Consumer Protection and the Illusory Promise of the Unconscionability Defense

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The United States Supreme Court's notorious decision in AT&T Mobility LLC v. Concepcion *seems to display impatience with the idea of an unconscionability defense to the enforcement of a contract. At the core of Justice Antonin Scalia's majority opinion, however, was not an argument against the idea of unconscionability per se, but an argument against using "unconscionability" as a cover for a broader public policy agenda. This interpretation is confirmed by the Court's little-known decision in* Marmet Health Care Center, Inc. v. Brown, *handed down the term after* Concepcion *was decided. Plaintiffs were allowed to move forward in* Marmet *because the Court acknowledged they might have an authentic unconscionability defense separate from their public policy defense.*

Despite Concepcion*'s undeniably negative impact on consumer rights, the little-known* Concepcion–Marmet *sequence contains a crucial lesson for progressive contract scholars today. The distinction between public policy and unconscionability defenses in contract is not just nitpicking; far from it. In a legal world dominated by online clickwrap and wildly asymmetrical bargaining power, a central question for contract law today is what sorts of defenses can stop boilerplate from eviscerating consumers' rights? Many judges and law professors—and indeed the American Law Institute in its new* Restatement of Consumer Contracts*—have proposed "the unconscionability defense" as the best answer. But as we illustrate in this Essay, that answer will be a catastrophe for consumers, just as it was in* Concepcion. *The conventional justification of unconscionability requires a showing of shocking injustice for the litigants before the court and is thus highly individualized. The problems with a wide array of boilerplate contracts are not the harshness or oppressiveness suffered by single litigants, and those subject to their terms cannot depend on individual litigation or arbitration. Courts' best reasons for declining to enforce the various waivers, disclaimers, and limitations that repeat-player actors force on consumers today turn on public welfare and market forces. For centuries, courts have enjoyed substantial if measured competency to regulate contracts with such*

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goals in mind—that is what "public policy" defenses are about. Calling these "unconscionability" arguments, we argue, is both a doctrinal error and a strategic misstep, because it obscures rather than highlights the power inherent in our common-law courts to structure the kinds of obligations to one another the law is willing to enforce.

Introduction

Among American law professors today, Justice Antonin Scalia's opinion for the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*[1] is notorious and staggeringly unpopular. On the conventional view, a conservative Supreme Court majority, under the guise of being apolitical and faithful interpreters of federal law, set back more than half a century of consumer empowerment and consumer rights; the Court arguably allowed the overwhelming majority of American businesses to avoid class actions brought on behalf of injured or defrauded consumers by simply fashioning the right boilerplate. Adding insult to injury, Justices supposedly priding themselves on states' rights showed no patience whatsoever for a state's considered policy judgments when that state was the large and deeply blue California. As predicted, the Court's decisions, in the years since *Concepcion* was decided, have displayed a strengthened resolve to allow powerful commercial actors to evade the courtroom and often—realistically—to avoid any form of accountability.[2]

With this background in place, our readers will find it peculiar that our aim in this Essay is actually to defend a basic feature of Justice Scalia's *Concepcion* opinion. More surprising still, perhaps, we shall argue that Scalia's opinion contains an argument crucial to those pushing for contract

1. 563 U.S. 333 (2011).

2. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013) (upholding arbitration clause as against Courts' prior vindication of federal rights exception to FAA in an antitrust case); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (upholding contractual waiver of federal statutory right to engage in collective bargaining in a Federal Labor Relations Act case involving agreement to arbitrate).

law that is highly sensitive to the vulnerabilities and interests of consumers. Indeed, the California decisions that Scalia rejected themselves threaten to undermine the very pro-consumer concerns that motivated them. Or so we shall argue.

A central plank of Scalia's *Concepcion* opinion is the proposition that what California is calling an "unconscionability" argument for striking down a contractual provision does not fall within the Federal Arbitration Act (FAA)'s savings clause because it is not meaningfully different from the kind of public policy argument that the Court regarded as falling within the scope of the FAA's preemption doctrine.[3] With caveats to be explained below, we think Justice Scalia was right about California's unconscionability argument. If unconscionability is to be understood as a basic and traditional contract defense from law and equity rather than a tool for a particular kind of judicial policymaking, it must have certain features, and it lacked those features in *Concepcion*. While there is of course *some* sense in which unconscionability-based invalidation of contractual clauses sounds in public policy, there are fundamentally different ways that contract defenses can sound in public policy, and unconscionability is but one. The *Concepcion* plaintiffs had good reason to want to persuade the Court that their defense fit the "unconscionability" label, but, as we shall argue, Scalia was on the mark in concluding that it did not, at least not in the relevant sense. As we will show, a unanimous Supreme Court adhered to the analytical distinction between unconscionability and public policy just one year after *Concepcion* in the little-known nursing home case *Marmet Health Care Center, Inc. v. Brown*.[4]

Notwithstanding the undoubtedly pro-business orientation of the *Concepcion* Court and the impact of that decision, we view the distinction between unconscionability and other public policy defenses in contract as crucial to the future of contract law. To that extent, Justice Scalia's characteristically acerbic rejection of the plaintiffs' unconscionability argument in *Concepcion* has a silver lining. The *Concepcion* plaintiffs argued that the FAA's savings clause shielded courts' power to decline to enforce contractual provisions that violated basic normative requirements of fairness and equity, and that "unconscionability" is the broad normative term denoting such considerations.[5] Add to this that federal preemption law is to be understood in a spirit that is deferential to states' own judgments about the dimensions of their common law and a strong savings clause argument follows. This argument seemed especially strong since the California Supreme Court had addressed the arbitration issue head-on in *Discover*

3. *Concepcion*, 563 U.S. at 343–44.
4. 565 U.S. 530 (2012).
5. *Concepcion*, 563 U.S. at 341.

Bank.[6] There, it ruled that when a large business entity writes boilerplate that forces a small-stakes consumer to replace judicial options with a version of arbitration that shears away class-based adjudication, the asymmetrical, unjust deal rises to the level of unconscionability.[7] AT&T's cell-phone-contract boilerplate did just that and therefore should qualify as unconscionable; California law's voiding of the language is an application of basic contract defenses, and is therefore saved, rather than preempted. Scalia reasoned that a state could not do indirectly, through the premise of an unconscionability defense, what it could not do directly (with a statute requiring arbitration clauses to include class provisions, in order to be enforceable).[8] This is not really unconscionability; it is California Supreme Court justices doing their own fairness-based policymaking, which is different, and falls outside of the savings clause.

Concepcion was half right, and here is why it matters: When courts are considering an argument from a party that their contract should not be enforced because of considerations of imbalance and unfairness, that is not—in and of itself—unconscionability. These considerations do not themselves entail that if the court were to uphold the contract, it would be doing something that *shocks the conscience*, that *dignity and decency hang in the balance*, or that the court *is serving as an instrument of injustice between these two parties*. But those are just the sort of attributes that would be applicable if this had been an unconscionability argument of the classic form. While important authorities have tried over the past decades to broaden unconscionability,[9] it overwhelmingly remains tied to substantive injustice in the particular bargain.[10] Consumers trying to win over judges will fail, time and again, because these are not in fact *unconscionable* deals (even if they are bad deals or regrettable ones). That certainly does not mean that they *should* be enforced. It means the consumer's lawyer used a doctrinal box ill-suited to the challenge.

Our concerns about the misuse of the concept of unconscionability are not merely academic—far from it. Drawing upon a range of judicial decisions from the past two decades, one of us (Takhshid) recently argued the blurring of unconscionability caused courts to lose their way in an important subset of tort/contract cases: those in which a repeat-player defendant argues for dismissal of a tort complaint based on the consumer's having executed a

6. Discover Bank v. Super. Ct. of L.A., 113 P.3d 1100, 1103 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333 (2011).

7. *Id.* at 1110.

8. *Concepcion*, 563 U.S. at 342.

9. *See infra* Part V (describing and critiquing efforts by the California Supreme Court and Restatement (Second) of Contracts to broaden "unconscionability").

10. *See infra* notes 158–69 and accompanying text.

boilerplate exculpatory clause.[11] When told that the enforceability of the clause turns on whether it rises to the level of unconscionability, courts typically enforce the clause. Yet that is not the way such exculpatory clause review has always been analyzed or should be analyzed. Seen as the question of when boilerplate provisions should end judicial oversight of risky enterprises and the injuries they spawn, it is surprising that only when the "boilerplate shocks the conscience" would ever have seemed to be the right answer.

Invasion into the domain of exculpatory clauses may be only the tip of the iceberg. As many readers will be aware, the American Law Institute's Restatement of Consumer Contracts proposes a highly simplified model for the enforceability of consumer contracts.[12] Boilerplate assent is fine as a default, but the domain of possible unconscionable provisions that courts could identify is expanded. Yet what the Reporters are calling "unconscionability" is really a hodgepodge of various different kinds of power imbalance or cause for suspecting there will be unfair or otherwise regrettable policy outcomes attached to enforcement. What that means is the broad array of doctrinal bases for courts to reject contractual provisions have been boiled down to something that many courts will think must shock the conscience or be deeply substantively unjust in the particular case to be successful as a defense. This is a recipe for shrinking what is ruled unenforceable and expanding the reach of boilerplate.

In an era of ever-expanding e-commerce, lawyers and citizens alike should be alarmed by new ways of entrenching the power of boilerplate. Ironically—and perhaps counterintuitively—that is just what is occurring today. While the effort to invigorate unconscionability attacks may seem pro-consumer, if it is done as a way to obscure courts' traditionally broad power to regulate forms of contract for a variety of reasons, it may well have the opposite impact. Clickwrap "agreements" are decimating consumer privacy and consumer rights; they are death by a million cuts. The occasional plaintiff victory via unconscionability has no chance of stemming the flow.

As hinted above, we do not in fact think the Supreme Court reached the right result in *Concepcion*, even if we think they were right about California's version of unconscionability. On our view of federal preemption, there should have been no need for an unconscionability-savings clause argument under a fair-minded reading of the FAA. In principle, at least, California should have been able to provide a straight-out state statute requiring that class or aggregate arbitration be permitted in mandatory arbitration (for all

11. Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183, 2197–202 (2021).

12. RESTATEMENT OF THE L., CONSUMER CONTS. (AM. L. INST., Tentative Draft No. 2, April 2022) [hereinafter *CC Restatement*].

cases in which class actions would be permitted in court); similarly, a straight-out judicial holding on pure public policy grounds that contractual anti-aggregation spoilers will be rejected should not have been deemed preempted. But we acknowledge the reality that the Justices would likely have rejected such an argument too. As numerous scholars have argued in a different context,[13] the Court's use of obstacle preemption doctrine is intrusive, unruly, and aggressive. In light of this and the Court's hostility to class actions, the Concepcions' lawyers certainly faced a daunting task. An unconscionability argument may have been their best shot, and in the end, they did persuade four Justices and came very close to persuading Justice Thomas.[14] We do not ultimately fault the *Concepcion* plaintiffs for making the unconscionability argument to California trial courts or for sticking with what seemed to work almost all the way up. The Court's hostility to class actions runs deep.[15]

Today, the resurgence of scholarship on Equity points to a deeply entrenched and thoughtful understanding of unconscionability.[16] Unconscionability is indeed about outliers, and in some sense, about reactivity and moral judgment too. But part of how it works is to function in opposition to the regularity and consistency of normal legal categories. None of this is meant to imply, however, that normal legal categories—in contract or beyond—are themselves to be understood on a basis that rejects nuance, normative judgment, awareness of distributive problems, and thoughtfulness about when private agreements should and should not be enforceable. To this extent, we hope the topic of how much of normative judicial reasoning should be stuffed into the concept of unconscionability—and, if not, where else—is of interest to a very broad domain of contract scholars. We also wish to highlight the irony that a decision by the United States' famously conservative and formalistic jurist—the late Justice Antonin Scalia—illuminates the message that contract law's sensitivity to consumer rights is harmonious with, not alien to, the structure and history of the common law.

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13. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 448, 450–51 (2016) (arguing that the Court's use of the federal preemption doctrine in tort law is intrusive and aggressive).

14. AT&T Mobility LLC v. Concepcion, 563 U.S. 353 (2011) (Thomas, J., concurring) (explaining how the same result can be reached without relying upon the majority's analysis).

15. *See, e.g.*, Adam Feldman, *Empirical SCOTUS: A Class of Their Own: The Supreme Court's Recent Take on Class Actions*, SCOTUSBLOG (Aug. 6, 2019), https://www.scotusblog.com/2019/08/empirical-scotus-a-class-of-their-own-the-supreme-courts-recent-take-on-class-actions [https://perma.cc/DF2D-N6LU] (noting that the Supreme Court overturns "almost 70 percent of class action decisions made by appeals courts"); Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1989 (2017) ("[I]f *Concepcion* and *Italian Colors* are not overruled . . . I am not sure how many class actions we will have in future years.").

16. *See generally, e.g.*, Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021) (defending traditional understanding of Equity as an important functional complement to law).

This Essay proceeds in five parts: Part I sets forth the background of *Concepcion*, the FAA at its center, Justice Scalia's decision in the case, and the legal community's response to it; it aims to capture the now-common narrative of *Concepcion* as a terrible opinion. Part II introduces *Marmet*, which displays the Supreme Court's apparent sincerity in distinguishing unconscionability from other public policy defenses, and the Court's openness to genuine unconscionability arguments. In Part III, considering the light shed by *Marmet*, we advance a reinterpretation of Justice Scalia's *Concepcion* opinion, one that ends up endorsing his reasons for rejecting the savings clause argument.[17]

Part IV explains why one take-home message of *Concepcion* is crucial for consumer advocates today: Dressing up public policy arguments in the clothing of unconscionability is too dangerous a game to play. Part IV explains both why legal thinkers have been tempted to overuse the label of "unconscionability," and why it is important that they not do so. The reason for the kind of unconscionability doctrine we have relies upon cases with a certain cluster of features that renders them well suited to one particular kind of judicial response of non-enforcement. That cluster of features is ill-suited to many of the settings that have most attracted advocates, and many of those settings have no need for an unconscionability argument once other well-developed contract defenses—and the reasons for them—are properly understood.

Some readers might bridle at our fussiness about words and wonder why it really matters which label is selected. Indeed, they might think it is crucial for advocates of change to be ready to latch onto any words, like "unconscionability," that could be made to work even if they do not already do so. Part V takes this realist critique seriously and offers a set of reasons for thinking that too much flexibility with words may be part of the problem, not part of the solution.

I. *AT&T Mobility LLC v. Concepcion*

Justice Scalia was no doubt comfortable with his *Concepcion* decision, in part because plaintiffs Vincent and Liza Concepcion had so little at stake. In 2002, the plaintiffs entered a cell phone agreement with Cingular Wireless (eventually taken over by AT&T) in response to an advertisement that they could get a free cell phone.[18] On entering the agreement, they turned out to have to pay $30.22 in taxes on the phone, notwithstanding the representation

17. See *infra* Part III for the position that, even if the savings clause argument was rightly rejected, *Concepcion* reached the wrong result because the implied preemption argument that allegedly necessitated the savings clause was itself unsound.

18. *Concepcion*, 563 U.S. at 336–37.

that it was "free."[19] Accordingly, they filed a claim in 2006 alleging the defendant engaged in false advertising and fraud.[20] Their claim was made part of a putative federal class action in the Southern District of California.[21]

AT&T moved to compel arbitration based on a provision in the written contract with the Concepcions that, as the Supreme Court described it, "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'"[22] The Concepcions opposed the motion based on the California Supreme Court's 2005 *Discover Bank* decision.[23] Agreeing with the Concepcions, the district court denied the motion,[24] and the Ninth Circuit affirmed.[25]

The Ninth Circuit's decision rested on two pillars: (i) the California Supreme Court's *Discover Bank* ruling that deems some mandatory arbitration clauses "unconscionable" and (ii) the Ninth Circuit's own decision that the FAA does not preempt the *Discover Bank* rule. Drawing upon a prior Ninth Circuit decision, *Shroyer v. New Cingular Wireless Services, Inc.*,[26] the court interpreted *Discover Bank* to say that a mandatory arbitration provision in a consumer contract is unenforceable due to unconscionability, at least where it is "a contract of adhesion," if the "disputes between the contracting parties [are] likely to involve small amounts of damages," and the plaintiffs have "alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money."[27] The *Laster 2* court concluded that all three of these conditions were satisfied and therefore found that the mandatory arbitration provision, which required the Concepcions to forego both litigation and classwide adjudication, was unconscionable.[28]

As to preemption, the Ninth Circuit principally stated that AT&T's "implied preemption" argument failed because requiring class arbitration

19. *Id.* at 337.

20. *Id.*

21. *Id.*

22. *Id.* at 336 (quoting the contract).

23. *Id.* at 341; *see* Discover Bank v. Super. Ct. of L.A., 113 P.3d 1100, 1103 (Cal. 2005) (holding that "the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration").

24. Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *17 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

25. Laster v. AT&T Mobility LLC, 584 F.3d 849, 859 (9th Cir. 2009) [hereinafter *Laster 2*].

26. 498 F.3d 976 (9th Cir. 2007).

27. *Laster 2*, 584 F.3d at 854 (citing *Shoyer*, 498 F.3d at 983).

28. *Id.* at 855.

provisions does not stand as an obstacle to the purposes of the FAA.[29] Those purposes are "first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims."[30] The court noted that it had rejected the supposed conflict between these purposes and class arbitration.[31] It added that, in any event, unconscionability falls within the FAA's savings clause.[32]

Writing for himself and three other members of the Court, Justice Scalia quite comfortably assumed that the Ninth Circuit was correct to conclude that the *Discover Bank* rule did apply to the facts of the Concepcions' case. Indeed, he noted that the California courts "have frequently applied this rule to find arbitration agreements unconscionable."[33] Evidently, this was all the more reason to ascertain whether the rule was preempted. Scalia's preemption analysis has two parts: a basic, proactive conflict-preemption part that explains why there is a big problem,[34] and a critique of the plaintiffs' unconscionability-based savings clause argument, which meant to shield the Concepcions from that basic conflict-preemption part.[35]

The FAA's purpose to streamline dispute resolution is the core of the former.[36] The Concepcions read *Discover Bank* to preclude enforcement of the mandatory arbitration clause unless there is an option for classwide arbitration.[37] Scalia characterizes this *Discover Bank* rule as discouraging arbitration and, in particular, as frustrating a key purpose of the FAA: to streamline dispute resolution.[38] That is why there is an obstacle preemption argument.[39]

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29. *Id.* at 857.

30. *Id.* (citing *Shoyer*, 498 F.3d at 989).

31. *Id.* at 858.

32. *Id.* at 859.

33. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (citations omitted). Justice Thomas's concurrence provided the Court's fifth vote for AT&T. *See id.* at 353 (Thomas, J., concurring) (arguing the FAA's text alone preempts the *Discover Bank* rule).

34. *Id.* at 341.

35. *Id.* at 343.

36. *See id.* at 344 (discussing the purpose of the FAA provisions "affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute").

37. *Id.* at 337–38.

38. *Id.* at 344, 346–47.

39. As to this "purpose of streamlining" argument, we are largely in agreement with Justice Breyer's dissent but will not be focusing on that (except for this paragraph). We have no doubt that eliminating the class option meant AT&T would have fewer overall cases by a wide measure, and resolving them would be simpler for AT&T than class action litigation or class arbitration would be; few people will bring claims for $30.22, and they will be quick in arbitration, while a class arbitration would likely be high cost and drag on. To this extent, the streamlining point seems

Few were expecting Scalia to accept a different view on the implied preemption matter; this was not the plaintiffs' best hope. Rather, the unconscionability argument of *Discover Bank* was supposed to win on the savings clause. After all, Section 2 provides that courts must treat arbitration clauses as "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*,"[40] and unconscionability *is* a ground at law or equity for the revocation of any contract. One might expect Justice Scalia, as a long-time supporter of formalistic approaches to understanding the law—including the common law—to take this savings clause argument very seriously.

Justice Scalia's treatment of the Concepcions' savings clause argument appears dismissive—and in some ways anomalous—given his well-developed jurisprudential and constitutional views. He concluded that the savings provision cannot be read to be so protective of states' prerogatives in contract doctrine that states are able to frustrate Congress's goal of encouraging arbitration, which is why Congress included the irrevocability provision of Section 2.[41] For a Justice as formalistic, as textualist, and as federalist as Justice Scalia purported to be, this is a puzzling position. If indeed unconscionability is a basic defense at law and equity, and if this contract is indeed unconscionable under California law, that should be the end of the story. The text of the statute is what counts. It is especially troubling that Justice Scalia is willing to let a vague purposiveness/implied preemption argument contradict the text. And doubly so given that the Court is already way out on a preemption doctrine ledge that is extraordinarily insensitive to state power.

Since the moment *Concepcion* was decided, law professors have not taken a generous view of it.[42] No doubt this negativity was due in part to their

undeniable. *See id.* at 363, 365 (Breyer, J., dissenting) (agreeing that class arbitration takes more time and is more complex than individual arbitration, but fewer cases will be brought if plaintiffs are forced to bring negative-expected-value cases individually). But Justice Breyer is surely right that the streamlining interest requires comparing arbitration of a kind of claim to litigation of a kind of claim, not individual arbitration to *class litigation*. *See id.* at 363 (Breyer, J., dissenting) (explaining how the majority's argument "rests critically upon the wrong comparison"). This is not to say that the streamlining argument would fail if done at the right level; perhaps class arbitration really would not be streamlined compared to class litigation. But the Court did not properly address that question.

40. 9 U.S.C. § 2 (emphasis added).

41. *Concepcion*, 563 U.S. at 339, 341, 343.

42. *See generally, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (evaluating the contours of the enforcement gap created by *Concepcion*'s effect on class actions); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011) (reading *Concepcion* in a line of cases grappling with dispute resolution mechanisms outside the courts and expressing fairness concerns with the absence of publicity); Jean

view of the decision's likely downstream consequences. Some predicted the decision spelled the end of consumer class actions in state and federal courts alike.[43] While it is beyond the scope of this paper to ascertain the reduction in class actions since 2011 or to assess the place of *Concepcion* within the causes of such reduction, it appears plausible that the case has in fact had a significant impact of just the kind predicted.[44] For some, *Concepcion* was alarming as a harbinger of a potentially more aggressive form of preemption analysis to come. Subsequent Supreme Court decisions have clearly confirmed such dire predictions.[45] There are, of course, commentators who believe the case was rightly decided and its impact salutary.[46] And there are developments no one predicted.[47]

Our principal interest in the case relates, however, to the jurisprudential and constitutional puzzle set forth above. Of course, it is easy to say that Justice Scalia and those who voted with him were simply doing what they needed to do to get where they wanted to go, and that hostility to class actions, class-action lawyers, and California Supreme Court rulings tells us all we really need to know. In what follows, however, we shed light on this puzzling aspect of *Concepcion* by looking at a subsequent Supreme Court decision, *Marmet Health Care Center, Inc. v. Brown*.[48]

II. *Marmet Health Care Center, Inc. v. Brown*

Two months after *Concepcion* was decided, the Supreme Court of Appeals of West Virginia decided another arbitration preemption case involving unconscionability, *Brown ex rel. Brown v. Genesis Healthcare*

R. Sternlight, *Tsunami:* AT&T v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012) (arguing that *Concepcion* is a "tsunami," wiping out broad swathes of consumer and employment class actions).

43. *See, e.g.*, Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 174 (2015) (expressing fear that class actions are "headed for demise"); Sternlight, *supra* note 42, at 724 (predicting a "substantial reduction in the number of class actions brought in federal and state court").

44. *See, e.g.*, Stephen E. Friedman, *Trusting Courts with Arbitration Provisions*, 68 CASE W. RES. L. REV. 821, 822–23 (2018) (noting increased prevalence of non-class arbitration provisions in consumer contracts).

45. *See supra* note 2.

46. *See generally, e.g.*, Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKLEY J. EMP. & LAB. L. 153 (2014) (characterizing the impact of *Concepcion* as being overstated and incorrectly blamed for effects that either it did not cause or that have not occurred). *See also* B. Rush Smith III & Sean R. Higgins, AT&T Mobility LLC v. Concepcion*: Time to Consider a Motion to Compel Arbitration?*, BUS. L. TODAY, Sept. 2011, at 1, 1–2 (advising on strategies for deploying *Concepcion* to help clients enforce their arbitration provisions).

47. *See generally, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (documenting erosion of substantive law that is flowing from Court's FAA decisions).

48. 565 U.S. 530 (2012).

Corp.[49] *Brown I* involved tort and contract litigation against nursing homes.[50] West Virginia's highest court was presented with three consolidated cases involving a similar factual pattern.[51] In all cases, a family member of an elder who needed extensive care had signed a nursing home admission agreement, and the agreement turned out to have an arbitration clause. [52] After the elder person had died, a family member filed a lawsuit against the nursing home alleging that the nursing home "negligently caused injuries which eventually resulted in the ill or incapacitated person's death."[53] The nursing home in each case moved to compel arbitration.[54] Plaintiffs asserted they could not be forced to proceed to arbitration because the agreements were contrary to the West Virginia Nursing Home Act.[55] According to the Act's Section (e), "[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, is void as contrary to public policy."[56] They also argued that the contracts were unconscionable under West Virginia common law.[57]

The West Virginia court in *Brown I* began in a deferential and obedient spirit. It held that to the extent the Nursing Home Act "attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident's legal representative, the statute is preempted by Section 2 of the Federal Arbitration Act."[58] In so doing, the West Virginia court was clearly following the Supreme Court's lead in *Concepcion*.

What came next did not smack of obedience to the U.S. Supreme Court. To the contrary, the West Virginia Supreme Court of Appeals actually accepted the plaintiff's argument that because the arbitration clauses were unconscionable under West Virginia common law, the FAA did not apply.[59] In other words, even in the face of *Concepcion*,[60] the court held the West Virginia common law argument in this context was: (a) distinct from the

49. 724 S.E.2d 250 (W. Va. 2011) [hereinafter *Brown I*], *cert. granted, judgment vacated sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012).

50. *Id.* at 263.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. W. Va. Code § 16B-4-15(e) (2024).

57. *Brown I*, 724 S.E.2d at 263.

58. *Id.* at 283.

59. *Id.* at 293.

60. *Id.* at 276.

statutory argument, which did fall to preemption[61] and (b) distinct from the unconscionability argument that had been rejected in *Concepcion*.[62]

Detail is needed to understand how the West Virginia court justified its action.[63] One of the three cases involved Clarence Brown ["Clarence"], who was born with severe cerebral palsy and had been admitted to the Marmet Health Care Center in Marmet, West Virginia.[64] The nursing home updated its admission agreement for Clarence eight years after his admission and added an arbitration clause.[65] The arbitration clause, as contended by the nursing home, was added once Marmet had lost its liability insurance coverage.[66] His brother, Clayton T. Brown ["Brown"], was appointed as his legal guardian.[67] After Clarence died, Brown sued various entities including Marmet Health Care Center, Inc,[68] alleging negligence and violation of the West Virginia Nursing Home Act.[69]

When Marmet and two other defendants moved to enforce the arbitration agreement, Brown argued the arbitration clause was unenforceable because it violated Section 15(c) of the West Virginia Nursing Home Act, which states: "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."[70] In addition to the contention that the clause violated the Nursing Home Act, the plaintiff also argued the clause was an unconscionable contract of adhesion.[71] The circuit court ruled in favor of arbitration and dismissed the plaintiff's claim.[72] Brown appealed to West Virginia's Supreme Court of Appeals.[73]

The second plaintiff in the consolidated cases, Leo Taylor's son Jeffrey Taylor, filed a wrongful death action and a negligence action against Marmet alleging that "the acts and omissions of the nursing home had caused Leo Taylor to fall several times, and caused him to have pressure ulcers, dehydration and other injuries that contributed to his death."[74] Leo's wife had also signed Marmet's admission agreement that entailed an identical

61. *Id.* at 263.

62. *Id.* at 276, 280–81, 297.

63. Our description of the facts of the cases assumes, as did the courts, that the factual allegations in the complaints were true.

64. *Brown I*, 724 S.E.2d at 263–64.

65. *Id.* at 264.

66. *Id.*

67. *Id.*

68. Referred to hereinafter as "Marmet."

69. *Brown I*, 724 S.E.2d at 264.

70. *Id.* (quoting W. Va. Code § 16-5C-15(c) (2024)).

71. *Id.* at 265.

72. *Id.*

73. *Id.*

74. *Id.* at 265.

arbitration clause as the one in Mr. Brown's admission agreement.[75] The circuit court also dismissed Taylor's lawsuit.[76] He appealed to the Supreme Court of West Virginia.[77]

The third plaintiff in *Brown I* was Sharon A. Marchio, the daughter of Pauline Virginia Willet, a 94-year-old patient who suffered from various diseases including Alzheimer's.[78] Ms. Marchio admitted her mother to the Clarksburg Continuous Care Center and signed a 73-page admission agreement on her behalf.[79] Over the course of five weeks at the LTC center, Ms. Willet "lost weight, had severe urinary tract and other infections, and became withdrawn and lethargic."[80] When transferred to a hospital, she was found to be "dehydrated, suffering from pneumonia, septicemia, an acute myocardial infarction, renal failure, and congestive heart failure."[81] Plaintiff argued the arbitration clause was void as contrary to public policy based on Section 15(c) of West Virginia's Nursing Home Act.[82] The circuit court declined to rule on the defendant's motion to dismiss and certified a question to the West Virginia Supreme Court to answer whether Section 15 of West Virginia's Nursing Home Act was preempted by the FAA.[83] West Virginia's Supreme Court granted the parties' petition to review the certified question.[84]

In addressing the plaintiffs' common law critique of the arbitration clause, the West Virginia court stated that the Supreme Court of the United States had not thus far dealt with the "enforceability of an arbitration clause in a health care contract."[85] The court reasoned "no jurisdiction has concluded that such arbitration clauses are unenforceable *per se*."[86] The court then turned to the question of whether such contract is unconscionable, which is a question of law.[87]

For the Supreme Court of Appeals of West Virginia, unconscionability is a matter of equity and fairness which "involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of

75. *Id.*
76. *Id.* at 266.
77. *Id.*
78. *Id.* at 266–67.
79. *Id.* at 266.
80. *Id.*
81. *Id.* at 266–67.
82. *Id.* at 267.
83. *Id.*
84. *Id.*
85. *Id.* at 282 (quoting Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How to Make It 'More' Right*, 113 PENN ST. L. REV. 527, 532 (2008)).
86. *Id.*
87. *Id.* at 282–84.

the contract as a whole."[88] The court used the common division of procedural unconscionability—which addresses "inequities, improprieties, or unfairness in the bargaining process and the formation of the contract"[89]—and substantive unconscionability—which "involves unfairness in the contract itself"[90]—and examined each component separately.[91] The court then turned to the plaintiffs' assertion that arbitration clauses in nursing home agreements "violate public policy as a matter of law, and are systemically unconscionable."[92] It stated that the most analogous cases to the nursing home arbitration clauses "involve[] pre-injury contracts immunizing one party from liability for negligence toward another party."[93] After examining the law on exculpatory clauses in West Virginia, it explained that West Virginia adopted the California Supreme Court's famous *Tunkl* test to evaluate whether an exculpatory clause should be upheld.[94] In particular, it focused on *Tunkl*'s recognition that exculpatory clauses are especially problematic in connection with contracts for a public service.[95]

The court stated:

> We recognize that a rule of state law disfavoring arbitration for a class of interstate commercial transactions is preempted by the FAA. However, Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public.[96]

In what seemed like a provocation to the United States Supreme Court, it added:

> Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be

88. *Id.* at 261 (quoting Troy Min. Corp. v. Itmann Coal Co., 346 S.E.2d 749 (W. Va. 1986)).

89. *Id.* at 261.

90. *Id.* at 262.

91. *Id.* at 293–94.

92. *Id.* at 289.

93. *Id.*

94. *See id.* at 290–91 (citing Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963) (en banc) (establishing the *Tunkl* test)). A broader discussion of *Tunkl* is offered in Part IV.

95. *Id.* at 290 (citing and discussing Kyriazis v. Univ. of W. Va., 450 S.E.2d 649 (W. Va. 1994)). In *Kyriazis*, the West Virginia Supreme Court invalidated an exculpatory clause that barred recovery in case of injury, incorporated by West Virginia University's rugby club. *Kyriazis*, 450 S.E.2d at 655. The court held athletics were an "integral" part of the university that qualified as a public service and thus the clause violated public policy and was void. *Id.*

96. *Brown I*, 724 S.E.2d at 291.

> submitted to arbitration, to be governed by the Federal Arbitration Act.[97]

Reversing the *Brown* and *Taylor* decisions below (and answering the certified question in *Marchio*), the court held that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence,"[98] adding "[a]lternatively, we find that two of the three arbitration clauses are, as a matter of law, unconscionable and unenforceable against the plaintiffs."[99] In the third case, the circuit court did not consider the unconscionability of the agreement.[100]

Unsurprisingly—given the apparent discordance between *Brown I* and the just-decided *Concepcion*—the defendants in *Brown I* petitioned for certiorari and the Court granted it.[101] What is surprising is what the Court did. In one fell swoop—via a per curiam opinion—the Court granted certiorari but declined to reverse the West Virginia decision, notwithstanding its seemingly defiant refusal to follow *Concepcion*.[102] To be sure, the Court did acknowledge that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA."[103] The Supreme Court in *Marmet*—as one would have predicted—rested its justification for that conclusion on *Concepcion*'s holding that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[104] Nonetheless, it did not regard this holding as sufficient to decide the case.[105] Instead, it ordered the West Virginia court to "consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common-law principles that are not specific to arbitration and pre-empted by the FAA."[106] But what does this mean? The West Virginia court had already stated that there were such principles—a principle against enforcement of unconscionable contracts, but

97. *Id.* at 292.
98. *Id.*
99. *Id.*
100. *Id.* at 263.
101. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012).
102. *Id.*
103. *Id.* at 533.
104. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011)).
105. *Id.* at 533–34.
106. *Id.* at 534.

the Supreme Court had, less than a year earlier, just ruled that California's unconscionability principle was displaced by the FAA.[107]

A clue is found in the *Marmet* Court's observation that the *Brown I* court found *the arbitration clauses* in the cases of *Brown* and *Taylor* to be unconscionable and thus unenforceable but had not made (and had not been asked to make) such a determination in the *Marchio* case.[108] That observation appears to have led the Court to infer that the common-law unconscionability argument for the West Virginia Supreme Court of Appeals was perhaps a distinct argument from both the statutory-based argument and the common-law, *Tunkl*-based argument of public policy against the enforceability of the mandatory arbitration clause.[109] If the unconscionability categorization in West Virginia was not simply another name for the *Tunkl*-based public policy argument prohibiting enforcement of arbitration clauses, then perhaps it really was protected by the savings clause.

On the other hand, the Court stated, preemption would still apply if it turned out that "the state court's alternative holding was influenced by the invalid, categorical rule discussed above, the rule against predispute arbitration agreements."[110] The Court ended up remanding *Brown* and *Taylor* precisely because of the need to clarify whether West Virginia's so-called "unconscionability" defense was an authentic version of a traditional defense in law or equity as contemplated by the savings clause, on the one hand, or a public-policy-based ruling against mandatory arbitration clauses in nursing home cases, on the other.[111] On remand, the West Virginia Supreme Court of Appeals adhered to its view that unconscionability was a distinct defense and thus not preempted, in turn remanding the cases to its own lower courts for a determination on unconscionability.[112]

Another Supreme Court case involving nursing home arbitration clauses further confirms our reading of *Concepcion* and *Marmet*. In *Kindred Nursing Centers Ltd. Partnership v. Clark*,[113] the Court held that requiring an explicit statement that an attorney has authority to waive access to court, such that the state of Kentucky had mandated, disfavors arbitration agreements and as such is preempted by the FAA.[114] The Court noted that "[a] court may invalidate an arbitration agreement based on 'generally applicable contract

107. *Concepcion*, 563 U.S. at 352.

108. *Marmet Health Care Ctr., Inc.*, 565 U.S. at 533–34.

109. *See id.* at 534 ("On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common-law principles that are not specific to arbitration . . . .").

110. *Id.*

111. *Id.* at 533–34.

112. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217 (W. Va. 2012).

113. 581 U.S. 246 (2017).

114. *Id.* at 256.

defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[115] Citing *Marmet*, Justice Kagan stated that on remand, the lower court in one of the consolidated cases must consider whether, absent Kentucky's clear statement rule, the lower court would have ruled against executing the arbitration agreement.[116]

III. *Concepcion* Revisited

The United States Supreme Court's disposition in *Marmet* sheds light on Justice Scalia's *Concepcion* opinion and helps us see his hostility to the Concepcions' unconscionability argument quite differently. The per curiam *Marmet* opinion shows us that the Justices—including Scalia—distinguished between authentic unconscionability arguments of a sort that would qualify under the savings clause and general, public-policy-based arguments for rejecting arbitration clauses masquerading as unconscionability arguments.[117] In *Marmet*, the Court expressed anxiety about whether the putative unconscionability argument was or was not authentic, and thus remanded.[118] In *Concepcion*, there was no such expression of doubt. While Justice Scalia was apparently willing to adopt the *Discover Bank* rule's terminology of "unconscionability," it is clear that he regarded it as just one argument—an argument sounding in the California Supreme Court's policy judgment that, for reasons of fairness,[119] such arbitration clauses must be struck down if they do not include the availability of classwide arbitration. *Marmet* strongly suggests that if the Concepcions' *Discover Bank* argument had been a plausible version of what the Court regards as an authentic unconscionability defense, the case might have come out differently.[120]

Our point is not really about what might have happened in *Concepcion* if only . . . and it is certainly not about what the highly accomplished

115. *Id*. at 251 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

116. *Id*. at 256.

117. *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012) (suggesting that if the West Virginia Supreme Court of Appeals could rest its decision outside of categorical rules against certain kinds of arbitration agreements based on public policy, its decision would not conflict with the Supreme Court's precedent).

118. *See id.* (stating that the West Virginia Supreme Court of Appeals' reliance on public policy was unclear).

119. *See Concepcion*, 563 U.S. at 340–42 (applying *Discover Banks*'s definition of unconscionability without distinguishing between public policy and general principles of unconscionability); *cf. id.* at 352–53 (Thomas, J., concurring) ("If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'").

120. *Cf.* Megan Barnett, *There Is Still Hope for the Little Guy: Unconscionability Is Still a Defense Against Arbitration Clauses Despite* AT&T Mobility v. Concepcion, 33 WHITTIER L. REV. 651, 655 (2012) (suggesting that more traditional, narrowly focused versions of unconscionability may still succeed after *Concepcion*).

plaintiffs' lawyers in *Concepcion* ought to have done to win. Indeed, we are not litigators, and *Concepcion* was known in advance to be so high stakes for the plaintiffs' bar that it no doubt attracted the best Supreme Court litigators and strategists, and failed nonetheless. Moreover, we doubt that such an "authentic" unconscionability argument was really available to the Concepcions. As the district court found[121] and the petitioners emphasized in their briefs to the Court,[122] when one just focuses on each individual consumer and their bargain with AT&T Mobile (as opposed to the collective question of all similarly situated consumers), the contract was arguably quite favorable to the individual plaintiff.[123] And yet unconscionability analysis overwhelmingly requires proof of both procedural unconscionability and substantive unconscionability.[124] The point is really that at least the Justices in the majority understandably failed to perceive an authentic unconscionability argument of a kind that really does qualify as a traditional defense in law or equity; what they saw was a public-policy-based argument for striking down boilerplate that some courts call "unconscionability," which does not so qualify. Indeed, it is possible that their belief in such a distinction was critical to one of the most consequential private law cases in American law of the past two decades.

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121. Laster v. T-Mobile USA, Inc., No. 05-cv-1167 DMS (AJB), 2008 WL 5216255, at *10–12 (S.D. Cal. Aug. 11, 2008).

122. Brief for Petitioner at 4–11, *Concepcion*, 563 U.S. 332 (No. 09-893).

123. The arbitration clause in *Concepcion* was in certain respects quite generous to the consumer. The Supreme Court characterized it as follows:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

Concepcion, 563 U.S. at 336–37.

124. *See* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18.10 (4th ed. 2024) (stating proof of unconscionability requires proof of procedural unconscionability and substantive unconscionability). *But see* RESTATEMENT OF THE L.: CONSUMER CONTS. § 6(B) (2024) ("In determining that a contract or a term is unconscionable, a greater degree of one of the factors in this subsection means that a lesser degree of the other factor is sufficient to establish unconscionability. In appropriate circumstances, a sufficiently high degree of one of the factors is sufficient to establish unconscionability."). Part V provides a critical assessment of the Restatement's effort to re-mold unconscionability.

Marmet provides a useful lens on *Concepcion* for reasons that should appeal to the common law jurist: An unconscionability critique of a nursing home agreement for caretaking of an ill and mentally disabled elderly person does in fact appear to be distinguishable from an unconscionability critique of a class of consumer cell phone agreements. And resolution of an individual dispute in which the plaintiff alleged that the defendant killed his brother by negligently causing "pressure sores, dehydration, malnutrition, contractures, aspiration pneumonia, and infections"[125] is different from a dispute in which a cell phone company allegedly defrauded the plaintiffs causing them less than $31 in damages. The point is not that one seems more urgent or meritorious than the other. It is that at least one prominent conception of unconscionability is about whether the contract as between the parties is so unequal, oppressive, or unjust that the state would be acting as an instrument of oppression were it to enforce the contract.[126] One of these fact patterns—that relating to individuals who entered nursing homes—actually presents a plausible version of that argument on the facts, while the other does not. Indeed, the plaintiffs in *Brown* and *Taylor* were in a sense fortunate that in their co-respondent's case—that of *Marchio*, from a different West Virginia county and court—did *not* come with a finding on unconscionability, highlighting that the *Marmet* litigation really concerned individual factual scenarios relating to contracts about nursing homes entered into by highly vulnerable persons under questionable circumstances.

Many courts around the country have in recent years confused classic unconscionability arguments with public-policy-based critiques of exculpatory clauses in tort cases.[127] There is no question that treatise writers and the Restatement (Second) of Contracts characterize these two types of defenses differently. Williston, for example, has a whole chapter on "Unconscionable Agreements."[128] This is entirely separate from sections devoted to the unenforceability of clauses that exculpate defendants from liability for tortious or criminal conduct; these are addressed in Sections 19.24 and 19.25.[129] Similarly, the Restatement (Second) of Contracts addresses unconscionability in Section 208,[130] noting in its

125. *Brown I*, 724 S.E.2d 250, 264 (W. Va. 2011).

126. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205, 209 (2000). *But see* Nicolas Cornell, *A Complainant-Oriented Approach Toward Unconscionability and Contract*, 164 U. PA. L. REV. 1131, 1134 (2016) (arguing instead that the unconscionability doctrine is best understood as recognizing that the plaintiff has no legal right to complain). Cornell's complainant-centered approach similarly relies in part on the fact that the contract is so unjust that the obligee seeking to benefit from it as against the individual plaintiff is not entitled to do so.

127. Takhshid, *supra* note 11, at 2185–86.

128. LORD, *supra* note 124, § 18.

129. *Id.* at §§ 19:24, 19:25.

130. RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

comments the classic formulation from *Earl of Chesterfield*—if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[131] Unenforceability of exculpatory clauses is addressed in Section 195 ("Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently").[132]

The same point can be made more generally about a variety of contract defenses that sound in public policy but are quite distinct from unconscionability arguments. To illustrate, again, with stock authorities, the Restatement (Second) of Contracts actually includes twenty different sections on unenforceability due to public policy,[133] and Williston has eight chapters on the topic.[134] Broadly speaking, "public policy" is a term used to denote reasons for the unenforceability of promises to commit crimes or torts, promises regarding marriage prohibitions, promises in restraint of trade, promises that tend to promote illegal activity, promises to aid foreign nations, as well as both agreements to indemnify, agreements to exculpate, and many others.[135]

The important questions do not turn principally on whether scholars or courts have chosen to use different labels for different public policy defenses or whether the formal taxonomies are pluralistic or monistic, divisive or unifying. The question is whether the grounds for nonenforcement that go along with those labels are of different kinds. In the case of the unenforceability of a contract for murder, it is not simply that the enforcement of the contract is likely to send the wrong incentives to members of the public. It is that the act of agreeing to do something in the context of what purport to be mutual promises cannot actually create a legal duty to do that thing, if the law forbids such a doing. The making of a promise cannot create a legal duty to perform an act that there is, in the law, an obligation to desist from performing. There is thus no contractual duty to enforce. More generally, enforcing such a contract would display no respect for another part of the law (criminal law).

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131. Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750)).

132. RESTATEMENT (SECOND) OF CONTS. § 195 (AM. L. INST. 1981).

133. *Id.* §§ 178–96, 356.

134. LORD, *supra* note 124, §§ 12–19.

135. *See generally* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012) (exploring the success of the "public policy defense" in contract law); Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1928) (noting traces of public policy arguments in English common law). For an analysis on various subcategories of public policy arguments, see generally Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685 (2016). Although Ghodoosi's article does not focus on unconscionability, it also asserts the importance of distinguishing various forms of public-policy-based arguments for nonenforcement and the different sets of reasons applicable to each.

The unenforceability of a duty to indemnify an insured person for an award of punitive damages entered against her is quite a different matter. There is no problem, it appears, saying the insurance company took on a legal obligation by agreeing to its own policy. The question is whether permitting such awards would undermine the deterrent effect and the expressive meaning of a punitive damages award, undercutting plaintiffs' rights and courts' powers in tort law. Courts that strike down such indemnification agreements on a public policy basis evidently believe so; those that decline to do so take the opposite view.

A third example is a contract to sell one's organ—say, a kidney. A person could choose to give her kidney to someone in need of a kidney, distinguishing this example from the murder analogy. Courts that refuse to enforce such contracts are typically worried about the commodification of body parts.[136] Perhaps a more extreme example is a contract to become a slave. Here, courts decline to enforce the contract because they regard control over one's own body and labor as *inalienable*, both as a matter of law and as a matter of moral right.

Finally, products liability law, common carrier law, the law governing fiduciaries, and those who provide public necessities in the United States have long imposed duties of care that are nonwaivable. To this extent, contract doctrine regarding warranties and liability for breach of such warranties treats waivers of such warranties as unenforceable as a matter of public policy—similarly for professionals, utilities, and common carriers. The reasoning underlying such law is typically two-fold. First, the protection tort law aims to provide users is undermined if an industry can simply include boilerplate to escape it. Second, and relatedly, such clauses provide a great advantage to the repeat player defendants who draft the boilerplate.

Courts clearly have ample power to strike down contracts or contractual provisions as inimical to public policy, and doing so often connects with other aspects of the legal system that would be undermined if such contractual provisions were upheld. Consider, in this light, the *Discover Bank*'s rule forbidding agreements precluding classwide adjudication. What kind of reasons lie behind that ruling? It is in significant part about an industry or enterprise not being able to undermine policies and principles of an area of law (e.g., securities) aimed at shielding them. Consumer law governing financial arrangements, credit, and debt (credit cards, as in *Discover Bank*) or consumer products and services (as in *Concepcion*) is in part aimed at protecting consumers. It is not implausible that unavailability

136. *See* Zahra Takhshid, *Kidney, Money, and the* Shīʻah *Implementation of the Rule of Necessity*, 19 UCLA J. ISLAMIC & NEAR E.L. 83, 84–85 (2021) (outlining a range of legal possibilities and potential ways to allow for monetary compensation while avoiding a sales contract and commodification of body parts in context of kidney donations, when necessity to save a life prevails).

of classwide dispute resolution will undermine both individuals' capacity to obtain remedies and the force of the law. That is because the prospect of large-scale liability is dramatically diminished. At the same time, the law also remedies agreements that are unduly favorable to those large actors in the marketplace on which ordinary people depend for safe processes.

Does the *Discover Bank* credit card agreement ruling fit best in the "shock-the-conscience" category of classic unconscionability cases, or is it best seen as an instance of the courts deciding as a matter of public policy that commercial actors should not be able to use boilerplate to limit remedies for what is independently defined as legally wrongful conduct? The answer is plainly the latter, and it was in *Concepcion* too. Of course, it is analytically (and doctrinally) possible that a case could fall simultaneously in both categories—both unconscionability *and* unenforceability as a matter of public policy,[137] so one must ask the question more carefully: Is the Court's concern about the oppressiveness of the contract as to the individual contractor in a particular bargain *and* about the systemic effects, or is it really all about the systemic effects? Here the answer is again that it is all about the systemic effects. The same is true about the Ninth Circuit decision which the Supreme Court ultimately reversed in *Concepcion*: Its finding of unconscionability was about systemic effects and did not really concern the defendant's oppression of the Concepcions.[138]

Does the conclusion that the *Discover Bank* rule was not an "authentic unconscionability" argument show that *Concepcion* reached the right answer? To reach that conclusion, we would need to add at least the premise that the FAA's savings clause, while it does include what we are calling "authentic unconscionability" defenses, does not cover the subcategory of public policy argument to which the *Discover Bank* rule belongs. We are willing to accept that—at least by 2011—that may have been the most defensible view of the savings clause. Even with this premise added, however, the correctness of the *Concepcion* decision does not follow, both because Justice Scalia's implied conflict preemption analysis was starkly aggressive[139] and because his efficiency/streamlining critique of class arbitration and the purposes of the FAA was highly tendentious, as argued in Justice Breyer's dissent.[140] We are thus skeptical about whether a savings clause argument was even needed to defend the *Discover Bank* rule from a preemption critique. Nonetheless, we are inclined to infer from the analysis

137. RESTATEMENT (SECOND) OF CONTS. § 208, cmt. a (AM. L. INST. 1981) ("[T]he policy [of non-enforcement on grounds of unconscionability] also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy").

138. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (reversing the Ninth Circuit's holding and explaining the reasoning).

139. *Id.* at 343 n.4.

140. *Id.* at 361–63 (Breyer, J., dissenting).

above that the savings clause argument upon which the Concepcions in fact relied at the Supreme Court was indeed fairly rejected by Justice Scalia in his opinion for the Court.

IV. Contrasting Unconscionability with Other Public Policy Arguments

In our Introduction, we suggested that the *Concepcion* opinion has a silver lining for those who wish to push contract law in a pro-consumer direction. No doubt that was an exaggeration, and in any event this Essay is not advanced as a work of advocacy. It would be more accurate to say that, in our view, *Concepcion* should alert those endeavoring to understand the law of contract that there is a wide range of well-developed public policy bases for declining to enforce contracts[141] that are—in crucial respects—different from unconscionability. Moreover, a failure to recognize the distinction can lead to unrealistic and undue reliance on an unconscionability defense.

It is helpful to begin by focusing upon the topic of exculpatory clauses because the California decisions examined in *Concepcion* displayed great interest in this area. As discussed in Part II, the classic twentieth-century American decision on exculpatory clauses is *Tunkl v. Regents of California*, decided in 1963 by the California Supreme Court.[142] The plaintiff in *Tunkl* sued a hospital for medical malpractice, and the hospital argued it was shielded from liability by an exculpatory clause that Mr. Tunkl had executed on admission to the hospital.[143] The clause purported to release the hospital "from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees."[144]

Tunkl asked the California Supreme Court to rule that the clause should be voided for reasons of public policy, and the court agreed.[145] Declining to strike down *all* exculpatory clauses, the court indicated that its precedents dictated a division between contracts that were "affected with a public interest" and those that were not.[146] Exculpatory clauses, it reasoned, were void as a matter of public policy for the former, but not for the latter.[147] The decision's most famous passage set out a list of six factors to be evaluated in

141. *Cf.* Ghodoosi, *supra* note 135, at 697, 700–01 (providing overview, taxonomy, and analysis of public-policy-based arguments against contractual enforcement). While Ghodoosi's recognition of the breadth of courts' usage of public-policy-based arguments is helpful, we do not endorse the taxonomy he offers.

142. Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).

143. *Id.* at 442.

144. *Id.*

145. *Id.* at 447.

146. *Id.* at 443–44.

147. *Id.* at 444.

ascertaining which contracts should be considered to be affected with the public interest (and thus struck down):

> [T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[148]

Unsurprisingly, the court found that hospital-patient contracts were indeed affected with the public interest and held that exculpatory clauses in such contracts are void as a matter of public policy.[149] As indicated above, the California Supreme Court held that satisfaction of *some* of these factors would generate a conclusion that the contract was affected with the public interest (even if the hospital–patient relation turned out to satisfy all).[150]

In some form, *Tunkl* has been integrated into the tort and contract law of virtually every American jurisdiction. Most tort scholars today refer to the use of exculpatory clauses as "express assumption of risk" and teach their students that courts typically use some version of the *Tunkl* factors to determine whether a written exculpatory clause will be deemed enforceable or void as a matter of public policy. Courts widely agree that in medical settings, such clauses are void, and in esoteric recreational activities, they are enforceable (although not as against gross negligence or intentional torts).[151] While the Restatement (Second) of Contracts Section 195 appears to endorse a rather narrow version of this doctrine and many leading jurisdictions do the

148. *Id.* at 445–46 (numbering added).

149. *Id.* at 445, 447.

150. *Id.* at 447.

151. City of Santa Barbara v. Super. Ct., 161 P.3d 1095, 1097 (Cal. 2007) (finding that even where *Tunkl* factors would permit enforcement of an exculpatory clause as against claim of negligence, the clause was void as against claim of gross negligence).

same today, some jurisdictions continue to apply a broad version, and, indeed, civil law jurisdictions and common law jurisdictions outside of the United States tend to embrace broad doctrines of the unenforceability of clauses releasing tortfeasors from liability for negligence.[152]

In some respects, a *Tunkl* critique of an exculpatory clause does look like an unconscionability critique. The fifth factor—contract of adhesion offered by a party with greater bargaining power—is literally what courts call, within unconscionability analysis, "procedural unconscionability."[153] And as with unconscionability, procedural unconscionability is only part of the critique; there must also be a substantive critique. Finally, when a plaintiff succeeds in making a *Tunkl* critique, it is likely that the court will have concluded that this superior bargaining position has enabled the counterparty to secure something that is not only to its advantage, but to its advantage to a degree that is *unfair*. In these ways, a successful *Tunkl* critique may end up looking and feeling like an unconscionability critique.

Nonetheless, it is crucial to see the shallowness and reductionism of that response, for the *Tunkl* framework is about an idea that is quite different from unconscionability and can in fact apply to cases that courts would not find to be unconscionable. *Tunkl* is quite comparable to some public-policy-based decisions that decline to enforce promises to perform a criminal act or to violate a fiduciary duty. The California Supreme Court was eager to know whether the domain of commerce in question is one "charged with a public interest," open to all, and subject to significant regulation, because it wanted to know the importance of the duties of care from which the exculpatory clause effectively immunized the plaintiffs.[154] If the domain is found to be one charged with the public interest, then the contract could not be used to nullify those duties. This is a recognition that some of the common law of negligence plays a significant risk-regulatory role.[155] More to the point, it is of a piece with other public policy defenses against contract enforcement that are rooted in harmonizing the enforcement of contractual duties while remaining true to other parts of the law.

Traditional unconscionability arguments, by contrast, are equitable (although today, of course, they are found in law and equity); they have been about "shocking the conscience." The court does not want to be an instrument

152. For a comparative discussion of the unenforceability of exculpatory clauses in civil and other common law systems, see Takhshid, *supra* note 11, at 2183, 2213–15, 2219–20 (providing an examination of the French and UK legal systems' view on waiver of liability for personal injuries).

153. *See Brown I*, 724 S.E.2d 250, 286–87 (W. Va. 2011) (explaining procedural unconscionability).

154. *Tunkl*, 383 P.2d at 445, 447.

155. For a similar discussion, see Hila Keren, *Contract Law v. Tort Law*, JOTWELL (May 19, 2021) (https://contracts.jotwell.com/contract-law-v-tort-law/%20) [https://perma.cc/44AX-MR9D] (reviewing Takhshid, *supra* note 11).

of injustice, and the judges' "shocked conscience" is evidence that what is being done is truly and strikingly unjust or unfair or oppressive. It is not—and is not meant to be—systematic. As Henry Smith's illuminating work on the law of equity shows, equity exists as a kind of relief-valve.[156] Unconscionability was meant to work the same way. That is indeed part of why, as Professor Aditi Bagchi has noted, unconscionability is disproportionality applied to relieve a poor litigant from a grossly disadvantageous bargain in an individual setting of great distributive injustice.[157] And it is part of why Judge Skelly Wright's provision of relief to an impoverished African-American mother in *Williams v. Walker-Thomas Furniture Co.*[158] is literally the textbook case of unconscionability in American contract law.[159]

Our eagerness to distinguish public-policy-based critiques of exculpatory clauses like *Tunkl* from unconscionability critiques is not a matter of positivistic fetishism or formalistic obsessionality. It has a set of practical implications and a deeper normative core. That is because the criteria for what counts as a meritorious unconscionability critique are different from those determining what counts as a meritorious *Tunkl* critique, and therefore arguments that should succeed under the latter are often bound to fail under the former.[160]

The simple case of *Jordan v. Diamond Equipment & Supply Co.*[161] provides an apt illustration. The plaintiff, a landscaper and light construction worker, rented a skid-steer loader (or "Bobcat") from the defendant equipment rental store.[162] He was (according to his Complaint) not instructed or warned that the loader could only be used safely on a flat or nearly flat

156. *See* Smith, *supra* note 16, at 1054–55 (arguing that equity solves special issues in law and serves as "meta-law"); Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 897 (2012) (arguing for more focus on equity in contract theories and stating that "equity as a safety valve can be justified on both deontological and consequentialist approaches to contract law"); Henry E. Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173, 173–75 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017) (proposing that equity is a "second-order safety valve" to solving complex and uncertain legal problems).

157. Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 135 (2008).

158. 350 F.2d 445 (D.C. Cir. 1965).

159. *Id.* at 449–50; *see* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 n.208 (1997) (describing research confirming that Ms. Williams was African American, even though this fact is not mentioned in the D.C. Circuit opinion).

160. *See* Meredith R. Miller, *Time's Up: Against Shortening Statutes of Limitations by Employment Contract*, 68 VILL. L. REV. 221, 252–53 (2023) (describing, in the context of assessing enforceability of clauses shortening statutes of limitation in employment context, important differences between "unconscionability" and "public policy" frameworks).

161. 207 S.W.3d 525 (Ark. 2005). Our description of the facts of the case assumes *arguendo* the truth of the plaintiff's allegations.

162. *Id.* at 528.

surface.[163] The Bobcat flipped over and caused a severe spinal injury when Jordan used it on a slope.[164] Diamond Equipment asserted that Jordan's invoice and contract included an exculpatory agreement, and thus the case should be dismissed.[165] In response to Jordan's argument that exculpatory clauses are disfavored in Arkansas and that the clause was unconscionable, a majority principally noted there was no gross inequality in bargaining power and the plaintiff had signed the agreement.[166] It did not even need to reach the question of substantive unconscionability but, if it had, the court would surely have ruled there was none; this was a reasonable price on a short-term rental. The unconscionability argument, taken seriously, had no chance. Justice Imber, in dissent, pointed out that the majority had completely failed to analyze the public policy implications of enforcing exculpatory clauses for companies that rent dangerous equipment.[167] Unlike employers (who face workers compensation systems), such enterprises would face no liability for the injuries their machines cause, and in this sense be totally unregulated.[168]

The term "unconscionable" clearly has a strong moral valence; it typically means so unjust that a court finds it shocks the conscience.[169] A court's unwillingness to enforce a contract is in part an unwillingness to be an instrument of such injustice against one person in a particular transaction. Moreover, judges are asked to be comfortable identifying features of contract that are unfair in this way. Their sense of fairness is triggered by the case before them, and the notions of fairness and moral permissibility are part of what judges are asked to deploy in identifying unconscionable contracts. They have this residual oversight power.

The problem, as illustrated by *Jordan*, is that there are many cases that may seem fair enough on the facts before courts—the consumer is *not* being oppressed or railroaded in the individual case, and the particular exchange, as written, would not really strike anyone as especially unfair or egregious.[170] As currently stated, the unconscionability language seems to be appealing to this kind of moral emotional response, but simultaneously indicates that a range of different policy arguments could count against the contractual

163. *Id.* at 529.

164. *Id.* at 528.

165. *Id.* at 530, 532.

166. *Id.* at 536.

167. *Id.* at 538 (Imber, J., dissenting).

168. *Id.*

169. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 499 (1967) (stating that unconscionability "is one of the prevention of oppression and unfair surprise . . . [and] something that is not only unexpected but hard on the complaining party").

170. *See Diamond Equip. & Supply Co.*, 207 S.W.3d at 536 (determining that the exculpatory provision in Jordan's contract was not unconscionable as there was no "gross inequality of bargaining power" and no issue raised regarding Jordan's comprehension of the provision).

provision in question. Some of these policy arguments may be entirely sound but not actually likely to generate such a moral emotional response. Notably, while the Concepcions did not wish to depict their argument as a general public-policy argument in light of the preemption argument they were confronting, their shock-the-conscience argument for unconscionability on the facts of their case was remarkably weak.[171]

While numerous scholars have demonstrated the wrongheadedness of rejecting emotion-laden concepts in the law,[172] it is crucial to distinguish among different ways that affectively laden concepts, moral concepts, and ideas of principle are integrated into law. Unconscionability in its narrowest form, referring to an almost noncognitive response, is understood to occur on a highly particularized, fact-based level. It is true that the California Supreme Court in *Sonic–Calabasas A, Inc. v. Moreno*[173] and again in *Sanchez v. Valencia Holding Co.*[174] expressly counseled against a narrow, highly subjective view, stating that an examination of the case law does not indicate that "'shock the conscience' is a different standard in practice than other formulations or that it is the one true, authoritative standard for substantive unconscionability, exclusive of all others."[175] There it stated a view that "[t]he ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement."[176] Even there, however, the court contemplated exculpatory clauses as circumstance-based.

A dramatic example of successful public-policy-based arguments for non-enforcement of contractual provisions is the nonwaivability of implied warranties and the tort liability that comes with their breach in the sale of products. But how would this fare on an authentic unconscionability analysis? Someone with premium-level medical insurance and automobile liability insurance might indeed wish to buy a new automobile for a greatly reduced price by waiving the right to sue in tort, but our legal system does not permit that. The decision of courts to decline to enforce warranty

171. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 252 (2017) (citing *Concepcion*'s description of waiver, which was in some ways quite generous to the consumer).

172. *See generally* VIRTUE, EMOTION AND IMAGINATION IN LAW AND LEGAL REASONING (Amalia Amaya & Maksymilian Del Mar eds., 2020) (examining ways in which emotion, virtue, and imagination add value to legal reasoning and theory). *See also, e.g.*, Benjamin C. Zipursky, *Anti-Empathy and Dispassionateness in Adjudication*, *in* NOMOS LIII: PASSIONS AND EMOTIONS 304, 307 (James E. Fleming ed., 2013) (discussing unconscionability and emotion); Benjamin Zipursky, Deshaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1103 (1990) (explaining the place of emotion in adjudication).

173. 311 P.3d 184 (Cal. 2013).

174. 353 P.3d 741 (Cal. 2015).

175. *Id.* at 749 (quoting *Sonic–Calabasas*, 311 P.3d at 212).

176. *Id.*

disclaimers in such cases is a decision about the relation between tort and contract that the jurisdiction deems most justifiable in this context. It might well be that the ultimate decision about this relationship turns in some significant ways on considerations of equity or fairness, as do many decisions of principle and policy in and out of private law. But it might not be, either. And even if the decision does, it is not principally the equity of the particular bargain being litigated that matters, and it certainly does not rely on a perception of shocking injustice at the moment of the bargain itself.

A central motivation for calling attention to public policy arguments beyond unconscionability relates, ironically, to our perception that there is a renewed interest among advocates, academics, and judges in unconscionability arguments. In 2019, Professor Jacob Hale Russell published an article entitled *Unconscionability's Greatly Exaggerated Death*,[177] chronicling renewed interest in the doctrine.[178] Over the past twenty-five years, Russell Korobkin,[179] Charles Knapp,[180] Amy Schmitz,[181] Colleen McCullough,[182] Brian McCall,[183] Hila Keren,[184] and Susan Randall[185] have also contributed to this literature, characterizing a change in the prevalence of unconscionability arguments and, typically, promoting the use of such arguments in a manner that blurs the distinctions advanced here.

The most concerning example of conflating unconscionability with more general public policy arguments relates to the American Law Institute's

177. Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019).

178. *Id.* at 969, 1003. Russell advocates for a case-specific, factually rich, "tailored" approach to unconscionability, which is consistent with the approach put forward here.

179. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (discussing modifying the unconscionability doctrine to create a closer fit between the doctrine and social or buyer welfare).

180. *See generally* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009) (tracking the rise of unconscionability claims and the impact of unconscionability on mandatory arbitration).

181. *See generally* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (arguing for the importance of the flexibility and contextual nature of the unconscionability standard).

182. *See generally* Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779 (2016) (arguing unconscionability is becoming a coherent legal concept).

183. *See generally* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773 (2020) (tracking the history and empirical studies of unconscionability to prove that it is not a modern or arbitrary concept).

184. *See generally* Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427 (arguing that courts can dissuade unconscionable agreements by better employing emotion in their decisions).

185. *See generally* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (noting an increase in both the frequency and success of unconscionability claims from 1982 to 2002).

draft *Restatement of the Law: Consumer Contracts*.[186] This project has been the subject of tremendous controversy both inside and outside of the American Law Institute.[187] Despite the controversy, and notwithstanding an initial period of uncertainty about whether the whole endeavor would be abandoned, the Institute ultimately approved a version of the draft.[188]

A member of the project's Advisory Group characterized the basic idea advanced by the Reporters for the *CC Restatement* as follows:

> The Reporters . . . accept[] the cases that bind consumers to standard form contracts [online] whether presented by "click wrap," "browse wrap," or "Pay Now, Terms Later," as long as the consumer "manifests assent" combined with an adequate notice of and opportunity to review terms. Since this "assent" is neither meaningful nor informed, the consumer assent in this context is a legal fiction.
>
> The Reporters say that the relaxed standard of assent is needed to make sure that online commerce can go forward because consumer contracts must be formed in an efficient manner. Consumers usually at least know the basic terms of the transaction, such as what product they are buying, the price, and the shipping terms. As to the other terms, all agree it would be impractical to force people to actually read and understand these terms prior to consenting. So the Reporters proposed a "GRAND BARGAIN": "fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going too far." The restrictions that keep businesses from going too far are mainly the doctrines of unconscionability and the law of deception.[189]

Given the burden placed on the unconscionability doctrine by this "grand bargain," consumer advocates might hope that the Reporters have proffered a broad version of the doctrine. While some advocates have criticized it as not broad enough,[190] the *CC Restatement* is broad relative to what this Essay contends lies within the traditional doctrine of

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186. RESTATEMENT OF THE L.: CONSUMER CONTS. (AM. L. INST., Tentative Draft No. 2, April 2022) [hereinafter *CC Restatement*].

187. *See, e.g.*, Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45, 101 (2019) (arguing that the ALI's "privacy policy data "do[es] not support the conclusions they draw"); Dee Pridgen, *ALI's Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 549–50 (2020) (noting the internal debate that took place at the ALI regarding unconscionability during the Restatement's drafting).

188. *Restatement of the Law, Consumer Contracts Is Available*, AM. L. INST. (June 26, 2024), https://www.ali.org/news/articles/restatement-law-consumer-contracts-available [https://perma.cc/B3RE-GMP8].

189. Pridgen, *supra* note 187, at 542–43 (quoting RESTATEMENT (THIRD) OF CONTS. Introductory Note (AM. L. INST., Preliminary Draft No. 2, 2015)).

190. Pridgen, *supra* note 187, at 553.

unconscionability. Indeed, in important respects the *Restatement* commits and entrenches the fallacy of conflating unconscionability with a range of important public policy defenses.[191] Section 5, titled "Unconscionability," defines "substantive unconscionability" as follows:

> (c) Without limiting the scope of subsection (b)(1), a contract term is substantively unconscionable if its effect is to: (1) unreasonably exclude or limit the business's liability or the consumer's remedies that would otherwise be applicable for: (A) death or personal injury for which, in the absence of a contractual provision in the consumer contract, the business would be liable; or (B) any loss to the consumer caused by an intentional or negligent act or omission of the business; (2) unreasonably expand the consumer's liability, the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer; or (3) unreasonably limit the consumer's ability to pursue or express a complaint or seek reasonable redress for a violation of a legal right.[192]

As should be clear from the discussion above, we think the *CC Restatement* is alien to the standard common law of contracts, including that relating to consumers. Its definition of substantive unconscionability conflates fundamental distinctions in the law of contract. It also creates great peril for consumers, putting extraordinary weight on unconscionability as the principal tool for monitoring unacceptable contract terms that are not deceptive.

In the Reporters' defense, it should be noted that Comment 11 to Section 5—called "Illegality"—expressly acknowledges: "The doctrine of unconscionability is related to but distinct from the doctrine of illegality or unenforceability on ground of public policy. A contract or a term is unenforceable if its performance is inconsistent with statutory or regulatory law or with public policy."[193]

Comment 11 is inadequate, and not merely because it is too little and too late in light of the massive investment in (and text of) Section 6. Its own text suggests that it is only a subset of public policy defenses they are distinguishing—those that constitute or are very near the notion of "illegality"—which is indeed the whole heading of the Comment. The classic example is courts' refusal to enforce a contract to commit homicide, on the grounds that homicide is illegal. Indeed, the Comment makes reference to statutes and regulations with respect to which contractual enforcement would be inconsistent. Although the Comment also adds the phrase "or with public policy" afterwards and cites to the Restatement (Second), the example

191. *But see infra* note 193 and accompanying text.

192. *CC Restatement* § 5(c).

193. *Id.* cmt. 11 (citing RESTATEMENT (SECOND) OF CONTS. § 178).

provided suggests conflicts with classic public law (here, free speech) norms, *not* a broader consideration (as in, for example, *Tunkl*) of the mesh between contract and judgments about the scope of courts' power to fashion private law for normative reasons.

More importantly, Comment 11 to Section 5 of the *CC Restatement* is inadequate to rectify the conflation problem because so much of the prominent text of Section 6 expressly asserts, with regard to a variety of arguments that were once in public policy, that those arguments are fundamentally to be assessed under the rubric of unconscionability.

V. Objections and Replies

Consumer advocates in contract law might be puzzled and frustrated by what they regard as inflexibility of those—like ourselves—who are resistant to putting the "unconscionability" term to greater use. Even if one largely concedes our historical or positive point about the concept of unconscionability and the history of the term, our hypothetical critics seem to be saying, why shouldn't unconscionability be *refashioned* to perform a more wide-ranging role? And they could plausibly add to this criticism that there are indeed prominent courts moving in this direction; the California Supreme Court's *Discover Bank* opinion obviously moved in that direction, and that court's post-*Concepcion* decisions on unconscionability expressly state this broader view.[194] In the aforementioned California case *Sanchez v. Valencia Holding Co.*, Justice Liu reasoned:

> The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as 'overly harsh' 'unduly oppressive' . . . 'so one-sided as to "shock the conscience"' . . . . All of these formulations point to the central idea that unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' . . . but with terms that are 'unreasonably favorable to the more powerful party.' These include 'terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.'[195]

194. *See supra* Part I (describing the *Discover Bank* decision and California Supreme Court decisions post-*Concepcion*).

195. Sanchez v. Valencia Holding Co., 353 P.3d 741, 748 (Cal. 2015) (quoting Sonic–Calabasas A, Inc. v. Moreno, 311 P.3d 184, 202–03 (Cal. 2013)) (internal citations omitted).

In criticizing the *CC Restatement*'s broadening of unconscionability, we are also thus criticizing California's movement—and the movement of other courts and scholars—to broaden the scope of the unconscionability defense. But what's wrong with this movement to broaden the defense, even conceding that it is a change? Shouldn't we just stop being so fussy?

Before responding to the "Don't be so fussy!" challenge—and in a spirit of open-mindedness—we shall add two arguments to support our hypothetical challenger: one based on *(putatively) better history* and one on the alleged *vacuousness* of "public policy."

Better History: The movement toward unconscionability as a flexible concept in a post-equity world did not begin with the California Supreme Court or the *CC Restatement*. It far predates both. Indeed, the UCC expressly proposed a looser conception of unconscionability in Section 2-302. Comment 1 to that section reads:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.[196]

Section 2-302 was urged on the Commissioners by illustrious Legal Realist and contract scholar Karl Llewellyn (indeed, in exasperation with how open-ended Section 2-302 seemed, Professor Arthur Leff published the famous law review article that generated the two-pronged procedural/substantive framework used today).[197] The idea of an expansive concept of unconscionability to serve as a judicial tool goes back at least to the early 1960s.

Vacuousness: The "unenforceability as a matter of public policy" defense that we contend to be a more suitable category is hardly free from problems itself. It is often confused with illegality (as mentioned above), and it appears to be almost vacuous and question-beggingly vague: Which public policy? After all, maintaining freedom of contract is a public policy too. Most of all, the "public policy" label seems to call attention to what is perhaps the largest concern of courts contemplating whether to withhold contractual

196. U.C.C. § 2-302 (1962), cmt. 1 (AM. L. INST. 1962) (emphasis added).

197. *See* Leff, *supra* note 169, at 488 & n.11 (explaining Llewellyn's role in drafting of U.C.C. Section 2-302 and characterizing Leff's view on the procedural/substantive aspects of unconscionability).

enforcement: Isn't it legislatures, not courts, who are best suited to making law that pushes against private arrangements?

In replying to these hypothetical objections, we shall proceed in reverse order. To begin with, it is crucial not to be misled by the label "public policy" for the category of defenses we have in mind. Sometimes a label for a category expresses the essence of the legal category—what makes it normatively significant or weighty in the law. Other times, however, the label for a category simply allows one to see why the different members of the category were deemed convenient to group together. In short, some terms denote legal principles, while others are cover terms. "Unenforceable as a matter of public policy" is a cover term, not a phrase denoting a principle. As indicated in Part IV, there are innumerable different considerations that lead courts to be unwilling to enforce contractual provisions—prohibiting homicide, maintaining a right to vote, allowing freedom of speech, or permitting tort law to function in important areas of consumer dependency. Contract law is common law created and sustained through the courts, as one part of a much larger legal system of common law, statutory law, administrative law, and constitutional law. So while it is true that there is little normative guidance in the phrase "public policy" itself, that hardly means there are not reasons available to courts and part of the body of the law in the jurisdiction.

While explicitly prohibitive legislation is indeed one category generating "unenforceability as a matter of public policy," it is a mistake to think that courts have the power to decline enforcement on public policy grounds only when they have a legislative judgment to back them up. Restatement (Second) Section 179 could not be clearer on this point:

> A public policy against the enforcement of promises or other terms may be derived by the court from
>
> (a) legislation relevant to such a policy, or
>
> (b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,
>
> (i) restraint of trade (§§ 186–188)
>
> (ii) impairment of family relations (§§ 189–191) and
>
> (iii) interference with other protected interests (§§ 192–196, 356).[198]

Notably, while the order of influence on contractual unenforceability is sometimes legislative enactment leading to judicial holding (as Restatement (Second) Section 179(a) suggests), there are prominent examples of the order moving in the other direction—judicial holding leading to legislative enactment. Indeed, much of antitrust statutory law evolved from judicial

198. RESTATEMENT (SECOND) OF CONTS. § 179 (AM. L. INST. 1981).

holdings that *contracts in restraint of trade* were unenforceable as a matter of public policy.[199] The products liability statutes of many states forbid courts from enforcing implied warranty disclaimers, and such statutes emerged from famous judicial decisions holding such contractual provisions unenforceable as a matter of public policy.[200] Additionally, it bears mention that some public-policy, non-enforceability decisions draw upon courts' power to structure appropriate rules for the remedies of the law of contract itself. Seana Shiffrin has made this point eloquently with respect to the established rule that liquidated damages clauses are presumptively unenforceable.[201]

To summarize, our reaction to the "vacuousness" challenge noted that the domain of doctrine to which we are adverting openly acknowledges that courts actually have—and always have had—a substantial normative role evaluating the kind of contracts that may be against the public interest. What is wrongheaded is the anxiety about admitting there is this important role to be played in the common law. Our references to established doctrine, authorities, and history are crucial because those considerations are core to establishing the competency of courts to do so. The leap to "unconscionability" insinuates an unwarranted and counterproductive concession that somehow public interest and public welfare are domains the judiciary must avoid, unless the judge perceives that some very high threshold of injustice in the particular case has been crossed.

The objection labeled "better history" essentially charged that we are behind the times, and it highlighted prominent legal work—the UCC in 1962—that famously took unconscionability to the next level, deliberately suggesting even then a broader role for the defense. Ironically, we think a look back at the 1960s only strengthens our point today. Legal historian John Fabian Witt and coauthors Ryan Martins and Shannon Price documented the waning power of public policy arguments in their important article *Contract's Revenge: The Waiver Society and the Death of Tort*.[202] On their account, early twentieth-century American courts were still in a libertarian mode in which contract was thought to dominate tort and therefore given a

199. *Id.* §§ 186–88.

200. *See* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95, 97 (N.J. Sup. Ct. 1960) (holding an implied warranty for automobile manufacturers void due to public policy, namely the disproportionate bargaining power of the manufacturers who easily escape liability).

201. Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 411 (2016) ("The burgeoning permissive stance toward remedial clauses fails adequately to appreciate the public's interest in reserving remedial decisionmaking to impartial adjudicators who are positioned to tailor remedies with sensitivity to the details of the circumstances and significance of a breach.").

202. *See generally* Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265 (2020).

special pass from considerations of social welfare.[203] But by the mid-twentieth century, Scholars like Gilmore and Prosser, in contract and tort (respectively), spoke of increasing dominance of contract *by tort*—as the advent of products liability in the 1960s illustrates.[204] By the third decade of the twenty-first century, however, the tables have turned once again:

> Virtually everywhere one goes in contemporary life, there are waivers to be signed: in apartments and housing developments, in daycare centers and nursing homes, in big box stores and birthday party factories, in schools and sporting events, at hair salons, in gyms, and on skiing slopes. In these domains and in many others, Americans today sign tort waivers at rates not seen since the middle of the nineteenth century, and perhaps never seen at all. The prevalence of waivers has produced something that neither Gilmore nor Prosser saw coming: a waiver society in which contract has once again, as it last did more than a century ago, succeeded in displacing large swaths of tort.[205]

Martins, Price, and Witt refer to this trend—turning back to an era before tort began to dominant contract—as "contract's revenge," and attribute it in part to the resurgent celebration of freedom of contract.[206] And it goes hand in hand with a diminished willingness to utilize *Tunkl* public-policy arguments in a confident fashion.[207]

On our view, there is a jurisprudential side to this story that helps to explain the phenomenon Witt and his coauthors depict. Of course, we do not believe the beginnings of an extension of the "unconscionability" concept is to blame for these changes (which no doubt have multiple causes). But if (as we shall suggest) the loosening of "unconscionability" is a symptom of a larger trend that weakened tort and allowed for contract to take its revenge, then that only supports our view that consumer advocates should be wary of unconscionability today and return to the more deeply entrenched and theoretically sound public-policy bases for nonenforcement.

The jurisprudential side of our story draws from prior writing by one of us (Zipursky), along with John Goldberg, on the impact of Legal Realism in American tort law. From our original coauthored article, *The Moral of* MacPherson[208] to our 2020 monograph *Recognizing Wrongs*,[209] we have taken issue with what we have depicted as a dogma of American legal

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203. *Id*. at 1266.

204. *Id*.

205. *Id*. at 1267–68 (internal citations omitted).

206. *Id*. at 1294.

207. *Id*. at 1291–92.

208. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1846 (1998).

209. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 72, 74 (2020).

theorists: that *reductive instrumentalism* in private law best serves a progressive legal agenda. It is indeed true, we concede, that some of the California Supreme Court's most famous progressive tort decisions center around the idea that "duty" does not really mean anything, but is just shorthand for policy thinking.[210] But we argue that conservative forces in American law have effectively utilized this instrumental framework to turn back tort law's progress; as we put it, "instrumentalism in tort law has become a battering ram for a well-funded and vigorous tort reform movement, both in courts and in legislatures."[211] Our basic idea is that, to the extent that legal thinkers come to treat words as mere labels or licenses to do what they want, legislators, lawyers, and citizens—as well as the judges who come to occupy our most powerful courts—will become more distrustful of judges and of their competency, and will constrict courts' power to fashion the law intelligently in a common law manner.

The narrative sketched above suggests a similar story in contract. On that account, the distrust of the conceptual integrity of legal concepts generated by instrumentalism led to the disempowerment of courts through legislative tort reform. By analogy, we conjecture that in contract, the distrust of judges to utilize legal concepts in a grounded and non-instrumental manner has played a role in the increasing attraction of legal thinkers to libertarian frameworks rooted in a notion of private legal arrangements. This is yet another reason to be concerned about loosening the meaning of "unconscionability" so that it no longer requires "shock-the-conscience" substantive injustice in a particular case. Doing so invites distrust, and the precursors of this approach decades past may indeed be part of what led to "the revenge of contract"—the robust inclination today to defer to the private arrangements found in the black-letter, regardless of the realities of today's contracting practices.

Finally, in casting doubt on the promise of an expanded notion of "unconscionability," we do not mean to say that there is only one way to solve this cluster of problems, and that we have it. To the contrary, we are far from the only legal scholars to be concerned about the expansion of boilerplate in a digital era, and many scholars have been exploring different avenues through which to recognize the prerogative and responsibility of courts to weigh in on such values.[212] All of those which are promising,

210. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968) (en banc) (discussing that the concept of duty reflects policy considerations).

211. John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of* MacPherson, 9 J. TORT L. 91, 116 (2016).

212. *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 126, 129–30 (2013) (asserting that the difficulty in establishing rules for unconscionability makes it an unsuitable doctrine for boilerplate rights); Hanoch Dagan & Avihay

however, provide structural considerations that are rooted in the competence of courts to craft the common law of contracts in certain ways for reasons of a categorical kind—not solely because of a general judgment of the injustice or unfairness of a particular deal that comes before the court.

Conclusion

For those deeply suspicious of class actions and those who believe big business is overburdened with meritless litigation, the United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion* is an emblem of great success. The opposite is true of consumer advocates: They regard the Court's aggressive critique of California unconscionability doctrine as facile and deeply regrettable.

In this Essay, we have rejected both views. Although we are skeptical of the Court's overall argument for federal preemption in *Concepcion*, we think some of what they had to say about unconscionability was actually correct. Indeed, by looking at the little-known Supreme Court decision that followed *Concepcion*—*Marmet Health Care Center, Inc. v. Brown*—we were able to depict the *Concepcion* decision as insisting on a distinction between the classic unconscionability arguments of law or equity, on the one hand, and a range of broader public-policy-based contract defenses against enforcement, on the other. Notwithstanding our inclination to think *Concepcion* was, overall, decided incorrectly, we think the Court was right that the Concepcions' defense was not classic unconscionability, but rather a defense based on a broader public-policy choice by the California Supreme Court.

The irony at the heart of this Essay is that the Supreme Court's distinction between broader public policy and authentic unconscionability—implicit in *Concepcion* and explicit in *Marmet*—is crucially important for those who recognize substantial resources for consumer protection within the common law of contracts itself. Outside of the arbitration context and in the vast domain of state common law of contract, courts have, and have always had, ample power to strike down contractual clauses because of their poor fit with other parts of the law and with important public policies, including respect for a just consumer marketplace. Looking for circumstances that shock the conscience is far too limited a picture of the proper domain of court oversight of contract. To the extent that *Concepcion* can be understood to stand for the perils of overinvesting in the idea of unconscionability, then it is a decision from which all can learn.

Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1425 (2016) (describing unconscionability as a doctrine designed to protect the weak and vulnerable); Shiffrin, *supra* note 201, at 425 (arguing that private parties should be limited in imposing remedial clauses in contracts).