aspects of the exchange and lead the other party into error concerning the nature of the proposed deal. The rules of classical contract law distinguish between procedural defects and unequal benefits.[186]

In Posner's ECONOMIC ANALYSIS OF LAW, 3d ed. (Boston: Little, Brown & Co., 1986) at 16 n. 1, he states that "positive economics *is* a scientific discipline" and he responds to the criticism that his analysis is simplistic because its models have little relation to the real world by saying, at 16, that "abstraction—reductionism if you like—is the essence of scientific inquiry." A model which reflected the complexity of the real world would be too unwieldy to yield any results. This claim to be scientific is obviously controversial. *See, e.g.*, Minow, *supra* note 18 at 159-63 for a critical discussion of the claim that economic analysis of law is scientific.

[185] *See* Trebilcock, *supra* note 4 at 376-77 where he states:

> [T]he concept of substantive unfairness, in the sense of a judicially perceived non-equivalence in the values exchanged by contracting parties, poses real conceptual difficulties following a determination of 1/ no abnormal market power and 2/ no aberrations in the process of contract formation. Almost by definition, the outcome of such a process cannot be unfair.

Posner, in THE ECONOMICS OF JUSTICE, *ibid.* at 86, refers to "the economist's relentless insistence on freedom of contract in contexts free from fraud, externality, incapacity, monopoly, or other sources of market failure." There is no exception to the binding nature of the contractual obligation. In ECONOMIC ANALYSIS OF LAW, *ibid.* at 104 he says:

> The foregoing discussion raises the general question whether the concept of unequal bargaining power is fruitful or even meaningful. Similar doubts are raised by the vague term "unconscionability", a ground of contract discharge in the Uniform Commercial Code. If unconscionability means that a court may nullify a contract if it considers the consideration inadequate or the terms otherwise one-sided, the basic principle of encouraging market rather than surrogate legal transactions where (market) transaction costs are low is badly compromised. Economic Analysis reveals no grounds other than fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain that he made in entering into the contract.

[186] For discussions of this distinction *see Unconscionability and the Code*, *supra* note 4; M. Trebilcock, *An Economic Approach to the Doctrine of Unconscionability* in Reiter & Swan, eds., *supra* note 49 states at 407:

It is legitimate to police contracting procedures but the courts should not interfere with the substance of the exchange.

It is true that there are inequalities. Individuals have different talents whether innate or acquired. Their level of education will vary. Each person's life experience is unique. Individuals do not have the same financial resources. These inequalities are even more striking when individuals and corporations are compared. Economic analysis does not pretend that these inequalities do not exist. It argues that they have no legal significance. The only relevant question is whether or not the parties have freely consented to the contractual terms.

Economic analysis does not exclude all regulation of the marketplace.[187] There are defective markets in which there is no real competition. The lack of competition allows one economic actor to charge prices that are above those of a competitive market, or to impose contractual terms that would disappear in a competitive market. Sometimes a group of persons will organize a cartel in order to make monopoly profits. Where a market is monopolized or controlled by a cartel, it is legitimate for the state to intervene.

However, it is important to use the appropriate criteria in analyzing any given market. The use of standard form contracts is not relevant. Contracting parties make use of such forms because they reduce the costs of negotiation for everyone. Buyers prefer to save time and energy and concentrate their efforts on the negotiation of price. It is true that these contracts often include exemption clauses that can appear onerous to the outside observer but, in reality, these clauses are to the advantage of the buyer because she obtains the goods or services at a better price. If such clauses are not economically justified or if there is consumer demand for better terms, the market will respond to the demand and correct the situation. Thus, standard form contracts and exemption clauses are unreliable indicators of monopolization and abuse of market power. Both can occur as often in a competitive market as in a defective market.[188]

> The doctrine of unconscionability, as it applies to the foregoing cases of impaired ability to process information, seems to be playing a very useful and defensible role. The scope of the inquiry posed for the courts by the doctrine in this context seems a relatively manageable one, given that typically the courts need only to examine the circumstances immediately surrounding the particular transaction in question, the characteristics of the parties, and the nature of the relationship between them. They are not called on to embark upon extensive inquiries into conditions generally in the relevant market beyond establishing, where possible, a market norm against which the values exchanged in the transaction can be measured.

See also Thal, *supra* note 4, for an analysis of English law which makes a similar distinction between procedure and substance.

[187] Judge Posner believes in the minimal state which has at most a very limited regulatory role. *See generally* THE ECONOMICS OF JUSTICE, *supra* note 184, and ECONOMIC ANALYSIS OF LAW, *supra* note 184. However, other less dogmatic and ideological forms of economic analysis exist which do not preclude state intervention to the same degree. *See, e.g.*, Trebilcock, *supra* note 70 and *ibid.*

[188] *See* Beale, *supra* note 4; Trebilcock, *supra* note 70; and G. Priest, *A Theory of the Consumer Warranty* (1981) 90 YALE L.J. 1297 for examples of this argument.

In addition, the doctrine of unconscionability is not necessarily the best tool for regulating the market. Problems of monopolization and cartelization are complex. Judges do not have the expertise necessary to identify defective markets. In the context of litigation, it is very difficult to obtain the information required to determine if the market in question is competitive. Even jurists who accept that in some cases it may be necessary to regulate the market oppose regulation by the courts. A regulatory approach is preferable.[189]

Aside from the issue of the defective market, the doctrine of unconscionability does not respect the premises of economic analysis. This doctrine accepts that individuals are not always rational and that it is possible for a court to evaluate objectively the merits of an exchange. This idea of an objective measure of the value of an exchange is meaningless. If the courts are allowed to intervene in the marketplace, the efficiency of market exchange will be reduced at the expense of society in general. By definition all voluntary exchange is in the interests of the parties. It would be wrong to void a contract *ex post facto* simply because one of the parties now regrets his choice. Such a decision would reduce the wealth of society.

Good intentions can lead astray. Judicial intervention is justified as a means of protecting the disadvantaged but any judicial intervention which distributes the rights and obligations differently than the contract negotiated by the parties or those active in the commerce in question will actually hurt those it is intended to help. The redistribution of rights and obligations increases the costs of doing business. When a court decides to void an agreement financing a consumer purchase because of an onerous clause, its decision increases the cost of credit. It becomes more difficult for those whom we wish to protect to obtain credit. Some — the most marginal — are excluded from the market. But it is not necessarily in their interests to prevent them from purchasing consumer goods on credit.[190] One can make the same argument in each case where the court declares a contract null and void.[191]

Economic analysis has been thoroughly critiqued by many authors.[192] These criticisms will not be repeated in detail here. The analysis has certain problems which relate directly to the issue of unconscionability. First, the concept of wealth maximization does not adequately resolve the problems of the utilitarian calculus.

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[189] *See* Trebilcock, *ibid.* The more dogmatic version of economic analysis would not make this concession. *See* Posner, *supra* note 184.

[190] This argument is found in *Unconscionability and the Code*, *supra* note 4 at 551-56, where Leff discusses the case of *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Professor Trebilcock makes a similar argument about songwriter publishing contracts, *supra* note 4.

[191] An analogous argument is often made by those opposing minimum salary laws which they argue put marginal employers out of business and hurt their employees. *See, e.g.* ECONOMIC ANALYSIS OF LAW, *supra* note 184 at 309-12.

[192] *See, e.g.*, T. Williams, *Of Scientism and Storytelling: Perspectives on the Economic Analysis of Remedies for Breach of Contract* in R.F. Devlin, ed., CANADIAN PERSPECTIVES ON LEGAL THEORY (Toronto: Emond Montgomery, 1991); A.A. Leff, *Economic Analysis of Law: Some Realism About Nominalism* (1974) 60 VA. L. REV. 451; C.E. Baker, *The Ideology of the Economic Analysis of Law* (1975) 5 J. PHIL. & PUB. AFF. 3 and *Starting Points in the Economic Analysis of Law* (1980) 8 HOFSTRA L. REV. 939; Kelman, *supra* note 18; D. Kennedy, *Cost-Benefit Analysis*

Wealth cannot be an independent value. Wealth is valuable because it is the means to other ends — such as happiness. When the analysis focuses on wealth, the latter is a surrogate for more important goals which are difficult to measure. But an increase in wealth does not automatically mean that one has achieved one's other more important goals. Indeed, increases in wealth may be detrimental to those goals. Once the possibility of divergence of the surrogate from fundamental goals is acknowledged, the problems of calculus encountered by utilitarianism resurface. Thus, the promotion of economic efficiency cannot be the sole and exclusive policy which underlies the law.

The second difficulty with economic analysis of the doctrine of unconscionability is that the argument is tautological. It has no operational content which would guide analysis of actual problems. The theory assumes perfect rationality and perfectly competitive markets. Whatever agreements result in such conditions have to be wealth maximizing and hence, fair, regardless of their content. No contract can be unconscionable *by definition*. Thus, the theory is compatible with absolutely any contract.[193] Any contract or contract term must be in the interests of all parties because, if it was not, it would be bargained away in the market. The theory provides no way of predicting choice prior to contracting because any behaviour is optimal and it provides no way of criticizing choice after contracting because whatever contract results is optimal.[194]

Finally, the theory assumes conditions in which there are no informational barriers, the parties are perfectly rational, there is choice, there are no constraints, and there are no transaction costs. This model of rational choice can offer real insights into human behaviour.[195] But, in reality, human beings must make choices in conditions of radical uncertainty where much is unknown especially about the future. Human psychology is complex and mysterious. Motives are often obscure or unacknowledged. Individuals seldom have life plans in any complete sense. The institutional framework within which they live their lives and make their choices does not resemble that of the theory. Knowledge is partial; rationality, imperfect; choice, limited. Every one operates within important constraints. Transaction costs are sometimes quite high. As Robert Heilbroner says:

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of Entitlement Problems: A Critique (1981) 33 STAN. L. REV. 387; R. Dworkin, *Is Wealth A Value?* (1980) 9 J. LEGAL STUD. 191; A. Kronman, *Wealth Maximization as A Normative Principle* (1980) 9 J. LEGAL STUD. 227.

[193] Contracts that offend ordinary ethical judgments are sometimes advocated by proponents of economic analysis. *See, e.g.*, E.M. Landes & R.A. Posner, *The Economics of the Baby Shortage* (1978) 7 J. LEGAL STUD. 323 discussing the creation of a market on children for purposes of adoption. Such proposals deeply offend views of those who do not operate within the same moral universe.

[194] Hence, the theory can justify slave contracts which are "freely" consented to on the part of the slave. *See* Posner, *supra* note 184, and Nozick, *supra* note 19. For a critique of the justification of slave contracts, *see* C. Pateman, THE SEXUAL CONTRACT (Cambridge: Polity, 1988).

[195] *See* M. Hollis, THE CUNNING OF REASON (Cambridge: Cambridge University Press, 1987) for a recent discussion of the usefulness of rational choice theories. *See also* J. Elster, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (Cambridge: Cambridge University Press, 1983).

> In its 'universal' neoclassical form, the theory applies only when the conditions for perfect rationality are assured. This immediately rules out its usefulness in real-life situations.[196]

To the extent that judges and legislators have to deal with actual problems in particular contexts, the theory provides little guidance to decision-making.[197]

Economic analysis of law uses a model of the market which is simply a model. It cannot be mistaken for a "photograph" of the real world. Thus, the model is only a metaphor for the social world which permits the economist to construct a narrative that provides insights into the functioning of the social world.[198] But often economic analysis refuses to acknowledge the limits of its model and uses the rhetoric of science in order to defeat critics who are alleged to be unscientific, while at the same time doing little empirical research itself. It assumes that the unregulated marketplace of its theoretical model has demonstrated its superiority over other possible forms of social organization rather than making a detailed inquiry into comparative advantage. Often, the rhetorical pretence of scientific method makes the discussion of important issues impossible by transforming them into technical issues that the economists will resolve through the use of their scientific "expertise". Once the issues are reframed as purely technical questions the argument becomes deductive and formalist because the conclusions are dictated by the premises of the model. Economic analysis is ideologically powerful because the all-encompassing model permits the reframing of issues in a vocabulary which is coherent and consistent. But the coherence of the model is not sufficient to make the moral universe of the legal economist attractive to those who do not share its premises.

2. *Unconscionability as an Ineffective Solution to A Real Problem*

There are two categories of authors who agree that the economic system produces injustice: the reformists and the radicals. These jurists do not oppose state regulation of the market. They agree that inequality of economic power is real. Contracts which result from market transactions protect the interests of the powerful at the expense of the disadvantaged.[199] Thus, they have criteria for identifying unconscionable contracts.

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[196] *Economics as Universal Science* (1991) 58 SOC. RES. 457 at 463.

[197] Amartya Sen comments in reaction to George Stigler's view that self-interest will win over ethics:

> [T]he fact is that there have been very few empirical testings of this kind, whether in economics, or in such matters as marital relations, or religious behaviour, despite analytically interesting pronouncements by some theorists. While assertions of conviction are plentiful, factual findings are rare.

ON ETHICS AND ECONOMICS (New York: Basil Blackwell, 1987) at 18.

[198] *See* McCloskey, *supra* note 7, and D.N. McCloskey, *The Rhetoric of Law and Economics* (1988) 86 MICH. L. REV. 752; and Williams, *supra* note 192.

[199] For example, Professor Hasson proposes the banning of sales by itinerant salespeople, a blanket requirement that sellers reimburse deposits left by consumers, a statutory guarantee by sellers of all cars for periods set by law, and the adoption of statutory standard form contracts for

Unfortunately, the reasoning which leads to this conclusion is seldom explicit. This creates a certain ambiguity in the arguments of the jurists who reject judicial regulation of unconscionable contracts in favour of legislative intervention. This ambiguity gives a false impression of symmetry with the arguments of those who oppose all forms of regulation of the market. The two groups argue that the doctrine of unconscionability, as proposed, is incoherent but the argument of those opposed to regulation is that a contract can never be unconscionable whereas those who favour regulation must believe that contractual unfairness is a real problem for which it is necessary to find a solution. For jurists who believe that the market should be regulated in order to reduce or eliminate abuse of economic power, the defect of the concept of unconscionability is not that it rejects the principle of subjectivity of values. The difficulties result from the illusory solution it offers to a real problem.[200]

(a) *The Reformist Argument*

The reformists argue, first, that the doctrine of unconscionability is incoherent. The concept of unconscionability has no content except in a specific context. The decisions are arbitrary. They depend on the prejudices of the judge[201] who hears the case. There is no rational analysis of the economic relationship involved in the dispute. Often, judges refuse to intervene in cases involving unconscionable contracts. Sometimes they void contracts or contractual clauses which are perfectly reasonable.[202] This incoherence creates enormous uncertainty. It is impossible to

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certain industries such as the car rental business. This programme of state regulation can only be explained by an argument that the unregulated market results in contracts which are systematically biased against consumers. *See supra* note 128; R. Hasson, *The Unconscionability Business — A Comment on* Tilden-Rent-A-Car *v.* Clendenning (1979) 3 CAN. BUS. L.J. 193 [hereinafter *The Unconscionability Business*] and *Tilden Rides Again: A Comment on* Réaume *v.* Caisse Populaire Ltée (1988) 14 CAN. BUS. L.J. 110.

200 *See, e.g., Loose Can(n)on, supra* note 4 at 42 where Vaver argues that:

> The danger of making the judges the RCCP (Royal Canadian Contractual Police) is that people will become deluded into believing that all contractual problems will thereby be solved. In reality, they will not and cannot be solved in this way. Indeed, a reform of this character may well create positive mischiefs.

and at 54:

> Far from being a useful tool, unconscionability is a positive hindrance to the extent that it diverts attention away from....more compact solutions.

See also Contract as Thing, supra note 4 where Leff argues that the analytical framework provided by the concept of exchange is no longer relevant in the case of sales of consumer goods the great majority of which take place on the basis of standard form contracts. This framework constitutes a positive hinderance to the solution of problems in this area. He suggests that consumer contracts should be reconceptualized as things whose quality can be regulated by the legal system in the same way as other products such as cars.

201 *See* Vaver, *ibid.* at 66-67.

202 *See* Hasson, *supra* note 128 at 400 where he states that:

> [W]hen the courts have had to deal with an unconscionability problem in the commercial field, the results have been singularly unimpressive. Sometimes, the courts strike down disclaimer clauses which are perfectly reasonable. At other times, these disclaimer

plan business, counsel a client or prepare for litigation.[203]

In addition, the common law system is not equipped to resolve issues of economic power. It costs a great deal to sue. The disadvantaged do not have equal access to the legal system. Legal procedures are complicated and success, unpredictable. Judges are members of an élite which does not understand the problems of the ordinary person. They do not understand or sympathize with the disadvantaged. These people must present themselves before the courts as victims incapable of protecting themselves in order to attract sympathy. The process is humiliating.[204]

Even if they have the best of intentions, the courts do not have the material and intellectual resources to carry out the kind of investigation necessary to determine if a contract or contract term is reasonable.[205] It is impossible for the courts to provide a solution that is simple and certain and that will prevent future abuses. The courts can only intervene *ex post facto* on a case-by-case basis to correct a loss. Finally, questions of this type are essentially political. Courts should be above political conflicts.[206]

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clauses will be upheld — sometimes by the same court which earlier struck down an almost identical disclaimer clause!

[203] *See Loose Can(n)on*, *supra* note 4 at 57-67, where he argues that it is impossible to apply the criteria of unconscionability proposed by the Ontario Law Reform Commission in its report, REPORT ON AMENDMENT OF LAW OF CONTRACT, *supra* note 124. *See also The Unconscionability Business*, *supra* note 199 at 193. Professor Hasson describes the doctrine as follows:

> Each case is like a bus ticket; it is seemingly valid for day of issue only. The case provides no guidance for other similar cases.

See ibid. at 397.

[204] In *Unconscionability and the Code*, *supra* note 4, Leff speaks at 532, of "presumptive sillies" and at 556 he says that:

> the typical has a tendency to become stereotypical, with what may be unpleasant results even for the beneficiaries of judicial benevolence.

It is definitely true that it is difficult for someone to argue that he or she has been exploited or taken advantage of without being humiliated in a culture which blames victims as the cause of their own difficulties. Professor Minow, *supra* note 18, argues that disadvantaged groups — women, members of ethnic or racial groups which have historically been targets of discrimination — often do not assert their statutory and constitutional rights precisely because the process requires that they portray themselves as victims rather than focus attention on the injustice of the system. This process is demeaning.

[205] *See Unconscionability and the Code*, *supra* note 4; Trebilcock, *supra* note 186; Hasson, *supra* note 128 at 398.

[206] *See* Hasson, *ibid.* at page 398 where he argues:

> Further if the courts begin to police contracts overtly, they will attract criticism from industry groups for interfering with freedom of contract and from consumer groups for not policing contracts vigorously enough. I think it is important to shield them from these kinds of criticisms. For one thing, if judges are to be agents of political change, they must be able to reply to their critics and few would want to see an ongoing debate between judges and various political groups. This addition to our political process does not appear to be a particularly attractive one.

Professor Hasson does not explain why a refusal to grant a remedy would be any less political or any less controversial. Such a refusal is as much an intervention as the granting of a remedy. *See*

Legislative regulation of the market is not subject to the same limitations. It is legitimate because the role of the legislature in our political system is precisely to decide issues which are political in character. The legislature has the resources necessary to identify problems, consult experts, and propose solutions which apply to all similar cases. These solutions can be simple and certain.[207] A legislative solution will reduce the costs of doing business. The rights and obligations of the parties will be known. The parties will be able to plan their dealings from clearly enunciated statutory rules. To the extent that the legislation has the desired characteristics, it will be able to prevent the abuse of economic power and protect the interests of the disadvantaged and society in general.[208]

The reformists accept neither the radical critique of capitalism nor the belief that all reform is destined to failure.[209] As a result, it is more difficult to explain how they distinguish between legitimate and illegitimate market exchanges and their justification for the regulation of the market. One possible justification uses the political system as the judge of the issue. Thus, the decision of a legislature to intervene is, in itself, proof of the unfairness of market dealings. The legislature would not intervene unless there was a good number of voters who organized

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Reiter, *supra* note 150 at 410. Groups representing consumers are not going to like such a decision which is as political as any decision to intervene.

[207] *See, e.g., The Unconscionability Business, supra* note 199 at 196-98, where Hasson proposes the adoption of a statutory standard form contract as a solution to the problem of abusive clauses in car rental contracts. This approach has its source in the article by Professor A.A. Leff, *Contract as Thing, supra* note 4. Of course, not just any old law will please the reformists. The proposal of the Ontario Law Reform Commission of a statute granting the courts a discretion to regulate unconscionable contracts provoked a harsh reaction. *See Loose Can(n)on, supra* note 4, where Professor Vaver argues that the statutory criteria of unconscionability are no more certain than the very general provision of the *UCC, supra* note 105.

[208] The authors tend to compare an idealized legislative system to the existing judicial system. There is little evidence that a majority of elected representatives want to regulate the market in the ways proposed by the reformists. Since Professor Hasson proposed statutory standard form contracts in the car rental business, no one has taken it up. Professor Vaver *ibid.* at 74, suggests that it is unfair to compare the existing legislative system and government bureaucracy with all its defects to an idealized common law. The opposite is equally valid. Professors Atiyah & Summers, *supra* note 137, suggest that one of the important differences between English and American legal cultures is the probability of legislative intervention. In England, with its centralized government, Parliament will intervene rapidly when a social problem has been identified. In the United States, where government is decentralized and state legislatures are dominated by local interest groups, it is less likely that the legislatures will act. According to the authors, this difference may explain in part the relatively greater importance of the courts in American legal thought. This analysis suggests that each legal system has its own characteristics. It is necessary to study the local situation in order to determine the likelihood of legislative regulation of economic power. In Canada the government is more decentralized than in England but less so than in the United States. Because it is necessary to convince ten governments to act, the reform of contract law is a long and arduous task. The difficulty encountered in trying to modernize the law of sale of goods in Canada is strong evidence of the slowness of legislative reform.

[209] For a discussion of the radical critique of the doctrine of unconscionability, *see* Part III.C.2.b, above.

themselves into a pressure group in order to convince their representatives that there was a need for legislation. The perception that there is a problem in a certain sector of the economy would be sufficient to justify regulation.

This argument is circular: legislative intervention is justified because the legislature decided it was justified; a market is unfair because we decided it was unfair. The argument is respectful of democratic politics, but it seems reasonable to ask for other criteria of the unfairness of the market than the legitimacy conferred by the democratic process. How are the legislators to determine the need for regulation in the context of a mixed economy?

Certain jurists distinguish commercial dealings from consumer dealings and argue that legislative intervention is necessary to protect consumers. Experienced commercial sellers and buyers do not need protection. Consumers, on the other hand, do not have the knowledge and experience necessary to protect themselves when negotiating contracts.[210] Consumer contracts are *prima facie* unconscionable. Hence, regulation of the market in consumer goods is necessary.

This argument offers a solution to the problem of identifying unconscionable contracts but, like all hard and fast distinctions, the category of consumer contract suffers from two defects. It is overinclusive in that it includes some perfectly reasonable contracts and it is underinclusive in that it excludes other contracts at least as unfair as consumer contracts. It is difficult to believe that professional buyers and sellers are all competent during working hours when they are dealing in their professional capacity but lose this competence on entering a store to purchase a good or a service for their personal use. Conversely, there are many commercial professionals who have little or no bargaining power and are in a position similar to that of the majority of consumers. Farmers and the owners of small businesses are examples.[211]

The distinction between commercial dealings and consumer contracts simplifies the analysis by eliminating the need to examine the actual economic power of the parties to the contract. But, by using surrogate criteria to justify regulation, the distinction provides a false sense of clarity and prevents us from seeing other situations in which regulation may be equally justified. Inevitably we need criteria which allow us to explain why regulation is justified even in the case of consumers. This need forces us to use the language of unequal bargaining power and the state of the market, but it is precisely this vocabulary and this kind of analysis that, according to the reformists, is impossible.[212]

The moral universe of the reformist is similar to that of the proponents of the doctrine of unconscionability.[213] The reformists accept the need for a mixed

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[210] *See, e.g.*, Hasson, *supra* note 128 at 400-02.

[211] The relationship of parts suppliers to automobile manufacturers studied by Stewart Macauley suggests that large manufacturers can use the law to create economic dependence and transfer the risk of market changes to small businesses which depend on them for their survival. *See* LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS (New York: Russell Sage Foundation, 1966).

[212] *See, e.g., Unconscionability and the Code*, *supra* note 4, and Hasson, *supra* note 128.

[213] *See* discussion of the arguments in support of the doctrine in Part III.B, above.

economy. The market offers important benefits to society but it must be regulated in order that private self-interest does not overwhelm other competing social goods. Thus, neither individual welfare nor wealth maximization exclusively define the ends of society. Egalitarian ends in terms of both opportunity and distribution of wealth must also be taken into account. When construed in this light, the debate between the proponents of the doctrine and the reformists is pragmatic and focuses on means to an end rather than the end itself. It occurs within a shared moral universe. On the other hand the differences between reformists and those who reject any doctrine of unconscionability, common law or statutory, reflect fundamentally different frameworks within which they, each, operate.

(b) *The Radical Argument*

A possible radical analysis is easier to sketch.[214] The radicals believe that the socio-economic system is fundamentally unjust.[215] The radicals argue that a system of market exchange necessarily involves inequality and abuse of market power. All exchanges have these characteristics. Racial, sexual, ethnic and class discrimination are the daily reality of capitalism. Victims of exploitation and discrimination do not

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[214] While it may be easier to outline the radical argument it is not clear from the literature that anyone really holds this view. The Critical Legal Studies school that may sometimes be equated with radicalism actually includes may divergent points of view. *See generally* Kelman, *supra* note 18, for an insider's account of the different currants which are associated with this school. The rhetoric employed by those who identify with it is sometimes quite radical. The critique of liberal concept of a right which argues that it is incoherent, illusory, and actually is an obstacle to the realization of an egalitarian and humane society suggests that these authors believe that radical change is the only way forward. Examples of such writings on contract law include C. Dalton, *An Essay in the Deconstruction of Contract Doctrine* (1985) 94 YALE L.J. 997; P. Gabel & J. Feinman, *Contract Law as Ideology* in D. Kairys, ed., POLITICS OF LAW: A PROGRESSIVE CRITIQUE (New York: Pantheon Books, 1982); J. Feinman, *The Meaning of Reliance: A Historical Perspective* (1984) WIS. L. REV. 1373. In general these authors do not propose specific reforms. The critic is essentially negative and suggests that all reform projects which do not attack the basis structures of society are destined to failure. This can be contrasted with the views of Duncan Kennedy who argues that judges can make a difference when they try to move law forward in progressive ways: *see Distributive and Paternalist Motives in Contract and Tort with Special Reference to Compulsory Terms and Unequal Bargaining Power* (1982) 41 MD. L. REV. 563 [hereinafter *Distributive and Paternalist Motives*]; D. Kennedy, *The Structure of Blackstone's Commentaries* (1979) 28 BUFFALO L. REV. 205; D. Kennedy, *Form and Substance in Private Law Adjudication* (1976) 89 HARV. LAW REV. 1685 [hereinafter *Form and Substance*]. Richard Rorty suggests that the relentless negative critique is a peculiarly American phenomenon and that Roberto Unger, sometimes called the guru of Critical Legal Studies, is actually interested in practical reform. *See Unger, Castoriadis, and the Romance of a National Future* (1988) 82 NW. U.L. REV. 335.

[215] *See, e.g.*, Dalton, where she states:

> Courts had to make concrete decisions about what was freedom and what coercion in specific contractual situations. They had to struggle with the fact that the whole economic structure quite obviously depended on the law accepting as legitimate countless deals imposed by one party upon another....
>
> If the mere *fact* of impaired bargaining power, in combination with an inequivalence of exchange, were enough to invoke duress doctrine, impaired bargaining power would not serve the purpose Dawson acknowledges it must: isolating just those kinds of

have economic or political power. The fact that exchange takes place between two parties who do not have the same negotiating power in the capitalist market is a sufficient reason to question the fairness of the exchange.

But the problem cannot be attacked at the level of exchange between the two parties who concluded a contract. Consumer protection and the doctrine of unconscionability merely distract us from the real issue. The socio-economic system must be transformed if discrimination and exploitation are to be eliminated.

Therefore, the doctrine of unconscionability cannot achieve its goal of distinguishing unfair exchange from fair exchange. There are no criteria which would enable one to make such a distinction because there is no theory or measure of value that exists outside of the tension between individual autonomy and collective solidarity.[216] In spite of this impossibility, the courts have developed a set of dichotomous categories which give the illusion that they can objectively distinguish a fair contract from an unconscionable agreement without confronting the issue of the injustices inherent in the economic system. As a result, the doctrine of unconscionability is incoherent.

The courts distinguish form or the negotiating tactics from the substance of the exchange. But it is clear that a procedural defect will not in itself justify judicial intervention. The common law punished fraud, duress and undue influence because the contracts that result from tainted bargaining are unfair. The unfairness of the exchange is the motive for questioning the bargaining tactics.[217] Thus, form and substance are inextricably linked.

The courts ask if the disadvantaged party freely consented to the deal. This inquiry into the exercise of the will of the parties requires that the courts examine their intentions. This involves the distinction between subjective or actual intention of the parties and the intention which the court will impute to the parties on the basis of their words and acts. But one cannot know the subjective intention of a person except through her acts. Thus, the court is inevitably driven to examine the substance of the exchange in order to decide if a reasonable person would have freely consented to such terms.[218]

> impairment that the law is prepared to redress without feeling that the whole structure of bargaining between unequals is put in jeopardy....
>
> Doctrinal commitment to a market system based on exploitation of inequality makes it impossible to judge as 'unreal' the majority of coerced assents.

Ibid. at 1027, 1031 & 1032.

[216] *See* Dalton, *ibid.* at 1025-26 where she argues that:

> [W]e lack any conceptual or instrumental scheme sufficiently persuasive in its neutrality or its appeal to consensual values to regulate when one impulse should predominate. How, then, should we determine that some self-interested behaviour is beyond the pale, but some other not? How should we determine that some transactions are acceptable in their terms but others not?

See also Form and Substance, supra note 214.

[217] *See* Dalton, *ibid.* at 1024-38. *See also Contract and Fair Exchange, supra* note 4 at 333-35 for a similar argument by someone who is definitely not a radical.

[218] *See* Dalton, *ibid.* at 1042-45.

The courts try to distinguish behaviour reasonably intended to defend the interests of the stronger party from behaviour which is abusive. But it is possible to describe any behaviour as either reasonable or abusive depending on the point of view. The terms "reasonable" and "abusive" have no referent that gives them a precise content. When one tries to elaborate criteria that would permit the analysis of the substance of the exchange, one encounters precisely the same dilemma. It is impossible to develop neutral or objective criteria that enable us to identify an unconscionable exchange.

The failure of the project of formulating a doctrine of unconscionability that could regulate the use of economic power is inevitable. If the courts cannot find a solution to these conceptual problems, it is a waste of time to turn to the legislatures for an answer. The problem is not one of institutional competence. Indeed, the distinction between judicial regulation and statutory regulation merely reproduces the same fundamental contradiction. The legislators are no more able to define criteria which would permit us to distinguish a fair contract from one which is unfair. This is a political problem which one cannot resolve without attacking exploitation, discrimination and power inequalities at their root.[219]

This reasoning could lead to two different conclusions. First, it is possible to conclude that it is necessary to abandon the realm of law for the realm of politics. It is impossible to eliminate socio-economic inequality through a litigation strategy. The only real solution is to organise a political movement capable of mobilizing the majority in order to change the economic system through the democratic process. In this version of radical reformism, the legal form which the transformation of the economic system would take is still legislative but, to avoid the trap of illusory change, it would be necessary to reconceptualize the relationship of the individual to collectivity and develop another conception of contractual obligation.[220]

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[219] *See* Dalton, *ibid.* at 1113 where she concludes that:

> My story reveals the world of contract doctrine to be one in which a comparatively few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private, or form from substance, or objective manifestation from subjective intent. The pain of that revelation, and its value, lies in its message that we can neither know nor control the boundary between self and other. Thus, although my story has reduced contract law to these few basic elements, they are elements that merit close scrutiny: They represent our most fundamental concerns.

[220] Examples from within the writings on contract law of what is sometimes characterized as a neo-marxist position are very few. This type of analysis is most frequently encountered in labour law, which is obviously relevant here because this law regulates the employment contract, and in the critique of the *Charter*. Examples would include J. Fudge, *Marx's Theory of History and a Marxist Analysis of Law* in R. Devlin, ed., CANADIAN PERSPECTIVES ON LEGAL THEORY (Toronto: Emond Montgomery, 1991) and H.J. Glasbeek & M. Mandel, *The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms* (1983) 2 SOC. STUD. 84. This analysis is described as neo-marxist, in part, because it appears to reject the traditional marxist view that the political movement should take the form of a revolutionary party which would lead the masses (the proletariat) to power through violent revolution. It is increasingly difficult for even the most committed Marxist-Leninist to make this argument in light of both the changes in Eastern

A second possible conclusion of this argument is that law is nothing more than another form of politics. The legal system should acknowledge that its decisions have no claim to objectivity. The courts should openly discuss the conflicting values and claims and use their power of decision-making to redistribute society's wealth and resources in a more egalitarian manner. Thus, law would become an instrument of social justice.[221]

The moral universe of the radical differs from that of the reformist in attaching greater weight to egalitarian ends. Alternative forms of social organization to the market economy are seen as necessary to remedy the injustices of the capitalist socio-economic system. The emphasis is on collective social ends rather than individual welfare. The costs of capitalism are emphasized in order to justify more radical forms of social experimentation. This view is obviously at odds with the individualist theories upon which the rejection of market regulation is based and with the more centrist positions which see the legal system as a mechanism of social justice in the context of a mixed economy.

(c) *Conclusion*

This discussion of the positions taken by various commentators in the debate over the merits of the doctrine of unconscionability shows that, regardless of the position taken, its author will, explicitly or implicitly, draw on positions on the socio-economic role of law and the relationship of law to the realm of contested social values. The debate about the merits of the doctrine of unconscionability always involves another more fundamental disagreement. But there are at this point no arguments that conclusively end the debate over large-scale frameworks.

The issue is framed in legal theory so as to force a choice between two poles of a dichotomy requiring acceptance of a single vision of society or a single ideology. One is either in favour of freedom in the market or state regulation. One believes in individual responsibility or in social solidarity. Formalist law or the rule of law is opposed to equitable justice; rules to standards. Or vice versa. One prefers either judicial creativity or legislative innovation.

Often the discussion is obscured by the fact that many commentators do not describe their vision of society with any clarity and do not acknowledge that the theoretical underpinnings of their position are controversial. But the problem is not one merely of lack of clarity. The debate has, over the years, forced the defenders of each position to refine and clarify their arguments. Nor is the problem one of errors in analysis. The rationality of the argument in favour of social solidarity that underlies the reformist position is not any less coherent than the rationality of

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Europe and the Soviet Union and the reluctance of the working class to behave according to theory. But there will always remain a few who fervently believe that the theory is right and reality will just have to learn to do what it is told.

[221] *See, e.g., Distributive and Paternalist Motives, supra* note 214 at 638-49, where he discusses the inevitability of paternalism in decision-making.

individual responsibility. They are simply different.[222] The analyses do not share starting points or premises. There is no neutral or objective criteria which will enable us to choose between frameworks without recreating the same problem of the foundation of the framework at another level.[223]

Professor Leff suggests that the issue of unconscionability raises problems which are not legal in nature. It is not simply a technical issue of the appropriate definition of a legal concept. The difficulty comes from "our" incoherent and conflicting desires.[224] "We" want to take advantage of market exchange and, at the same time, live in a society which is fair and just.[225] "We" have set two contradictory

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[222] *See, e.g.*, Ewald, *supra* note 166, for an analysis of the legal logic of the welfare state which, according to him, is internally consistent and coherent.

[223] Perhaps the clearest example of the suppression of discussion of frameworks is economic analysis. Authors working within this framework make use of the economic concepts of a single school of economics which are as controversial as the legal concepts. But the analysis is presented as if no economist disputes or disagrees with the methodology used. In reality, the economic concepts are not universally accepted. When one turns to economics as a way of providing grounding for choices of legal rules, one encounters precisely the same kind of conflict between large-scale frameworks. Legal scholars can call on different schools of economics to support conflicting conclusions. Thus, the choice of economic theory involves exacting the same kind of dilemmas as the choice of legal theory. For examples of authors who call on economic theories which are very different from those used by Judge Posner, *see* R.W. Gordon, *Macauley, Macneil, and the Discovery of Solidarity and Power in Contract Law* (1985) WIS. L. REV. 565 (a discussion of the role of economics in Professor Ian Macneil's theory of contract which rejects the approach of Judge Posner). *See also* I. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'* (1981) 75 NW. U.L. REV. 1081; and Macneil, *supra* note 177.

[224] It is important to unpack the meaning of "we" in his analysis of the debate. It suggests that all participants in the debate and, indeed, all citizens hold these incoherent desires. But this is clearly not the case. For some the choice of values and ends of society are quite clear and not the least incoherent.

[225] *See Thomist Unconscionability* (1980) 4 CAN. BUS. L.J. 424 where he argues at 427-28 that:

> [B]oth a general duty to volunteer all information material to a transaction, and a general concept of inequality of bargaining power are, in fact, not the culminations of the fraud and force lines of contract defences at all....
>
> Unconscionability.... means: a bad deal not brought about by any determinable bad conduct (the finding of which would render the use of unconscionability superfluous) but rather bad only because of its intrinsic badness: its out of ordinary 'price'....
>
> It is not an extension of market-perfecting capitalism facilitating law, but its covert enemy....
>
> Our problem is that we want *simultaneously* to produce and protect market efficiency *and* to achieve non-exploitative market results but (given individual differences among people, and innocently achieved superior information, market power and pure luck) *we cannot have both at the same time....*
>
> [D]oing both is not a technical problem — how do you define unconscionability, how do you specify unfairness in a short statute — but a cultural one: we cannot have perfect freedom and perfect fairness at once. What we have, instead, is 'unconscionability', a legal device that allows us, inconsistently and with only symbolic impact, an occasional evasive bow in the direction of our incoherent hearts' desires.

objectives and "we" are unwilling or unable to give one priority. He argues that the doctrine of unconscionability is necessarily anti-capitalist.[226] "We" are torn intellectually because "we" are unable, for whatever reason, to choose another form of social organization.

The analysis of the various positions staked out in this debate shows that Professor Leff is right in saying that the issue is not merely a technical legal problem. But the choice as he describes it — between capitalism and economic justice — simplifies the dilemma confronting us into a stark and impossible choice.

The examination of the various theoretical positions taken on the issue of unconscionability shows that the incompatibility of premises is not due only to divergences on the merits of capitalism. In actuality, the jurists involved do not define the controversy in the same way. Nor do they share the same conflicting desires. Judge Posner attacks Kantian rights analysis and utilitarianism with the same vigour as he attacks the welfare state and socialism.[227] Liberals severely criticize economic analysis.[228] Reformists try to separate themselves from the radicals with as much energy as they attack more traditional analyses.

The difficulty is not simply that our desires are conflicting and incoherent. The difficulty comes from the lack of consensus of fundamental values in a society in which appeals to the laws of nature or of history no longer have persuasive force.[229] Once the fundamental frameworks underlying the analyses of unconscionability are made explicit, there is no possible resolution of the debate either in the domain of legal theory or of social theory in the absence of a consensus on values outside of theory. Lacking the definitive argument which demonstrates irrefutably that one vision of society is objectively true, the jurist can retreat into blind faith in her own strongly held beliefs and avoid all discussion of their grounding, simply despair of resolution, or ask if there is another way to analyze legal issues which may provide a way out of the impasse into which grand theory has led us.

IV. Is There Any Way Around the Dilemma of the Choice of Large-scale Theoretical Framework?

In the third part of this article I argued that the analyses of the merits of the doctrine of unconscionability found in the theoretical writings require acceptance of a large-scale framework and the suppressing of important difficulties that arise if one tries to operate within one framework to the exclusion of all others. If, as argued at the outset, there is no argument justifying the choice of large-scale framework which is independent of the framework, such a choice cannot be justified to those who do

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226 *See ibid.* at 427.

227 *See Utilitarianism, Economics and Social Theory* in The Economics of Justice *supra* note 184.

228 *See, e.g.*, Dworkin, *supra* note 192; Kronman, *supra* note 192; E.J. Weinrib, *Utilitarianism, Economics, and Legal Theory* (1980) 30 U.T.L.J. 307; and Leff, *supra* note 192.

229 *See* Taylor, *supra* note 5; Contingency, Irony, and Solidarity, *supra* note 5; MacIntyre, *supra* note 9; and Minow, *supra* note 18.

not already share the framework. If the legal system makes such a choice its decisions will lack legitimacy. They will be experienced by those who do not share the framework as arbitrary exercises of power.

This argument raises important issues for both legal theory and the legal system. But these problems are not identical. In this concluding section I will look at the implications of the argument first for legal theory and then, more briefly, for the decision-maker whether legislative or judicial.

A. *Legal Theory*

It would be inconsistent with the premise of this article to argue that there is a single method or other simple solution to the difficulties created for legal theory by the absence of arguments that could bring the theoretical debate over large-scale frameworks to an end. We are faced with a profound dilemma. Frameworks are inescapable. We cannot look to a method for salvation. Nor is there a philosophic position which would enable us to avoid the problem. But if one accepts the argument that the legal system should not impose values on society in the guise of resolutions to technical-legal issues, it is necessary to find a way to avoid the trap of theory without losing its benefits.

A sharp dichotomy opposing theory and method is artificial and distorting. There is no method that is theory free. A legal thinker always needs a theory to construct the method with which social problems will be identified and their solutions assessed.[230] One's method is always constructed as a member of a "particular community of inquirers".[231] The categories the inquirer uses construct the problem analyzed, the context in which it is analyzed and the range of possible solutions.[232]

One possible way around the dilemma is to reject completely the project of finding arguments justifying the choice of a large-scale framework in favour of a pragmatic approach to law that assesses the merits of any legal rule in light of its usefulness in achieving social ends.[233] Such pragmatism can be seen as the eschewing of all theory in favour of practical results.[234] Thus, Richard Rorty has described contemporary legal debate as follows:

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[230] Thus, Martha Minow and Elizabeth Spelman stress that the move to decision-making in context does not entail the abandonment of theory because the contextualist must use abstract categories and criteria to define the context. *See In Context* (1990) 63 S. CAL. L. REV. 1597, especially at 1628. *See also* C. Wells, *Situated Decisionmaking* (1990) 63 S. CAL. L. REV. 1727 at 1743-45, where she discusses the impossibility of theory-free descriptions of facts.

[231] M. Smiley, *Pragmatism as A Political Theory* (1990) 63 S. CAL. L. REV. 1843 at 1845.

[232] "What you observe and how you categorize depends, in part, on who you are and what you seek.": *see* Wells, *supra* note 230 at 1745.

[233] This is the position of Richard Rorty. *See* CONTINGENCY, SOLIDARITY AND IRONY, *supra* note 5. For an interesting analysis of the relevance of pragmatism to law *see Symposium on the Renaissance of Pragmatism in American Legal Thought* (1990) 63 S. CAL. L. REV. 1569-1853.

[234] For an analysis of "the traditional English preference for 'muddling through'" and hostility to theory, *see* P.S. Atiyah, PRAGMATISM AND THEORY IN ENGLISH LAW (London: Stevens & Sons, 1987) at 4ff., in which he describes the rejection of theory which is so important to the ideology of the English judiciary and legal profession.

> For myself, I find it hard to discern any interesting *philosophical* differences between Unger, Dworkin, and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need. All three have visionary notions, but their visions are different. I do not think that one has to broaden the sense of "pragmatist" very far to include all three men under this accommodating rubric.[235]

This assimilation of such different thinkers suggests that one can simply bracket any discussion of the foundations of thought in favour of a vigorous political debate. Rorty's view that the search for foundations is futile and should be abandoned has considerable persuasive power in the current intellectual and political context. Unfortunately, this move will not resolve the problem of large-scale frameworks.

First, Rorty's position itself is one that only makes sense within its own large-scale framework. Pragmatism is itself a theory. It must try to persuade those who disagree to accept the reframing of the debate in its own pragmatic vocabulary. However, it lacks any argument which is likely to persuade those who operate within competing frameworks.[236] Indeed, the abandoning of the search for foundations may be positively offensive to those who are not already convinced by the argument.

Second, Rorty contrasts philosophy with politics. If he means simply that all positions taken in the debate are politically charged, clearly this is true. No position is neutral.[237] But he can be read as suggesting that there are no significant philosophical differences between the enumerated thinkers because they operate within the same framework. This is just as clearly not true.

Such an assimilation of the positions suppresses the important issue of values. It ignores the range of positions in the debate, the philosophical underpinnings of those positions and the formulations used by the authors of the arguments. Some of these authors take the view that their arguments demonstrate universal truths. They believe that such arguments are both possible and persuasive as a question of philosophy. In any case, legal thinkers will continue to propose new theories of law and to elaborate existing theories even if they are constructed on unstable foundations.[238] These theories constitute an important contribution to our understanding of law and its role in society. Thus, the characterization of the debate as politics does not get us very far.

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[235] *The Banality of Pragmatism and the Poetry of Justice* (1990) 63 S. CAL. L. REV. 1811 at 1813.

[236] *See* Malachowski, ed., *supra* note 31.

[237] It may well be that, as Allan Hutchinson suggests, politics is prior to philosophy and "The contending positions in contemporary jurisprudence track and often derive from those on the larger political scene. Legal scholars take the hermeneutical stances that they do because of their prior and more fundamental political commitments": *The Three "R's": Reading/Rorty/Radically* (1989) 103 HARV. L. REV. 555 at 573.

[238] As Thomas C. Grey points out: "Theories that make their mark in the world tend to be bold, sweeping, and dramatic — it is their drama that wins them an audience." *see Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory* (1990) 63 S. CAL. L. REV. 1569 at 1591. Thus, legal theorists most of whom work in law faculties have a vested interest in developing such theories because their academic reputation and survival may depend on it.

Third, assuming acceptance of the view that pragmatism is the most useful approach to take to legal issues, these issues can only be resolved by assessing the usefulness of proposed or existing rules in light of some ends of society. Thus, there must be a debate about the objects which the society is trying to achieve. There is currently no consensus about ends. The arguments in favour of particular ends — utility, wealth maximization or the reduction of inequality and oppression, for example — reproduce the same dilemmas as the philosophic debate. While some relief may be derived from freeing oneself from the need to justify ends by universally valid arguments, the move away from foundationalism does not in itself provide criteria for the choice of ends.[239] This debate is as intractable as the philosophic debate. The ends proposed by the adherents of competing positions are derived from their large-scale frameworks.

If the pragmatist accepts that the ends of society are whatever ends are defined by the existing political system, she risks having nothing interesting to say in the debate over ends. Her pragmatism will be conservative and complacent.[240] If she argues in favour of certain ends she will have to provide reasons. In doing so she will be driven beyond purely pragmatic considerations if she wants to avoid banal relativistic arguments.

It is not obvious that there is a way out of the dilemma of legal theory. Perhaps the only solution in the existing context is the adoption of an intellectual stance that acknowledges the absence of decisive arguments and eschews overinflated rhetoric designed to camouflage this absence. Intellectual modesty may be the only stance which will enable legal thinkers to move beyond the bind created by the absolutist nature of legal theory which dominates legal analysis. While this stance does not dictate any single method, such a stance would entail that, whatever the framework of one's analysis, it must involve a critical and self-critical approach that will always question its own theoretical underpinnings in light of descriptive narratives of the complex social world in which legal rules are enforced and of the consequences of those rules for real people.[241]

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[239] The critique of Rorty which argues that his pragmatism is essentially conservative shows that the move to pragmatism does not resolve the problem of competing large-scale frameworks unless one is willing to accept a purely relativistic ethical stance. The debate is only translated into another vocabulary. Those who want to defend a more progressive politics argue that pragmatism must be given a specific moral spin — the opposition to oppression, patriarchy and hierarchy. *See* Hutchinson, *supra* note 237; Minow & Spelman, *supra* note 230, particularly at 1634-39 (discussing relativism); J.W. Singer, *Should Lawyers Care About Philosophy?* (1989) DUKE L.J. 1752.

[240] *See* M.J. Radin, *The Pragmatist and the Feminist* (1990) 63 S. CAL. L. REV. 1699 for a discussion of the conservative and complacent tendencies of pragmatism.

[241] The intellectual stance outlined here draws heavily on feminist approaches to law. While feminists are not monolithic in their approach to law, I believe that the best feminist scholarship avoids the pitfalls of absolutist theory. Professor Martha Minow outlines one such feminist method. She calls it "the social relations approach":

> For legal analysis, relational approaches may be best articulated as imperatives to engage an observer — a judge, a legislator, or a citizen — in the problems of difference: *Notice* the mutual dependence of people. *Investigate* the construction of difference in

Theory which insists that reality conform to its premises must be abandoned in favour of theory that requires the rethinking of its own premises in light of reality. The inevitable need for a theory does not mean that discussion of premises must be suppressed. On the contrary, premises should be made explicit and subject to constant revision. This is true of all frameworks across the spectrum.[242]

Sensitivity to the ways in which one's framework can prevent one from seeing other aspects of the problem is essential. Descriptive narratives must be multiple and pluralistic in order to be useful. Careful attention to context will require rich description of situations in which problems arise. It is important to understand the impact of possible decisions on the parties involved as well as the social consequences of proposed rules.

Empirical research involving attention to both the construction of context and the narratives of those involved in the situation would play an important role in such a method. It is necessary to have the fullest possible picture of the context within which the legal issue arises.[243] It is important to be aware of how the construction of

> light of the norms and patterns of interpersonal and institutional relationships which make some traits matter. *Question* the relationship between the observer and the observed in order to situate judgments in the perspective of the actual judge. *Seek out* and *consider* competing perspectives, especially those of people defined as the problem. *Locate* theory within context; *criticize* practice in light of theoretical commitments; and *challenge* abstract theories in light of their practical effects. *Connect* the parts and the whole of a situation; *see* how the frame of analysis influences what is assumed to be given.

Supra note 18 at 213. What is interesting in this proposed method which as described remains to be thoroughly worked out, is the call for humility on the part of the observer in regards to her or his capacity to know and state the "truth" and the avoidance of dogmatism which insists that reality must conform to theory. This author uses feminism as her inspiration and demonstrates convincingly the relevance of feminist methodology for legal theory in general. For another discussion of ways to get beyond the distorting frameworks imposed by grand theory *see* S. Toulmin, COSMOPOLIS: THE AGENDA OF MODERNITY (New York: Free Press, 1990) c. 5. For a brief discussion contrasting the dominant conceptions of law and legal method especially positivism and alternative methods *see* T.B. Dawson, *Identifying Law: An Introduction* in T.B. Dawson, ed., WOMEN, LAW AND SOCIAL CHANGE: CORE READINGS AND CURRENT ISSUES (North York: Captus Press, 1990) at 27-33.

[242] Judge Posner criticizes the left for its refusal to criticize its own "pieties" calling them "dogmatists in pragmatists' clothing" in *What has Pragmatism to Offer?* (1990) 63 S. CAL. L. REV. 1653 at 1659. But he is as completely uncritical of his own pieties and, hence, vulnerable to the same criticism. His answer to all legal questions is the free market, a concept which is never critically analyzed. *See* J.W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism* (1990) 63 S. CAL. L. REV. 1821 at 1825.

[243] There is nothing new in this proposal. The Realists thought that social science and empirical research would clarify many issues. Some took it to great extremes. *See generally*, Schlegel, *supra* note 145. What is surprising is to note how little empirical research is actually done. Even economic analysis does very little investigation to see if its highly abstract and theoretical models correspond to anything in the real world. *See* Sen, *supra* note 197 at 18 for a discussion of the lack of empirical research to support the argument of economic analysis of law. Professor Vaver in *Loose Can(n)on*, *supra* note 4 at 45 criticizes the Ontario Law Reform Commission for the lack of empirical research to support its proposals in REPORT ON AMENDMENT OF THE LAW OF CONTRACT, *supra* note 124. Professor Trebilcock makes use of statistics concerning

the context frames the issue to the exclusion of other possible ways of seeing it.

In addition to intellectual modesty, openness to other narratives, and the use of the best available empirical research, it would also be useful if theory abandoned the project of building single all-encompassing theories. Human beings (and particularly male thinkers) have always demonstrated considerable hubris when faced with the complexities of the world. But in law (as elsewhere) "no single theory is ever likely to serve satisfactorily as an all-purpose or final guide to life."[244] A willingness to tolerate more pluralist legal theories would enable legal thinkers to propose more practical and concrete solutions to actual problems. This would also reduce the importance of the dilemma of the choice of large-scale framework because the choice would no longer be framed as all or nothing and exclusivist in nature.

If we return briefly to contract law and the issue around which the argument of this article has been constructed, this intellectual stance would suggest that contract scholars should revise the presentation of their arguments. First, the contingent nature of the large-scale framework within which the argument is presented should be acknowledged and problematized. Competing frameworks should be taken more seriously. Conclusions should be presented more tentatively. Greater attention must be paid to the careful identification of actual contracting problems so that the theoretical debate is better grounded.

Until now contract scholars have done little empirical research.[245] For them, case law constitutes the most important source of information concerning the market and the kinds of problems encountered there. But this sample is not representative. First, the case law seldom includes the voices of those involved in the disputes. The legal system which produces decisions always re-tells the narrative in its own voice. Second, the majority of problems that arise during negotiation and execution of contracts are resolved without recourse to the judicial system.[246] The problems of the average citizen who does not have the resources to invest in costly litigation especially when the sums involved in the individual case are not great, also merit

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the music publishing industry in his article *Post-Benthamite Economics*, *supra* note 4, but what is most striking about his use of these statistics is the lack of analysis which would make them meaningful. Models for such research would include the work of feminists on sexual harassment and domestic violence in which the study of women's lived experience brought actual problems out into the open and forced courts and legislators to acknowledge their reality and offer solutions. *See, e.g.*, C. Mackinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (New Haven: Yale University Press, 1979) and E. Sheehy, *Canadian Judges and the Law of Rape: Should the* Charter *Insulate Bias?* (1989) 21 OTTAWA L. REV. 741.

244 Grey, *supra* note 238 at 1578.

245 *See, e.g.*, H. Beale, D. Harris & T. Sharpe, *La distribution automobile au Royaume-Uni, une technique contractuelle complexe* in D. Tallon & D. Harris, eds., LE CONTRAT AUJOURD'HUI: COMPARAISONS FRANCO-ANGLAISES (Paris: L.G.D.J., 1987); C.W. Grau & W.C. Whitford, *The Impact of Judicializing Repossession: The Wisconsin Consumer Act Revisted* (1978) WIS. L. REV. 983; *Elegant Models*, *supra* note 177; Beale & Dugdale, *supra* note 177; W.C. Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty* (1968) WIS. L. REV. 1006; Macaulay, *supra* note 211; *Non-Contractual Relations*, *supra* note 177; and F. Kessler, *Automobile Dealer Franchises* (1957) 66 YALE L.J. 1135.

246 *See* the articles cited *ibid.*

attention.[247]

This does not mean that the examples found in the case law are of no interest. Litigation such as that concerning ureaformaldehyde insulation teach us a great deal about the functioning of the economic system, the failures of government regulation on which consumers rely for protection, and the viability of litigation as means of obtaining redress in such cases.[248] But our understanding of law must go beyond the minority of cases which go to litigation.

The debate over the merits of the doctrine of unconscionability has served in this article as the means to illustrate the difficulties of legal theory. It is not necessarily the most important issue in contract law. It is possible that the important problems in the production and distribution of goods have very little to do with the unequal bargaining power and the contractual relation between an individual seller and an individual buyer. If this is true, the doctrine of unconscionability will have at best a very limited role to play in the policing of the market. It seems clear, however, that, in the context of unconscionability, we need more information about the impact of unequal economic power on market exchanges. We need to know more about the expectations of professional sellers and buyers and the experience of the ordinary citizen. At the moment, our information is at best impressionistic. We are not yet in a position to judge if the adoption of the reform proposed by the Ontario Law Reform Commission[249] or any other version of the doctrine would be beneficial.

Thus, the conclusion of this analysis is modest. The dilemma of theory will not go away but it is possible to approach theory with a different attitude. Much legal theory works from unexamined premises derived from large-scale frameworks which define away problems. Such theory insists on theoretical absolutism requiring the formulation of a single solution which applies in all circumstances without regard for context. As long as the issues are framed in this way, legal theory will be unable to get beyond the dilemma created by the absence of arguments which justify the choice of large-scale framework. Taking greater care in acknowledging the limits of the framework within which one operates, in identifying actual lived problems and in tentatively proposing possible solutions may offer a way to move beyond the current bind which does not reduce the choice of legal rule or doctrine to the arbitrary exercise of power.

B. *Decision Making*

Legal theory is the privilege of those who are not directly involved in law making or the deciding of actual cases. The theorist's argument is judged on the basis of the coherence of her or his argument in terms of logic, evidence and social vision.

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[247] The obstacles to consumer litigation which make the identification and solving of problems difficult are discussed in Reiter, *supra* note 150 at 403-05; and E. Belobaba, *The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention* in Reiter & Swan, eds., *supra* note 49 at 423.

[248] *See* C. Masse, *La compensation des victimes de désastres collectifs au Québec* (1990) 9 WINDSOR Y.B. ACCESS JUST. 3.

[249] *See supra* note 124.

The work of the legislator or the judge is very different and is evaluated according to different criteria. She or he must decide what the law should be. The legislator must decide the merits of any proposed reform. The judge must formulate the best possible proposition of law in order to decide the rights of the parties in the context of litigation. Once a decision is reached the power of the law-making institution and the state enforces it. The concern for legitimacy is central in legislative or judicial decision-making. The result must convince both those who benefit from the decision and those who are disadvantaged.

No politician will rely solely on the fact of power to justify a legislative choice. A politician will always argue that any legislative choice is in the best interests of all of society. A legislator will resort to substantive justifications in her attempt to convince the population of the legitimacy of her preferred legislative option. In light of the inevitability of a multiplicity of large-scale frameworks, the claim to know what is best for society as a whole will be unpersuasive to those opposed and will often be seen as ideological camouflage for the exercise of power.

When confronted by vocal opposition, a legislator can always retreat to the argument from democracy to justify her position. The electoral process gives her a mandate to argue for certain reforms. While it is highly unlikely that an electoral platform will include a position on issues such as contractual unconscionability, she can argue that the electorate was aware of her general philosophy and supported it by voting in her favour. But the democracy argument focuses on process and abandons the attempt to provide independent ethical grounding for proposed legislative measures. This is both realistic given the dynamics of political power and necessary because of the inconclusive nature of political debate. But few politicians and, more importantly, few ordinary citizens would regard such arguments as persuasive in and of themselves. Thus, legitimacy in the political realm is always tenuous and ephemeral.

The courts cannot have recourse to majoritarian arguments because the judicial system is not a democratic institution. Given the elitist nature of the courts, any choice of legal rule is more obviously the result of an exercise of power. To avoid perceptions of abuse of power, courts can make different kinds of claims. They can argue for example, that judges must decide in light of fundamental principles of society.[250] This view assumes that there is a limited set of fundamental principles to which judges can appeal in order to resolve controversial cases. Another strategy would be to argue that there are shared community values that must guide judicial decision-making.[251] This view assumes that we can avoid the problem of foundations

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[250] *See, e.g.*, R. Dworkin, TAKING RIGHTS SERIOUSLY (Cambridge, Mass.: Harvard University Press, 1977); *supra* note 22; and *supra* note 36, where he develops and refines his argument that there are right answers to hard cases.

[251] *See* M.A. Eisenberg, THE NATURE OF THE COMMON LAW (Cambridge, Mass.: Harvard University Press, 1988), particularly c. 4 where he discusses the role of social propositions in common law adjudication. Social propositions are those moral norms, policies and experiential propositions which reflect the interests or aspirations of the community as a whole and have substantial support in the community. Professor Eisenberg deals with the problem of community at 19-21, but does not convincingly respond to the issues of contested values and unequal power.

by defining a community morality that will enable the judge to reach the right and, hence, legitimate answer.

Neither of these strategies is satisfactory as a response to the problem of large-scale frameworks. The first avoids the problem by assuming fundamental principles which are inevitably going to be controversial. Even if we accept the view that such principles exist, there is no reason to believe that such principles will dictate a particular result in a difficult dispute.

The second argument is a variation on the first but it resembles Rorty's argument in that it tries to locate consensus in the values of the community. However, the community morality is also a controversial construct. It is premised on the existence of a single community which shares values. However, this "community" is either an ideological construct which suppresses the reality of contested values and unequal power or a sociological construct defined by the zones of agreement, however ephemeral, among the groups constituting the community. In either approach, the definition of community reproduces the same problems of framework that the concept of community was intended to resolve. In addition, it is likely that, if we could agree on the contours of community morality or values, the description would be so abstract and general that it would not dictate any particular result in a difficult case involving conflicting social visions.

Another possible argument would be that judges, because of their training and personal integrity, can be trusted to balance the interests at play impartially and reach appropriate conclusions. However, given the non-representative character of the judiciary, it is unclear why those whose values are excluded from the legal system should respect the conclusions of judges. There is nothing in the selection process or the legal process itself which self-evidently endows judges with greater insight and infallibility than ordinary citizens.[252]

Courts cannot refuse to decide cases which come before them. But decision-making inevitably involves choices about rules which may do violence to competing ethical and social visions derived from differing large-scale frameworks. Judicial legislation in the realm of private law is unavoidable but no less controversial than in constitutional law. If the courts are to avoid serious challenges to the legitimacy of their conclusions, they must approach theoretical arguments sceptically. They must scrutinize the underpinnings of any argument carefully before adopting it. They must be very sensitive to the controversial nature of the choices they inevitably must make.

Thus, intellectual modesty, while admirable in the theorist, becomes imperative in the judge. There are no uncontested principles to which the court can refer to ground either its formulation of the rule or its application of that rule in the case before it. The court must be careful to preserve the possibility of competing doctrines

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See also Lambert, J.'s judgment in *Kreutziger*, *supra* note 83, for a judicial formulation of the community standards test.

[252] For a useful discussion of these arguments in the context of constitutional law, *see* J. Bakan, *Some Hard Questions About the Hard Cases Question* (1992) 42 U.T.L.J. 504, and Bakan, *supra* note 2.

which may be necessary to the resolution of future and unforeseen disputes. The ideal of a contract law that is open to the possibility of new narratives, points of view and frameworks and contains a multiplicity of rules and doctrines with which to respond to new claims is one that the courts should strive to realize as they construct the law of contracts in deciding its application in particular cases.