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Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device

CHARLES L. KNAPP*

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[J]udicial decisions invoking unconscionability doctrine have, like the safety valve on an overheating boiler, served two very important functions. First, they *relieved the pressure* on individual judges who otherwise might have been forced by the traditional rules of law either to render decisions they regarded as in fact unjust, or else to reach just results by twisting doctrine out of shape (using Llewellyn's well-known "covert tools"). Second, the early unconscionability decisions served as an *alarm* to the system as a whole, alerting society (or at least the legal community) to the presence of social evils requiring action.¹

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1. CHARLES L. KNAPP & NATHAN M. CRYSTAL, *TEACHER'S MANUAL, PROBLEMS IN CONTRACT LAW* 156 (3d ed. 1993). The reference to covert tools refers to Professor Llewellyn's dictum that "[c]overt tools are never reliable tools." K.N. Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700, 703 (1939).

This Article is concerned with two areas of American law and their intersection. One is the legal doctrine—which exists in both common law and statutory form—known as “unconscionability.” The other is the form of dispute resolution called “arbitration.” These would on the face of it seem to be unrelated concepts; unconscionability is generally thought of as part of the law of contract, while arbitration is essentially a type of procedure, one of a number of mechanisms for settling disputes between private parties. By an accident of legal history, however, the two notions appear to be in the process of a slow-motion head-on collision. This Article will attempt to look more closely at the present state of affairs and to make some observations about the effect that each of these bodies of law may be having on the other as their paths converge.

I. THE DOCTRINE OF UNCONSCIONABILITY

Given the audience for which this piece is written, it should not be necessary here to recount in detail the modern story of unconscionability. Long present at the margins as an equitable doctrine occasionally employed to resist contractual enforcement where otherwise the result would be simply too extreme for the judicial stomach,² revived by its inclusion in Article 2 of the Uniform Commercial Code (UCC) as a potential defense to liability,³ then swallowed whole by the *Restatement (Second) of Contracts* as a principle not dependent on statute for its legitimacy,⁴ the doctrine of unconscionability has been comfortably seated at the table of contract law since the mid-twentieth century, albeit well below the salt.⁵ Commentators have differed about its wisdom,⁶ its

2. Dando B. Cellini & Barry Wertz, Comment, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 TUL. L. REV. 193, 196–99 (1967); see generally Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 466–90 (1995). Professor Prince also discusses the history of the doctrine in California. *Id.* at 490–99.

3. U.C.C. § 2-302 (2008).

4. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

5. One commentator has characterized the doctrine as “a disfavored stepchild of contract law.” Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 840 (2004).

6. Professor Leff’s article is usually considered the leading article on unconscionability as set forth in section 2-302. Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967). It contains a lengthy account of the drafting history of section 2-302, and is the source of the “substantive/procedural” analysis predominant in the case law of unconscionability, but it also voices strong criticism of the doctrine for its “amorphous” nature. *Id.* at 488. See also Stempel, *supra* note 5, at 813–18. More favorable views of section 2-302 were expressed in M.P.

utility,⁷ and even its efficiency, or lack thereof.⁸ Some have feared its potentially undermining effect on the whole of contract law as a possible opening wedge for uncontrolled judicial discretion,⁹ while at the opposite extreme, others have urged the courts to view the doctrine expansively.¹⁰ One of the most notable of the early attempts to refine our concept of unconscionability was a 1970 article by the young Dick Speidel, then a Professor of Law at the University of Virginia.¹¹ Dick's article was—like all of his work—lucid, serious, and persuasive. Although it may be remembered today more for its attempt to suggest a quantitative test for “price unconscionability,”¹² the 1970 article is also notable for its clearheaded appraisal of the role that true assent does—or does not—play in consumer transactions. Building on the then-fresh work of others¹³ and foreshadowing later analyses to come,¹⁴ Dick concluded with the following passage:

Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 757–58 (1969), and John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 11 (1969).

7. E.g., Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 3 (1981) (asserting that courts should employ traditional doctrines wherever possible rather than resorting to the less focused concept of unconscionability); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 753–54 (1982) (arguing that courts should give the concept of unconscionability an expansive interpretation).

8. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95 (1975) (contending that too free a use of the doctrine of unconscionability would be inefficient, but that it can foster efficiency when used to police opportunistic behavior).

9. E.g., Comment, *Policing Contracts Under the Proposed Commercial Code*, 18 U. CHI. L. REV. 146, 151–53 (1950) (asserting that the proposed section would permit extensive judicial policing of contracts, which is not a desirable development); Note, *Unconscionable Business Contracts: A Doctrine Gone Awry*, 70 YALE L.J. 453 (1961) (contending that the doctrine is out of place in business settings when used to counterbalance uneven bargaining power).

10. E.g., Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1066 (1986) (asserting that unconscionability need not be limited to consumer transactions); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 450 (1994) (arguing that courts should use substantive unconscionability to redress problems of the disadvantaged).

11. Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

12. *Id.* at 372–74.

13. Ellinghaus, *supra* note 6, at 812–14; John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 945–48 (1969).

14. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176, 1245–48 (1983); Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 118–36 (2006).

The proposal here made is that the element of assent be excised from the determination of unconscionability in consumer transactions. When individual consumers are involved, particularly those in low-income areas, it is unrealistic to rely upon either disclosure or choice to influence or deter unfair contracts. In place of assent the court should, once the consumer has demonstrated that a particular contract or clause is *prima facie* unconscionable, place the burden on the professional to justify his conduct under UCC 2-302(2).¹⁵

Whatever its theoretical merits or demerits, the doctrine of unconscionability in fact played a prominent role in contracts jurisprudence only in the early years of its UCC-fostered renaissance.¹⁶ Dick's article quoted above was one of many that commented on the then-developing case law in which consumers—often of limited economic means,¹⁷ sometimes speaking English poorly or not at all,¹⁸ and sometimes members of a minority group with a history of having to contend with majority discrimination, economic and otherwise¹⁹—were granted relief against all or at least some terms of a contract that otherwise would have required them to pay a grossly exorbitant price for goods that maybe they did not need or even want, or would have deprived them of some remedy to which under general contract law they would have been entitled.²⁰ The early case of *Williams v. Walker-Thomas Furniture Co.*²¹ was representative of the cases that followed. In *Williams*, Judge Skelly Wright, reversing a lower court, held that the common law of the District of Columbia at that time²² did in fact allow a court to find that the contract by which the plaintiff and others had purchased furniture from the defendant was unconscionable, at least with regard to the enforcement of an add-on clause that potentially subjected to repossession all the household items that the plaintiff had purchased from the defendant, even though the purchase price of many of those items had in effect been paid many times over.²³ Judge Wright's opinion did not expressly hold either the whole Walker-Thomas contract or the specific clause at issue to be unconscionable—merely to be potentially so, should the lower court on remand so find—but the sympathies of Judge Wright and his

15. Speidel, *supra* note 11, at 374–75.

16. See generally Stempel, *supra* note 5, at 812–31 (discussing various factors that may have contributed to the decline of unconscionability as an active force).

17. E.g., *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969).

18. E.g., *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd*, 281 N.Y.S.2d 964 (App. Term 1967).

19. E.g., *Kugler v. Romain*, 279 A.2d 640, 643 (N.J. 1971).

20. E.g., *Am. Home Improvement v. MacIver*, 201 A.2d 886, 887–89 (N.H. 1964).

21. 350 F.2d 445 (D.C. Cir. 1965).

22. The case arose before the UCC was effective in the District of Columbia, although the court does refer to section 2-302 in its opinion. *Id.* at 448–49.

23. *Id.* at 450.

court have seemed clear to many over the years.²⁴ Similar cases followed in many jurisdictions, as other courts took advantage of the invitations extended by the Federal Circuit Court of Appeals and the drafters of UCC Article 2 to review contracts on their merits for potential unconscionability.²⁵

By the early 1970s, however, the case law applying the doctrine of unconscionability appeared to have run its course, and a decade or two of relative dormancy for the doctrine lay ahead. This could perhaps be attributed at least initially to the fact that the focus in terms of consumer protection had shifted from individual lawsuits to legislation and regulation, at both the state and federal level. Statutes aimed at providing both full disclosure and substantive regulation proliferated, agencies like the Federal Trade Commission and its state counterparts prohibited or restricted various contractual devices of the sort that the courts had reacted against, and “storefront lawyers” were at least temporarily in vogue, both on television²⁶ and in real life.²⁷ As asserted in the above-quoted passage, it has seemed to some of us that the function of the modern doctrine of unconscionability during the early period of its case law development was twofold. First, when courts felt that existing rules of law were enabling merchants to impose on their customers contracts that were grossly unbalanced and inequitable—either because the effects of those contracts were not initially apparent or because the merchants’ raw economic power enabled them to do so—the courts could refuse to enforce those contracts on the ground of unconscionability. This is, of course, the “safety valve” referred to in the quotation above. Second, by producing and publishing opinions in which various problematic contracts

24. In the early days of my teaching career at N.Y.U. Law School, Judge Wright spoke at some public occasion there, which was followed, as such events usually are, by a reception at which the speakers could mingle with those in attendance. Being a young contracts teacher, I buttonholed Judge Wright and in conversation asked him a question, the gist of which was something like, “Was it difficult wrestling with the question of applying unconscionability to the contracts in *Williams v. Walker-Thomas*?” I would like to think I was more eloquent than that, but I probably was not. My recollection is that he looked down at me—I am not short, but I remember him as being a pretty tall guy—smiled benignly and said simply, “Well, it was just the right thing to do.” At the time I was thrilled that he had shared this vision of justice with me; with hindsight I am guessing it was a well-polished answer to a tiresomely recurring inquiry.

25. See, e.g., *supra* notes 17–20.

26. CBS aired *Storefront Lawyers* during the 1970–1971 television season.

27. See CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 596–99 (6th ed. 2007).

and clauses were examined and condemned vocally and prominently, courts and individual judges could call to the attention of other actors in the legal system the existence of legal lacunae—gaps in existing law that failed to protect consumers against such overreaching. They could, in other words, “blow the whistle.”²⁸ Of course the individuals affected may have benefitted from particular applications of the doctrine,²⁹ but as commentators have pointed out, the use of individual lawsuits to develop a generally consumer-protective common law is by itself an inefficient and probably ultimately ineffective strategy.³⁰ However, seen as a means of engaging other parts of the legal system and alerting them to problems in need of attention, the doctrine of unconscionability seems actually to have done in the 1960s and 1970s precisely what its proponents might have hoped: it helped to produce, at least for awhile, a legal climate in which the legislative, executive, and judicial branches with a more or less common voice sought to dispense a better brand of justice to consumers—not just to consumers of goods and services, but to consumers of the legal system itself.

II. MANDATORY ARBITRATION

Unlike the doctrine of unconscionability, which he did not address in a major way after 1970, the topic of arbitration was one of Dick Speidel’s career-long central concerns.³¹ In articles, casebooks, and treatises, he explored the ins and outs of commercial arbitration and offered his own

28. In the quotation at the head of this article, we refer to the whistle on a safety valve as the source of our metaphor. That kind of whistle is essentially a signal that something dangerous is happening—a steam boiler might be in danger of exploding from internal pressure. Probably the more frequent present day use of the phrase “blow the whistle” is as a signal of an act of misconduct, as when a referee calls a foul in a sports contest or an employee discloses her employer’s wrongdoing to some appropriate public authority. One also thinks of the police officer’s blowing the whistle as a call for assistance from other officers. All of those usages seem to me to be implicated here: something potentially dangerous is happening, a type of misconduct is occurring and should be exposed, and there is a need for assistance from others who are qualified and able to render it.

29. Although some skepticism may be in order here. See, for example, *Frostifresh Corp. v. Reynoso*, 281 N.Y.S.2d 964, 965 (App. Term 1967), reversing the trial court’s decision cited in note 18 *supra* and remanding to allow the court below to compute what a fair price for the freezer would have been, thereby removing whatever incentive the doctrine’s application might have created for the seller to avoid overreaching.

30. E.g., Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356–57 (1970).

31. See *Selected Works by Richard E. Speidel*, 46 SAN DIEGO L. REV. 550–52 (2009). His other area of principal concern was of course commercial law in general and the UCC in particular, an area in which he produced, alone or with collaborators, a host of casebooks, treatises, and law review articles. *Id.*

insights regarding its incidents and uses.³² Clearly a strong proponent of arbitration in general as a dispute-resolving mechanism, Dick nevertheless had reservations about its use in situations where the consent of one of the parties was doubtful or perhaps absent.³³ He also expressed fear that the Supreme Court's overly determined extension of the Federal Arbitration Act (FAA) could have a negative effect on the ability of claimants to enforce statutory rights under state or federal law.³⁴ In 1998, Dick published an article in the *Arizona Law Review* that demonstrated his willingness to examine fundamental assumptions about the arbitration process. Entitled *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*,³⁵ this piece noted the increasing use of predispute arbitration clauses in contracts between consumers and business organizations, as well as in healthcare contracts, franchise agreements, and various other contexts—a process by which the law of arbitration had been, as he put it, “consumerized.”³⁶ Characteristically balanced in its attempt to suggest a variety of ways in which the process of “consumer arbitration” might be improved through private efforts or public actions, the article nevertheless concluded that the present state of affairs was untenable:

As transactional contexts change and develop, and as the legal system regulates in new and different ways, a unitary model of arbitration enforced by mandatory order in consumer arbitrations has outlived its welcome. It is time for a change in the legal framework surrounding the process in the interest of protecting freedom from arbitration and of promoting integrity in the process and sound legal outcomes in the decision of statutory claims.³⁷

32. See, e.g., EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN E. STERNLIGHT & STEPHEN H. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006).

33. Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 *BROOK. L. REV.* 1335, 1335–39 (1996).

34. Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 *OHIO ST. J. ON DISP. RESOL.* 157, 157–58 (1989).

35. Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 *ARIZ. L. REV.* 1069 (1998). The title of Dick's article indicates his reservations about the use of the term *mandatory arbitration* to describe a contractual agreement to arbitrate disputes that might arise in the future, as opposed to an agreement to submit an already existing dispute, because both types of agreement are at least in theory entered into voluntarily. As I have in earlier articles, I will here use the term *mandatory arbitration* to describe predispute agreements, while recognizing, as Dick did, its ambiguity.

36. *Id.* at 1072.

37. *Id.* at 1092.

III. UNCONSCIONABILITY AS APPLIED TO MANDATORY ARBITRATION

In his article quoted above, Dick considered various defenses that might be asserted against application of the FAA to disputes that would otherwise be subject to conventional litigation in state or federal court.³⁸ One possible defense he explored but ultimately found to be of little potential application was the defense of unconscionability—that the contract as a whole or the arbitration clause specifically should be held unenforceable because unconscionable.³⁹ Section 2 of the FAA allows for this possibility by making arbitration clauses “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴⁰ Several different unconscionability arguments could be made, he suggested: the clause was hidden in fine print, it was offered on a take-it-or-leave-it basis, and application of the clause would substantially advantage the drafting party or be under its control.⁴¹ But these arguments can be countered, he continued, by the fact that the adhering party usually has the ability to review the form, by the fact that the clause is likely to be fully disclosed rather than hidden, and by the fact that arbitration is favored by the law, which regards the arbitration process as inherently balanced and fair.⁴² There might be cases, Dick conceded, in which an unconscionability defense could successfully be employed to stave off arbitration, but—at least as of the time the article was being written, some ten-plus years ago—such cases were “few and far between.”⁴³

38. *Id.* at 1075–79. For example, was the dispute an arbitrable one? *Id.* at 1077–82. Does the FAA—as opposed to some state version—apply? *Id.* at 1075–76. Was there a written agreement to arbitrate? *Id.* at 1077–78. Et cetera.

39. *Id.* at 1080.

40. 9 U.S.C. § 2 (2006). The statute’s use of the term *revocation* rather than *avoidance* seems awkward because lawyers usually speak of revocation of an offer, as contrasted with avoidance or perhaps rescission of a contract. No one appears to be bothered by that when considering how or when to apply the statute, however.

41. Speidel, *supra* note 35, at 1080.

42. *Id.* The argument for unconscionability, Dick wrote, may not be persuasive even when an arbitration clause is offered to an employee on a take-it-or-leave-it basis:

Where is the oppression in that? If you “take it” you get employment where both parties are bound to arbitrate, and if you “leave it” you can search for work where arbitration is not required. . . . [T]his analysis . . . reflects the view of the courts in all but the most egregious situation.

Id.

43. *Id.* He cites only one arbitration decision, *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997), as accepting an unconscionability defense, noting that the court held that the arbitration agreement was “unconscionable on unique facts.” Speidel, *supra* note 35, at 1080 n.50.

Well that was then, of course, and this is now. In the intervening years, cases have proliferated in which a party resisting arbitration has attempted to argue the unconscionability defense. Many of those have failed, as Dick foresaw, but a substantial and increasing number have been, and are, succeeding—in both state and federal courts, trial and appellate.⁴⁴ An abundance of articles has addressed the subject of mandatory arbitration,⁴⁵ and most of those take seriously the possibility that unconscionability may be a successful defense to the enforcement of an arbitration clause, at least in a “consumer contract” or “adhesion contract” situation. As might be expected, the commentators differ in their evaluations of this phenomenon. Many see this as a classic instance of “hard cases making bad law,” because in their eyes the doctrine of unconscionability is being reshaped in an inappropriate fashion just to avoid what is regarded by some courts as an undesirable result in the arbitration area.⁴⁶ Other commentators, however, view the

44. See *infra* notes 69–84 and accompanying text.

45. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 763 n.7 (2002), for a list of those articles that as of 2002 seemed to be most helpful. Since then another flood of articles has come through the gate, more than I could as a practical matter cite here. The two that seem to me most helpful on the topic of this Article—the interplay of the unconscionability doctrine and arbitration in the courts—are Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 *N.Y.U. L. REV.* 1420 (2008), and Stempel, *supra* note 5. These two studies are comprehensive and scholarly, and together pretty well map out the territory as of their respective times of creation. Also very helpful to my understanding of the underlying issues at stake here was an article by Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *LAW & CONTEMP. PROBS.* 279 (2004). Other recent articles will be cited below at various points where relevant.

46. E.g., Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 *HASTINGS BUS. L.J.* 39, 39–41 (2006); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 *J. DISP. RESOL.* 469, 470–71; Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 *BUFF. L. REV.* 185, 186 (2004); Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts’ Disdain for Arbitration Agreements*, 2008 *J. DISP. RESOL.* 591, 591. The Riske article is primarily a commentary on *Davis v. O’Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), in which the Ninth Circuit Court of Appeals declined to enforce an arbitration clause against a paralegal employee of the defendant law firm’s Los Angeles office who sought to enforce claims against the law firm based on asserted violations of federal and state labor laws. Riske, *supra*, at 591–93. See also Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*,

expanding application of the unconscionability doctrine as a salutary development, not only as a desirable counterbalance to the Supreme Court's insistence on a strong preference for enforcement of mandatory arbitration clauses, but also more generally as a welcome reinvigoration of the unconscionability doctrine for the twenty-first century.⁴⁷ Professor Stempel's conclusion is worth repeating here:

[T]he answer of many courts to the . . . problem of arbitrability has been the rediscovery and reinvigoration of a venerable doctrine that deserves greater respect and more frequent use across the board. . . . The rediscovery of unconscionability has softened the rougher edges of the Supreme Court's arbitration formalism and made both the judicial and arbitration systems more effective. The arbitration-unconscionability experience suggests that a relatively less constrained version of the unconscionability norm should continue to play a role in contract construction, both for arbitration terms and other contract provisions.⁴⁸

Although it has had opportunities to do so, the Supreme Court has thus far refrained from reining in courts that uphold the unconscionability defense against arbitration.⁴⁹ This may yet happen and would not be surprising if it did.⁵⁰ Conversely, in light of the political sea change that

2005 J. DISP. RESOL. 61. Messrs. McGuinness and Karr are stated to be attorneys in the Los Angeles office of the O'Melveny law firm, specializing in labor and employment matters—when they are not reading Robert Frost or socializing with the paralegals, one assumes.

47. E.g., Marissa Dawn Lawson, Note, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable*, 23 REV. LITIG. 463, 465 (2004); Sara Lingafelter, Comment, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 804–05 (2005); Ryan M. Turley, Note, *Only the Rich Can Afford a Remedy: The Unconscionable Enforcement of Arbitration Provisions Against the Indigent*, 2007 J. DISP. RESOL. 611, 614. See also Stempel, *supra* note 5, at 840–60.

48. Stempel, *supra* note 5, at 860 (footnote omitted).

49. It could do so by defining unconscionability more narrowly than some courts are now doing. Of course unconscionability is essentially a contract law, and thus a state law, doctrine, but the Supreme Court is, well, the Supreme Court. Or, more simply and more in harmony perhaps with its overall approach to the whole arbitration issue, the Court might seize an appropriate opportunity to rule that under the FAA the issue of unconscionability—whether of the whole agreement or merely of the arbitration clause—is an issue that in all cases must be submitted to the arbitrator for decision, rather than being resolved at the outset by a court. See generally Bruhl, *supra* note 45, at 1464–86 (discussing various possible judicial responses).

50. Professor Bruhl has suggested reasons, however, why it might not:

Unconscionability might operate as a sort of safety valve that makes arbitration politically sustainable. It permits courts, on a case-by-case basis, to respond to the most compelling inequities. At the same time, the mere risk of an unconscionability challenge may prevent drafters of arbitration clauses from overreaching. In this way, unconscionability is an outlet to relieve pressure on the system and avert the truly intolerable outcomes that might provoke legislative action. To the extent that the recent Democratic majorities in Congress make legislative action to restrict arbitration more likely . . . a sophisticated Supreme Court would tend to be careful about closing off this safety valve.

Id. at 1488.

took place in 2008, it now appears more likely than it did a few years ago that Congress might in some form or another attempt to undo some of the Supreme Court's handiwork, perhaps by restoring to the states the power to regulate or even to proscribe mandatory arbitration in some situations, or by specifying particular types of cases in which arbitration could not be contractually imposed by one party on the other.⁵¹ Pending some such fundamental shift of the legal playing field, however, it seems still pertinent to consider the extent to which courts over the last several years have been willing to uphold claims of unconscionability as a defense to the contractual duty to arbitrate.⁵² Which I shall therefore proceed to do.

IV. SURVEYING THE CASE LAW—PRELIMINARY OBSERVATIONS

As a teacher of contract law for some forty-odd years, I have had repeated occasions to grapple in the classroom with *Williams v. Walker-Thomas* and its progeny.⁵³ In recent years, like many of my contracts-teaching colleagues, I have also been forced to confront the prospect that contract law as a judicially created component of our legal system might be doomed to obsolescence by the mushrooming employment of arbitration clauses in adhesive contracts of all sorts. This concern with mandatory arbitration impelled me a few years ago to add my voice to a growing chorus of alarm about the impending privatization of contract law.⁵⁴ More recently, a desire to assess the ongoing significance of the unconscionability doctrine has led me to attempt to investigate the various ways in which courts over the past several years have been applying the doctrine of unconscionability in contract disputes.⁵⁵ The more the evidence accumulated, however, the more it appeared that the

51. *See id.* at 1486.

52. Both as a complete defense and as a defense to particular aspects of an arbitration scheme.

53. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Useful commentaries on this case include Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441 (2004), and Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 98–102 (1994).

54. Knapp, *supra* note 45.

55. One of my principal questions was the extent to which courts are moving past the sliding scale approach to procedural and substantive unconscionability, toward the position that if there is enough of one, there need not be any finding of the other. *See, e.g., Adler v. Fred Lind Manor*, 103 P.3d 773, 782 (Wash. 2004) (en banc). Further discussion of this development will have to wait until another occasion.

two topics were essentially one. The story of present-day unconscionability—at least for the time being—is merely the flipside⁵⁶ of the story of present-day arbitration litigation.

Thanks to a pair of extremely diligent and capable research assistants,⁵⁷ I am able for this discussion to draw on an accumulated analysis of the reported case law of unconscionability beginning with 1990 and extending though 2008—nearly two decades of reported cases, well over 750 in all, collected and examined in detail.⁵⁸ Such a survey is of course incomplete; it does not cover unreported decisions in litigated cases,⁵⁹ much less settlements of unlitigated disputes in which claims of unconscionability might have been advanced.⁶⁰ But by applying a consistent search procedure over a substantial period of time, we can at least gather data that may give us some basis for generalizing about movement in the law—the extent to which changes appear to be occurring over the past two decades of court decisions.

Our study to some extent mirrors others conducted in recent years, although it covers a somewhat longer time period.⁶¹ Because of limitations of space and time, our presentation here of the data collected is not as refined or as elaborate as hopefully it can be for later discussions. For the purpose of this Article, we have attempted first to identify all reported court decisions—both state and federal, at any

56. CDs do not have flip sides like 78s, 45s, and even LPs did. And anyway, CDs are also apparently on their way to the scrapheap. Coins, however, do continue to have flip sides, so perhaps this figure of speech will survive.

57. See *supra* note *.

58. We did a Westlaw headnotes search for *unconscionability* for each year specified—1990–2008. Cases that had unconscionability as a topic were then combed through in order to determine which cases actually discussed unconscionability and which cases merely mentioned it in passing, either because unconscionability was not the real topic or because the case did not actually end up discussing unconscionability at any appreciable length. For example, many times, *unconscionability* would show up in the headnotes in the phrase “[b]arring unconscionability, fraud, or duress” but the court would then discuss fraud or duress rather than unconscionability as a basis for voiding a contract.

59. We also elected not to include those oxymoronic phenomena, officially unpublished opinions, which nevertheless are in fact published in some form—on Westlaw or even in hard copy advance sheets—but not deemed officially citable.

60. In occasional instances, we have counted separately a lower court’s reported opinion and a later appellate opinion in the same case, which may or may not be affirming. *E.g.*, *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 780 (M.D. Tenn. 2002), *rev’d in part and vacated in part*, 2004 FED App. 0126P at 17 (6th Cir.). We have done so because our focus here is on court behavior, not on what the rule may be in a given jurisdiction.

61. Other case surveys include those by Professors Broome, Bruhl, and Randall. See Broome, *supra* note 46, at 44–48; Bruhl, *supra* note 45, at 1436–39; Randall, *supra* note 46, at 194–96. Possibly due to differences in search techniques, our numbers are somewhat different from those in other studies. The overall trends visible are consistent, however.

level—in which a claim of unconscionability was advanced by one of the parties and seriously addressed by the court in its opinion. We will refer to these simply as *unconscionability decisions*. We then divided the results into two categories, those in which the claim failed completely and those in which it succeeded to some extent—actually or at least potentially.⁶² We also divided all of the cases into two other groups—those that involved the enforceability of an arbitration clause and those that did not.⁶³ And we also sorted cases by jurisdictions, state and federal.

Based on our study, it appears that a number of preliminary conclusions could be drawn about the law of unconscionability in the 1990s and the 2000s. These are stated and discussed below:

Increase in unconscionability claims generally. From 1990 to the present day, there has been a very definite increase, in absolute terms, in the number of reported decisions of litigated cases in which a claim of unconscionability was advanced by one party and taken seriously enough by the court to warrant discussion. Perhaps “explosion” is too strong a term, but at least the increase is surely a substantial one. It has for some time been more or less accepted as conventional wisdom, I believe, that by the 1980s and 1990s the flow of unconscionability jurisprudence had pretty much dried up—that even if it persisted as a subject to be addressed in contract law casebooks,⁶⁴ the unconscionability doctrine was no longer of any practical significance to lawyers or judges.⁶⁵ That may well have been so as of 1990, at the start of the

62. Thus the category of successful cases for the purpose of this discussion would include not only cases in which a contract was completely invalidated or a particular term was struck down, but also those in which an appellate court merely held that a lower court had wrongly refused to consider a potentially valid claim of unconscionability. The latter is a weak kind of success for the unconscionability doctrine, of course, but it is the same kind the buyers enjoyed in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

63. At this stage, we have not further distinguished between cases in which the arbitration clause was completely invalidated and those in which one or more unconscionable features of the clause were identified and severed from the remainder, which was then enforced. Both types would be included in our “successful” category. Obviously this is an important distinction, but again one that must await a later opportunity for discussion. At this stage, we are simply trying to separate the completely ineffective claims of unconscionability from those held to be of at least some potential merit.

64. *E.g.*, E. ALLAN FARNSWORTH ET AL., *CONTRACTS* 494–521 (7th ed. 2008); KNAPP, CRYSTAL & PRINCE, *supra* note 27, at 584–632.

65. *E.g.*, Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 287–89 (2000); Randall,

period we examined, but by 1995 the tide was beginning to turn, and in the first few years of the new century what had a decade earlier been a mere trickle of cases became at least a stream, one that has continued to rise as the century advances. Unconscionability litigation may not yet be a flood, but given the relative paucity of reported contract decisions generally,⁶⁶ the topic of unconscionability has once again come to occupy a rather prominent place of its own. By 2008, the last year addressed in our study, the total number of reported unconscionability decisions in our collected cases had increased nearly tenfold—from 16 in 1990 to 155 in 2008. Even if our harvest of cases for 2008 should be seen at this point as somewhat anomalous, perhaps because the dust has not yet settled on its judicial reports,⁶⁷ the five years preceding, 2003 to 2007, produced an average of 54 reported unconscionability decisions per year, more than three times the number reported in 1990.

Increase in claims of unconscionability as a defense to arbitration. Even more pertinent to the subject of this Article is the evident increase in arbitration cases. Of the total number of unconscionability decisions gathered in our study, those involving arbitration clauses accounted for the lion's share of the overall increase. The number of unconscionability cases involving issues other than arbitration remained fairly constant over the period we reviewed, oscillating somewhat from year to year but in the long run not trending either up or down.⁶⁸ The annual number of arbitration clause cases, however, expanded rather dramatically—from 1 or 2 at most through 1996, up to an average of 38 from the years 2003 through 2007, and to 115 in 2008.

Increasing rate of success of unconscionability claims in arbitration cases. Not only did the volume of unconscionability cases increase over the last two decades, the relative success of unconscionability claims increased as well. Even more than the general increase in cases discussed in the preceding paragraphs, the increase in successful claims was attributable to arbitration clause cases. Over the entire period from 1990 through 2008, the annual number of nonarbitration cases in which an unconscionability claim was upheld remained remarkably constant at

supra note 46, at 194 (stating that prior to the increase in arbitration agreements, “[t]he conventional wisdom was that unconscionability claims fail”).

66. See Knapp, *supra* note 45, at 763, describing my attempt to gather recent California contracts cases for a seminar course, only to find that arbitration clause cases made up “[f]ar and away the most pervasive contract-related issue” litigated during the period of my search. That has continued to be true in later years.

67. Some of the decisions we have gathered may end up “unpublished.” See *supra* note 59.

68. Again, 2008 is somewhat of an anomaly here, with an increase to 40. The highest numbers before that had been 24 in 2000 and 2001, and 25 in 2007.

only a handful—never more than half a dozen per year.⁶⁹ By contrast, not only did the annual number of unconscionability claims in arbitration cases show a consistent increase beginning in 1997, their relative rate of success also increased over the first years of the new century.⁷⁰

The preceding observations have to do with the overall increase in successful unconscionability claims, particularly in arbitration cases. Another question that interested us was the extent to which this phenomenon might be identified with a particular state or region, or with particular courts. To some extent, the battle over arbitration has been perceived as one in which the federal courts led by the Supreme Court have struggled to impose federal supremacy on recalcitrant state courts opposed to arbitration.⁷¹ And, judging from the opinions of commentators expressed in recent years, this conflict is perceived as particularly acute in the courts of California.⁷² Do the results of our survey support those conclusions? Generally they do, but it is not quite that simple.

Unconscionability claims are more likely to succeed in the state courts of California. Here, at least, the perception is indeed the reality. Although the phenomenon of mandatory arbitration has national significance, and the willingness of some state courts to apply the unconscionability doctrine in arbitration cases in fact extends nationwide,⁷³ California case law is particularly significant in this area. Over the period studied, the total number of successful claims of unconscionability in arbitration cases in California state courts was 32. Of those, 4 were from the California Supreme Court⁷⁴ and the other 28 were from the California Courts of Appeal.⁷⁵ These California decisions represent over one-

69. This is true even for 2008, despite the substantial increase that year in the assertion of such claims.

70. For the years from 2003 through 2007, the success rate of unconscionability claims in arbitration cases averaged around 40%—81 out of a total of 191. In 2008, it fell somewhat because the total number of arbitration decisions nearly tripled—from 41 in 2007 to 115 in 2008—while the number of successful claims only doubled—from 19 to 41, a success rate of a little over one-third.

71. See, e.g., Burton, *supra* note 46, at 470.

72. See, e.g., Broome, *supra* note 46, at 39.

73. See *infra* notes 80–82 and accompanying text.

74. Gentry v. Superior Court, 165 P.3d 556, 574–75 (Cal. 2007); Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005); Little v. Auto Stiegler, Inc., 63 P.3d 979, 983–87 (Cal. 2003); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689–99 (Cal. 2000).

75. The earliest of these in the period we studied was *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563 (Ct. App. 1993). The most recent were 4 decisions in 2008. See *Thompson v. Toll Dublin, LLC*, 81 Cal. Rptr. 3d 736, 746 (Ct. App. 2008);

third—32 out of 88—of the total of all such state court decisions during this period. And the significance of the California cases can be seen not only in their sheer numbers, but in their influence: decisions from the California Supreme Court have been important in their analysis and identification of potential unconscionability factors in arbitration provisions.⁷⁶

Unconscionability claims are also more likely to succeed in federal courts in California. The California-centric nature of the unconscionability expansion in arbitration cases is augmented by another factor: the federal courts in California have been relatively readier than their counterparts in other parts of the country to entertain claims of arbitration unconscionability. Particularly noteworthy here is the record of the Ninth Circuit Court of Appeals, which has⁷⁷ rendered a striking total of 13 decisions in which arbitration clauses were subjected in whole or part to claims of unconscionability.⁷⁸ And, presumably due in large measure to the stance of the Ninth Circuit, the lower federal courts in California have rendered another 21 similar decisions.⁷⁹

The success of unconscionability claims in state courts is not limited to California, but extends nationwide. Although the California state courts are clearly playing a leading role, the state courts in 22 other states have also upheld unconscionability claims in arbitration cases.

Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 489 (Ct. App. 2008), *cert. denied*, 129 S. Ct. 1048 (2009); Bruni v. Didion, 73 Cal. Rptr. 3d 395, 415 (Ct. App. 2008), *appeal denied*, No. S162755, 2008 Cal. LEXIS 7524 (June 18, 2008); Baker v. Osborne Dev. Corp., 71 Cal. Rptr. 3d 854, 864 (Ct. App. 2008), *appeal denied*, No. S161417, 2008 Cal. LEXIS 4831 (Apr. 30, 2008).

76. *Armendariz*, 6 P.3d 669, has been widely cited and discussed for its delineation of the factors in an arbitration clause that would be deemed unconscionable. *Discover Bank*, 113 P.3d 1100, is notable in its insistence that some form of class action be available in situations where corporate wrongdoing and overreaching would otherwise be irremediable. *Id.* at 1110.

77. One is tempted at this point to say “singlehandedly,” although that term seems awkward when discussing a composite body such as a Federal Circuit Court of Appeals.

78. Notable examples include *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1214–15 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 45 (2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 978 (9th Cir. 2007); *Nagrampa v. Mailcoups., Inc.*, 469 F.3d 1257, 1294 (9th Cir. 2006) (en banc); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003); *Circuit City Stores, Inc., v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002).

79. Beginning with 2 in 2002, the annual number of such decisions ranged from 0 to 3 until 2008, when a surprising total of 12 were handed down—8 from the Northern District of California alone, 3 from the Eastern District, and 1 from the Southern District. Notable 2008 examples include *In re Apple Antitrust Litigation*, 596 F. Supp. 2d 1288, 1298–1300 (N.D. Cal. 2008); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, No. 2:08-cv-00767-MCE-EFB, 2008 WL 3876341, at *11 (E.D. Cal. Aug. 20, 2008); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS(AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008); *Stiener v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, 1018 (N.D. Cal. 2008).

These include the high courts of 14 states,⁸⁰ plus lower courts in some of those states, and courts in another 8 states as well.⁸¹ The total number of such state court decisions—again, excluding the courts of California—is 56, of which 15 were handed down in 2008.⁸² The states represented thus include the East, West, North, and South; interior and coastal; industrial and rural.

Federal courts outside of California have also upheld unconscionability claims. Although the number of their decisions is by no means as great, it should also be noted that federal courts outside of California and the Ninth Circuit have also contributed to the increasing number of unconscionability decisions in arbitration cases. Several circuit courts of appeals in addition to the Ninth Circuit have reached decisions avoiding or limiting the effect of arbitration clauses on the basis of unconscionability. There are 2 such decisions from the Third and Fifth Circuits, and 1 each from the First, Fourth, and Eleventh Circuits.⁸³ In addition, another 31 decisions were made in lower federal courts, in districts located in 18 states and the Virgin Islands; 10 of these were 2008 decisions.⁸⁴

Much more than I have attempted here could be done to analyze the reported decisions reported so summarily above. Hopefully other efforts on my part can and will follow this one, in which the various differences among the unconscionability decisions—those involving arbitration and the others as well—can be delineated and explored. My aim here has

80. Mississippi leads the way here with 4 such decisions; Alabama and West Virginia have 3; New Jersey and Washington have 2. States with 1 high court decision include Illinois, Missouri, Montana, Nevada, New Mexico, North Carolina, South Carolina, Texas, and Wisconsin.

81. Florida, Kentucky, Louisiana, New York, Ohio, Oregon, Pennsylvania, and Tennessee.

82. The 2008 decisions include 4 high court decisions from New Mexico, North Carolina, Texas, and Washington: *Fiser v. Dell Computer Corp.*, 2008-NMSC-046188, ¶ 25, 144 N.M. 464, 188 P.3d 1215; *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373–74 (N.C. 2008); *In re Poly-America, L.P.*, 262 S.W.3d 337, 360–61 (Tex. 2008); *McKee v. AT&T Corp.*, 191 P.3d 845, 861 (Wash. 2008) (en banc). Other states represented in 2008 include Florida, Illinois, Kentucky, Missouri, Ohio, and Tennessee.

83. Some examples include *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 51–52 (1st Cir. 2007); *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269, 277–85 (3d Cir. 2004); *Murray v. United Food & Commercial Workers International Union, Local 400*, 289 F.3d 297, 302–05 (4th Cir. 2002); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 433 (5th Cir. 2004); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007).

84. The 2008 cases came from federal district courts in Illinois, Michigan, New Jersey, Oregon, Pennsylvania, and the Virgin Islands.

been a much simpler one, however: to demonstrate that the willingness of courts to allow the unconscionability defense against mandatory arbitration clauses, while most visible in the courts (state and federal) of California, is (a) a nationwide phenomenon, (b) not just a manifestation of state court resistance to federal authority, and (c) not going away.⁸⁵ If that is indeed the case, how should we view this collective exhibition of judicial behavior?

V. SOME CLOSING THOUGHTS OF MY OWN⁸⁶

When the arbitration wars were in their early stages, feelings ran high and rhetorical blood was spilled on both sides. The series of *Doctor's Associates* decisions⁸⁷ exposed a deep rift between some state courts, jealous of their power, and the U.S. Supreme Court, supremely jealous of its own power as well and determined to make full use of its position. Although individual judges may occasionally take the opportunity to vent their own feelings on the subject,⁸⁸ such outward shows of

85. In his survey of decisions, Professor Bruhl noted that there appeared to be some leveling off in the years 2005–2007. Bruhl, *supra* note 45, at 1440–41, 1489. Our survey showed a sharp increase for the year 2008, however.

86. This heading is not intended as a claim of originality; indeed, everything I am about to say here has probably been said before. I am merely disclaiming any pretense of neutrality.

87. The series culminated in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). The tug-of-war between the U.S. Supreme Court and the Montana state courts is recounted in Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 164–78. See also Knapp, *supra* note 45, at 777 n.61.

88. In *Cooper v. MRM Investment Co.*, 199 F. Supp. 2d 771 (M.D. Tenn. 2002), *rev'd*, 2004 FED App. 0126P (6th Cir.), Federal District Court Judge John T. Nixon considered whether an arbitration clause should bar the plaintiff from pursuing her claim against a Kentucky Fried Chicken franchisee for sexual harassment. In a footnote to the opinion that found the arbitration clause at issue to be unconscionable and therefore unenforceable for a number of reasons, Judge Nixon had this to say about the underlying policy issue:

This court is aware of the difficulties facing employers, who must deal with many employment discrimination claims, many of which are ultimately found to be without merit. The Court is also mindful of the large number of employment discrimination cases in the federal court system. However, this Court will not overlook the clear unconscionability of these arbitration agreements in order to achieve greater efficiency or convenience. This issue is simply too important. These cases do not “clog” the federal docket—they belong in federal court. Employees must not be forced to either forgo employment or forgo their right to a day in court, and Courts must not use the perceived problems associated with employment discrimination to prevent employees, and society at large, from vindicating the rights that Congress enshrined in the Civil Rights Acts.

Id. at 779 n.7. Judge Nixon's decision was reversed by the Sixth Circuit Court of Appeals, although that decision did leave room for a finding that the fee splitting portion of the clause was unenforceable. *Cooper v. MRM Inv. Co.*, 2004 FED App. 0126P at 15–16, 28 (6th Cir.).

animosity have for the most part given way to a more measured response, in which the lower courts carefully attempt to identify which aspects of a particular arbitration scheme should be viewed as so fundamentally unfair that either the clause as a whole or those particular components of it should be deemed unconscionable and therefore unenforceable.⁸⁹ This more nuanced approach is if nothing else more likely to produce the desired result,⁹⁰ and for that reason is seen by some as a hypocritical mask, a tactical shift only, designed to circumvent the FAA's authority and thereby avoid mandatory arbitration whenever and wherever possible.⁹¹ The recalcitrant lower courts, these commentators fume, are merely taking advantage of an as-yet-unclosed loophole in the case law to defy the expressed will of the federal government, legislative and judicial.⁹² Indeed, some have even suggested a comparison between this situation and the defiance of the law of the land in the name of states' rights that followed on the heels of *Brown v. Board of Education*⁹³ in the 1950s and 1960s.⁹⁴

Although I have tried in reporting our case research above to simply describe the results of our study, avoiding value judgments, I have in the past made no secret of my dislike for mandatory arbitration,⁹⁵ at least as imposed by contracts of adhesion,⁹⁶ so any opinions I express from here on presumably will and should be taken by my readers with a grain of salt. Fair enough. Nevertheless, it does seem to me that invoking the history of the civil rights struggle on behalf of the *proponents* of mandatory arbitration is at least ill-advised, perhaps even—dare I say it?—unconscionable. Yes, the Supreme Court has spoken, and so in one sense we are indeed witnessing another struggle to assert federal supremacy

89. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689–99 (Cal. 2000).

90. The result, that is, of not being held to have flouted the FAA by improperly disfavoring arbitration.

91. See sources cited *supra* note 46.

92. E.g., Broome, *supra* note 46, at 41 (“[T]he California courts are clearly biased against arbitration Their disdain manifests in unique unconscionability requirements applicable solely when arbitration agreements are at issue and in lower standards for demonstrating unconscionability in the arbitration context.”).

93. 347 U.S. 483 (1954).

94. See Bruhl, *supra* note 45, at 1455.

95. See generally Knapp, *supra* note 45.

96. See generally Knapp, *supra* note 14.

over unwilling state institutions, both courts and legislatures.⁹⁷ But to what end? Yes, the Supreme Court indeed did decide *Brown*, but it also decided *Scott v. Sandford*⁹⁸ and *Plessy v. Ferguson*.⁹⁹ And those decisions were also, in their time and place, expressions of the federal will. If the current arbitration controversy is appropriately to be seen as analogous to the civil rights struggle of the twentieth century, this could be because once again the ability of relatively powerless individuals to have unfettered access to their governmental institutions is being threatened by powerful interests who seek to deny that access, and who are supported by some of the very institutions by which those rights should be protected. But this time, instead of leading the fight to establish and protect individual rights, the Supreme Court has enlisted on the other side—on behalf of the credit card issuers and bank lenders, communications giants, powerful employers, and other drafters and enforcers of adhesion contracts, collectively the forces of what in this context one might fairly call “oppression and unfair surprise.”¹⁰⁰

Our survey of the courts at work in the unconscionability decisions reveals to me neither a lawless mob armed with pitchforks and torches, storming the castle of federal supremacy, nor a cabal of crafty and conniving functionaries, out to subvert established authority. Rather I see merely a loose collection of public servants, united only by their zeal to preserve, protect, and defend the rights of those who appear before them. By invoking the rhetoric of unconscionability, these judges are not merely acting tactically in a game of legal chess—although they may be doing that as well¹⁰¹—they are sending a message, not just to the U.S. Supreme Court, but to the other officials and institutions that collectively make up our legal system.

Yes, these courts may be blowing off steam, but they are also sounding an alarm. Hopefully, someone or something with the power to do so will hear the sound of the whistle blowing and come to their aid.

97. As well as some federal courts. *See supra* notes 77–79, 83–84 and accompanying text.

98. 60 U.S. 393 (1857).

99. 163 U.S. 537 (1896).

100. *Cf.* U.C.C. § 2-302 cmt. 1 (2008).

101. *See generally* Bruhl, *supra* note 45, at 1443–59.