A SOCIAL CONTRACT: THE DOCTRINE OF UNCONSCIONABILITY AND ITS RELATION TO SOCIAL PROGRESS

Henry Amoroso,[†] Paula Alexander Becker,[††] and Evan Weiss[†††]

Stillman School of Business, Seton Hall University

[†] Dr. Henry J. Amoroso is an Associate Professor in the Department of Legal Studies at Seton Hall University. He is also the inaugural Director of the Micah Institute for Business Ethics, which seeks to engage and support the development of business school faculty and assist them with incorporating consideration of ethical behaviors and decision making into the curricula of business school courses, all within the context of the Catholic Social Tradition and the Catholic mission of Seton Hall. Dr. Amoroso teaches undergraduate and graduate courses in the legal environment of business, liability, ethics, and public policy. Dr. Amoroso's research interests center on the contributions of business experience to the scholarship and practice of teaching, as well as the incorporation of the Catholic social tradition into business pedagogy. Dr. Amoroso has in addition to co-authoring books on legal studies, he has published in several journals dealing with issues involving both legal and ethical considerations. Dr. Amoroso serves as of Counsel at the law firm Chiesa Shahinian & Giantomasi and Principal of HJA Strategies, a boutique consulting firm. Among Dr. Amoroso's principle work he is the pro bono Principal Legal Advisor to the Bilateral Permanent Working Commission between the Holy See and the State of Israel and pro bono counsel to the New Jersey Pandemic Relief Fund Chaired by First Lady Tammy Murphy.

[††] Dr. Paula Alexander Becker earned her Ph.D. in Sociology from Rutgers University, Graduate School of Arts and Sciences, New Brunswick, New Jersey and her J.D. from New York University School of Law in New York, USA. Paula developed the curriculum for Corporate Social Responsibility, a core course in the MBA program at the School of Business at Seton Hall University. Dr. Alexander Becker's current research, which is predominantly discipline based, relates to executive compensation, firm financial performance and socially responsible management practices, the ethics of supply chain management, and human rights in business operations. She has presented papers on the ethics of global supply chain management at Wal-Mart, in the Bangladesh textile industry and the cocoa industry in the Ivory Coast at national conferences. Routledge published her business ethics textbook, Corporate Social Irresponsibility, February 2015. "A Leader's Personal Journey of Insight: Going Through Darkness into Light as a Condition of Leading an Organization Through Its Own Darkness" was published in The Palgrave Macmillan Handbook of Workplace Spirituality and Fulfillment, 2018. Her chapter, "Work Alienation and Disengagement: Sexual Harassment and Uber" was published in the Palgrave Handbook of Workplace Wellbeing, 2020. She currently serves as the chair of the Department of Management in the Stillman School of Business.

[†††] Evan Weiss is the Senior Advisor for Public Finance in the administration of Governor Phil Murphy. He focuses on finding creative solutions to New Jersey's most pressing economic and community development problems, including managing the fiscal response to COVID-19, building the largest offshore wind port in the US, financing affordable housing and water infrastructure, leveraging Opportunity Zones, and collaborating with hospitals and universities. He has published several articles on tax incentives and has worked on initiatives to use Opportunity Zones to build schools and invest in high-potential tech, life sciences, and small businesses. Prior to entering the Governor's administration, Mr. Weiss was Director at PEL Analytics and HJA Strategies, where he specialized in developing and implementing turnaround strategies for distressed cities and school districts. He is a graduate of the University of Chicago.

Abstract: The current structure of American contract law may limit the availability of adequate remedies for citizens within certain socioeconomic strata who, in the formation of a contract, often experience an asymmetry of information, financial resources, and lack what is broadly termed social capital. This paper further argues that this population might be better served by expanding how the court interprets and applies the doctrine of unconscionability through a reexamination of the foundational principles that led to its codification in the 1950s in the Uniform Commercial Code. Throughout this paper, I will also consider how several foundational principles of Catholic Social Teaching closely align with the foundational principles of American law and unconscionability, namely: solidarity, subsidiarity, a clarified accounting of freedom and equality, and, most importantly, the absolute dignity of the human person. By coming to a better understanding of these foundational principles shared across the American legal and Catholic intellectual traditions, we will be better suited to judge the appropriate application of the doctrine of unconscionability itself. Applications are made to living wage and guaranteed basic income initiatives.

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INTRODUCTION TO THE PROBLEM OF UNCONSCIONABILITY

Unconscionability is, without a doubt, among the most morally significant American legal concepts. Few other codified concepts explicitly ask legal professionals—judges, lawyers, etc.— to, in essence, make moral judgments.[1] This is not to say that unconscionability is the only concept at law to do so, however. For example, within the Uniform Commercial Code, as well as within the body of common law, there are explicit and implied moral issues in the consideration of concepts such as good faith, misrepresentation and fraud, and the relative status of contracting parties.[2] And, naturally, a living, breathing Judge, although operating within a fundamentally secular framework, will take into consideration his or her own experiences from his or her moral and spiritual life when rendering a judgement. In what cases might we see the values of Catholic social teaching enter into this reasoning—even if the Judge may not be Catholic? Is unconscionability imbued with a particularly vigorous moral character, and, if so, how might the principles of Catholic social teaching help us understand it?

In the broadest of terms, the doctrine of unconscionability allows a court to declare a contract void if the contract is "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other."[3] Contained in the doctrine of unconscionability is the *potential* for a remarkable realignment of how contracts might be formed and executed. Moreover, given how contracts seem to underlie much of what we do in society, unconscionability offers a

[1] Unconscionability, as the definitions below make clear, has an inherent moral character: Uniform U.C.C. § 2-104 (AM. LAW INST. & UNIF. LAW COMM'N 2007); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981). The UCC § 2-104 states:

> (1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result; (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

[2] The Uniform Commercial Code, for example, makes a distinction between a merchant and non-merchant and applies certain more rigorous standards to the merchant in his or her dealings. Uniform Commercial Code § 2-104. For two classic examples of misrepresentation and fraud, *c.f.*, Vokes v. Arthur Murray, Inc. (Fla. Dist. Ct. App. 1968); Sellers v. Looper, 503 P.2d 692 (Or. 1972).

[3] Earl of Chesterfield v Janssen (1751) 28 Eng. Rep. 531; Ves. Sen. Supp 297. I have deliberately chosen a somewhat antiquated definition of unconscionability to set out with, as it helps us understand what the origin point of the doctrine essentially was. Though the definition has certainly been refined and the saucy language dulled, the kernel of the idea remains.

genuine means to reshape how we interact with each other.[4] As a primary example, the doctrine of unconscionability could be used as a singularly effective means to ameliorate the vast problems presented by inequality of bargaining power, especially to those in lower socioeconomic strata, when more traditional legislatively-formulated remedies do not solve the problems. However, the potential for unconscionability' to reshape socioeconomic relations brings pause to as many as it excites, since many consider unconscionability to be a slippery slope threatening to erode a core value of the American legal system: freedom of contract.[5]

Inequality is recognized as a growing problem in contemporary society and is one that the Church has increasingly emphasized since the ascension of Pope Francis.[6] The appropriate role of the legal system in relieving, condoning or even magnifying inequality is, correspondingly, a matter of great debate.[7] This article will examine how the current structure of American contract law may limit the availability of adequate remedies for citizens within lower socioeconomic strata who—in the formation of a contract—often experience an asymmetry of information, financial resources, and lack what is broadly termed social capital.[8] This paper will further argue that this population would be better served by expanding how courts interpret and apply the doctrine of unconscionability by reexamining the foundational principles that led to its codification in the 1950s in the

[4] Consider a basic, and generally accepted, definition "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT, *supra* note 1, § 1. Therefore, any transaction is essentially a contract, and we may interpret this broadly. If I park in a parking lot, for example, by my taking a ticket at the entrance, I am entering into a contract.

[5] The "dean" of the critique of unconscionability, Arthur Leff, worried about the applications of the clause by "the judicial bureaucracy, on an *ad* hoc case-by-case basis essentially unrestrained by legislative or administrative guidance…" Arthur Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 UNIV. OF PITT. L. REV. 349, 353 (1970).

[6] The Pontiff's first Apostolic Exhortation is a sure example, as will be discussed further below: Pope Francis, EVANGELII GAUDIUM OF THE HOLY FATHER GRANCIS TO THE BISHOPS, CLERGY, CONSECRATED PERSONS AND THE LAY FAITHFUL ON THE PROCLAMATION OF THE GOSPEL IN TODAY'S WORLD, 1.59 (2013). For popular accounts, see: Andrew Brown, *Pope Francis Condemns Inequality, Thus Refusing to Play the Game*, THE GUARDIAN (Apr. 26, 2014, 16:03 EDT), http://www.theguardian.com/commentisfree/2014/apr/28/pope-francis-condemns-inequality-john-paul; Daniel D'Addario, *Pope Francis Rails Against Modern 'Throwaway Culture*, TIME (Feb. 28, 2015), http://time.com/3727280/pope-francis-inequality-throwaway-culture/.

[7] For an excellent account of this debate, as well as a wonderfully comprehensive resource, see *Stanford Center on Poverty and Inequality*, STAN. CTR. ON POVERTY & INEQ., inequality.stanford.edu. One particularly rich area of debate is prisoner reentry. *C.f.*, Joan Petersilia, *What Works in Prisoner Reentry - Reviewing and Questioning the Evidence*, 68 FED. PROB. 4 (SPECIAL ISSUE) (2004); Richard P. Seiter and Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ 360 (2003).

[8] Wayne Baker, *Achieving Success Through Social Capital*, UNIV. OF MICH. (2000) https://static1.squarespace.com/static/5b5f329c89c1727df1284330/t/5bc77ffee4966bd2e878cd09/1539801087312/BakerChap1.pdf.

Uniform Commercial Code.[9] Throughout this paper, we will also consider how several foundational principles of Catholic social teaching closely align with the foundational principles of American law and the doctrine of unconscionability, namely: solidarity, subsidiarity, a clarified accounting of freedom and equality, and, most importantly, the absolute dignity of the human person. By coming to a better understanding of these foundational principles, which are shared across both the American legal and Catholic intellectual traditions, we will be better suited to judge the appropriate application of the doctrine of unconscionability itself.

A COMPARATIVE ACCOUNTING OF THE PHILOSOPHICAL FOUNDATIONS OF LAW: FROM ST. THOMAS TO THE FRAMERS

As the moral character of unconscionability, including the demands it puts on judges, lawyers, and other legal professionals, is somewhat unusual, it is vital to form a working understanding of how morality is found and permitted to operate within our secular legal system. Despite the clear secular-ecclesiastic divide, the fundamental social ends of American legal theory and Catholic social teaching are, in many cases, similar: genuine freedom, fundamental equality, and the dignity of the human person.[10] The quibbles arise when we start asking how we achieve these ends and whether or not we have done so. Naturally, the *ultimate* ends of the Church are profoundly different from the secular ends embedded within the American legal system.[11] For that reason, we shall attempt to limit our analysis to the social ends of the Church as outlined in the body of thought known as Catholic social teaching. However, as has been pointed out time and time again, the unfortunate tendency to "shoehorn" concepts of Catholic social teaching into secular frameworks can be problematic.[12] In all discussions of

[9] *See supra* note 1 and accompanying text.

[10] Consider Jefferson's voice in the Declaration of Independence, which, in many ways, forms the philosophical foundation of a country that seeks to enshrine "certain unalienable Rights…Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE § 2 (U.S. 1776). It is important to note, especially in light of our analysis, the clear relationship between the Declaration and John Locke's famous invocation of reason's support for a group of rights that may be condensed to life, liberty and property. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke's thought, as well as several of his approximate contemporaries, such as Hobbes and Rousseau, form the basis of America's foundational values and, in turn, the fundamental legal principles built off that foundation.

[11] As St. Thomas succinctly puts it: "That All Things are Directed to One End, Which is God." ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, Book III, Ch. XVII (1265).

[12] *C.f.*, ROBERT K. VISCHER, SOLIDARITY, SUBSIDIARITY, AND THE CONSUMERIST IMPETUS OF AMERICAN LAW, IN RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW (Michael A. Scaperlanda & Teresa S. Collett ed., Catholic Univeristy of American Press 2007)

> [I]t bears emphasis that [solidarity and subsidiarity] are indivisible from the broader framework of Catholic social thought. Try as they might, modern secularists have not been

the lessons of Catholic social teaching for secularly oriented domains, it is vital to maintain a balance between learning from analytically rich concepts and maintaining their genuine theoretical foundations.

Today, even after the "End of History"[13] and the "triumph of western liberal democracy," the ability of modern liberal democratic society to deliver on these fundamental social ends is coming increasingly into question.[14] The Church is certainly doing more questing than many, returning to prominence as representing a non-"third way" between capitalism and socialism.[15] Just as Pope John Paul II was a central figure in the debate between communism and capitalism,[16] Pope Francis has emerged as a staunch critic of what he sees as increasingly unbridled free market capitalism.[17] His first Apostolic Exhortation, *Evangelii gaudium,* Pope Francis clearly defined the Church's stance and his point of emphasis:

> Just as the commandment "Thou shalt not kill" sets a clear limit in order to safeguard the value of human life, today we also have to say "thou shalt not" to an economy of exclusion and inequality. Such an economy kills … Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless.[18]

Here, Pope Francis offers a systemic and harsh critique of the broader social world we inhabit, where "everything comes under the laws of competition."[19]

able to maintain either doctrine's vibrancy without taking account of the theologically informed anthropological presumptions from which both doctrines arise.

[13] The "end of history" references FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (First Free Press trade paperback ed. 2006).

[14] Unsurprisingly, Pope Francis criticizes this triumphalism, "We are far from the so-called "end of history", since the conditions for a sustainable and peaceful development have not yet been adequately articulated and realized." EVANGELII, *supra* note 6, at 1.59.

[15] POPE JOHN PAUL II, SOLLICITUDO REI SOCIALIS: TO THE BISHOPS, PRIESTS, RELIGIOUS FAMILIES, SONS AND DAUGHTERS OF THE CHURCH AND ALL PEOPLE OF GOOD WILL FOR THE TWENTIETH ANNIVERSARY OF POPULORUM PROGRESSIO, para. 42 (1987).

> The Church's social doctrine is not a 'third way' between liberal capitalism and Marxist collectivism, nor even a possible alternative to other solutions less radically opposed to one another: rather, it constitutes a category of its own. Nor is it an ideology, but rather the accurate formulation of the results of a careful reflection on the complex realities of human existence, in society and international order, in the light of faith and of the Church's tradition.

[16] See POPE JOHN PAUL II, CENTESIMUS ANNUS: ENCYCLICAL LETTER TO HIS VENERABLE BROTHER BISHOPS IN THE EPISCOPATE, THE PRIESTS AND DEACONS, FAMILIES OF ME AND WOMEN OF GOOD WILL ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM (1991).

[17] For an interesting account of Pope Francis' intellectual development beyond the primary sources, *see* Bruce Duncan, *Pope Francis's Call for Social Justice in the Global Economy*, AUSTRALASIAN CATH. REC. 178, 178–93 (2014).

[18] EVANGELII GAUDIUM, *supra* note 6, at 1.53.

[19] *Id*.

The "law" counterpoised to the transcendental "commandment"[20] is not any kind of political or legal framework—capitalist, communist, or otherwise; Francis denounces the laws of competition, by which the (economically) fittest survive, as *deadly* inequality. So, the problem—inequality—is clear, but what role does the state and, for our purposes, the law, have in addressing it?

Let's consider another encyclical (a sort of papal newsletter) to pursue this question. In celebration of the centennial of *Rerum novarum*, the foundational document of modern Catholic social teaching, Pope John Paul II wrote, in 1991, the same year as the collapse of the Soviet Union:

> [C]an it perhaps be said that, after the failure of Communism, capitalism is the victorious social system … If by "capitalism" is meant an economic system which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative… But if by "capitalism" is meant a system in which freedom in the economic sector is not circumscribed within a strong *juridical framework* which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative.[21]

This fascinating passage relates what is, perhaps, one key difference between the dominant liberal view of capitalism and the Church's: for liberal society, capitalism *eo ipso* is believed to lead to the achievement and distribution of social ends, whereas, for the Church, *regulated* capitalism is at the service of these ends. Liberal thinkers, perhaps beginning with Bernard Mandeville and continuing through to Adam Smith to Ayn Rand, believed that the best way to achieve the common good was *not* to take it as a point of departure, but rather the good of each individual; i.e., if each individual is left to pursue his or her own good, the common good will be achieved.[22] This notion resonates in Adam Smith's "the invisible hand." In addition, Pope John Paul II defines the "juridical" sphere as the necessary ingredient for putting capitalism in society's service; it, therefore, gives the law a profound

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[20] The transcendental commandment is to love your neighbor as yourself. *Leviticus* 19:18 (New International Version); *Mark* 12:31 (New International Version).

[21] CENTESIMUS ANNUS, *supra* note 16, § I.42 (emphasis added).

[22] *C.f.*, BERNARD MANDEVILLE AND PHILLIP HARTH, THE FABLE OF THE BEES: OR PRIVATE VICES, PUBLICK BENEFITS, VOL1 1 (LIBERTY FUND, INC. 1988); Andrew M. Yuengert, *The Common Good for Economists*, 38 FAITH & ECON. 1, 7 (noting the more common "In competition, individual ambition serves the common good" angle, *but see* also Smith's belief in some degree of "public virtue." AYN RAND AND NATHANIEL BRANDEN, THE VIRTUE OF SELFISHNESS (Centennial ed. 1964).

moral and even theological weight beyond its oft-repeated "mechanical" functions, namely the maintenance of order and efficient markets.[23]

In a Thomist framing, all law is ordered towards the common good.[24] This remains fundamental to Catholic social teaching, wherein the "common good" remains both one of the central concepts and one of the central ends.[25] In fact, if law runs counter to the common good, it should not be understood as law, according to Church Fathers.[26] The starting point of Catholic legal thought is the natural law, which is, according to Thomas Aquinas the "participation in the eternal law by rational creatures…"[27] St. Augustine believes that natural law is "written" or "inscribed" on the hearts of human beings",[28]language which remains notably consistent in Enlightenment thought.[29] The first precept of natural law, that "we should do and seek good, and shun evil," though frustratingly abstract, is the base from which all other natural law is derived.[30] This basic account of natural law is vitally important for understanding Catholic social teaching, especially as it relates to its application within modern secular society. To put it succinctly, Catholic social teaching is a means to make natural law human. The natural law, moreover, is essentially the yardstick by which we judge whether or not a

[23] The scholar Tamar Frankel writes, "Some of the conditions that enhance market efficiencies can be imposed and regulated privately by market participants. However, it is not always possible for these participants, acting separately, to create and enforce all these conditions on their own. Therefore, some of these conditions must be established by law." She goes on to note that even Hayek, the free market thinkers' free market thinker, concedes that "his spontaneous order can rest "on rules which are entirely the result of deliberate design." Tamar Frankel, *Legal Infrastructure of Markets: The Role of Contract and Property Law*, 73 BOS. UNIV. L. REV. 389 (1993).

[24] See the discussion in: THOMAS AQUINAS, ON LAW, MORALITY AND POLITICS 12-13 (William P. Baumgarth & Richard J. Regan, eds. 2nd Ed. 2002) (Question 90. A. 2: "Is Law Always Ordered to the Common Good?").

[25] In the *Compendium of the Social Doctrine of the Church*, the common good is one of the paramount themes, the first principle to be examined in the explication of the "Principles of the Church's Social Doctrine" section and is referenced 143 times throughout the tract; by comparison, "equality" is referenced 24 times. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, (1st ed. 2005). For an excellent and much needed catalog of some of the specific applications of Catholic social teaching, after assuming the common good as the primary end, see: Albino Barrera, O.P., *What Does Catholic Social Thought Recommend for the Economy?* in THE TRUE WEALTH OF NATIONS 13-36 (Daniel K. Finn ed., 2010).

[26] *C.f.*, ST. AUGUSTINE, ON FREE CHOICE OF THE WILL, ON GRACE AND FREE CHOICE, AND OTHER WRITINGS (Peter King ed., 2010).

[27] ON LAW, MORALITY AND POLITICS, *supra* note 23, at 12-13.

[28] *C.f.*, ST. AUGUSTINE, On the Sermon On the Mount in NICENE AND POST-NICENE FATHERS, FIRST SERIES (Phiillip Schaff ed., 1888), https://newadvent.org/fathers/16012.htm.; ST. AUGUSTINE, THE CONFESSIONS, 15-16 (Henry Chadwick ed., 1991).

[29] *C.f.*, DAVID LAY WILLIAMS, ROUSSEAU'S PLATONIC ENLIGHTENMENT 74 (Penn State Press, 2010).

[30] ON LAW, MORALITY AND POLITICS, *supra* note 23, at 12-13 (Question 94. A. 2. "Does the Natural Law Include Several Precepts or Only One?") "Good" is broadly defined, following an Aristotelian framework, as "what all things seek."

human law is a "perversion" of law and thus no law at all.[31] Though this idea may seem somewhat elusive, it is important to note that the common good is the point of departure and the "*measure*" by which the goodness of a law is to be determined. It is also important to note, with Yuengert, that "the ultimate purpose of the common good—the end of the social order—is the person," an idea that, once again, highlights the shared language, if different orientation, between Catholic social teaching and the liberal tradition.[32]

And, here, we come to the essential foundation of modern Catholic social teaching's legal voice and a following explanation of its role. In discussions of law, Catholic social teaching is a body of thought that can *practically* guide us towards an understanding of what could correct the failings of human law and bring our society closer to the natural law. Catholic social teaching is also a body of thought that takes, *as its point of departure*, the common good—with an understanding that the common good cannot be claimed without a presupposition of human dignity and centrality of the person. While both Catholic social teaching and its intellectual antecedents demonstrate the vital importance of individual rights and notably individual property rights, they are *at the service* of the common good and not the other way around.[33] Pope John Paul II critiques the more individualistic approach to the common good in his 100th Anniversary examination of *Rerum novarum*,

> …there is a growing inability to situate particular interests within the framework of a coherent vision of the common good. The latter is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person.[34]

Though American courts, generally speaking, no doubt aim to achieve the common good when handling matters beyond the horizon of just a few particular individuals, they often do so by following the more fundamental philosophical orientation as described above, i.e., the protection of individual

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[31] And a human law diverging in any way from the natural law will be a perversion of the law. *Id.* (Question 95. A. 2: "Is Every Human Law Derived From the Natural Law?").

[32] Andrew Yuengert, *What is 'Sustainable Prosperity for All' in the Catholic Social Tradition? in* THE TRUE WEALTH OF NATIONS 17-62 (Daniel K. Finn ed., 2010).

[33] *C.f.*, POPE LEO XIII, RERUM NOVARUM: ENCYCLICAL OF POPE LEO XIII ON CAPITAL AND LABOR 99-107, 131-133 (May 15, 1891). Moreover, rights should not be conflated with a more holistic understanding of the fulfillment of an individual's dignity. CENTESIMUS ANNUS *supra* note 16, § IV.30. The right to private property, for example, is not held to be an absolute right but one subordinated to the common good of all (following St. Thomas Aquinas). This should not be mistaken for an argument for socialism, as the role of the state in the Catholic view cannot be central in the proper dispensation of property. Further Catholic critiques of too universal a state will be discussed below.

[34] CENTESIMUS ANNUS *supra* note 16, V.47.

freedom as the best means to the common good. In a society of growing inequality, Pope Francis recognizes that remediation is required by the creation and application of a meaningful legal framework which address these inequalities. Because of the court's fundamental commitment to freedom of contract and a concomitant commitment to "efficient" contracts, this can be hard to achieve.[35] However, the doctrine of unconscionability presents an opportunity to reorient the American legal system's approach to the common good by explicitly considering the significant inequalities in bargaining power of those in the lower socioeconomic strata—and seeking to rectify the inequalities in the ability of the parties to realize in practical terms their freedom of contract.

UNDERSTANDING AND TESTING UNCONSCIONABILITY THROUGH SUBSIDIARITY AND SOLIDARITY

In evaluating applications of unconscionability, by probing the Church's own understanding of subsidiarity and solidarity, we might be better suited to find a remedy to the "slippery slope" problem often expressed in relation to unconscionability. The most commonly referenced account of subsidiarity from the body of Catholic social teaching comes from the following passage in *Quadragesimo anno*, which is typically held to be the concept's first major appearance:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.[36]

Though subsidiarity is often viewed as a principle by which power is *devolved*, it is just as much about the appropriate organization of the hierarchies of power and decision-making, with the aim of *empowering* each level, top to bottom, appropriately. When subsidiarity is applied in secular contexts, as has become fashionable, it is typically limited to speaking about

[35] For an explanation of the role of efficient contracts in modern society, see Benjamin E. Hermalin, Avery W. Katz, and Richard Craswell, *The Law & Economics of Contract*, *in* HANDBOOK OF LAW AND ECONOMICS (A. Mitchell Polinsky & Steven Shavell eds., 2007). The preeminent study is surely RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2010).

[36] POPE PIUS XI, QUADRAGESIMO ANNO: ENCYCLICAL OF POPE PIUS XI ON RECONSTRUCTION OF THE SOCIAL ORDER TO OUR VENERABLE BRETHREN AND OTHER ORDINARIES IN PEACE AND COMMUNION WITH THE APOSTOLIC SEE, AND LIKEWIDE TO ALL THE FAITHFUL OF THE CATHOLIC WORLD para. 79 (May 15, 1931).

governance and, more specifically, devolution.[37] One must not forget the basic reason for the Church's formulation of the concept of subsidiarity in *Quadragesimo anno*: concern over the collapse of civil society by the growing state, leaving only the state and the individual behind.[38] Therefore, it is somewhat ironic that the secular adoption of subsidiarity is often applied *within* the bureaucratic apparatus of a large state (or transnational body, such as the European Union).[39] In regard to the large state or the "Welfare State" or "Social Assistance State,"

> . . . the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good … the Social Assistance State … [is] dominated more by bureaucratic ways of thinking than by concern for serving their clients …. In fact, it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbors to those in need.[40]

We may view the courts as somewhat of a middle ground that absolves itself of many of the problems of a large bureaucratic apparatus while bringing to bear the resources of a modern state, offering means to help individuals as circumstance prescribes "always with a view to the common good." Of course, the court familiar with a given case is far better equipped to make a judgment about the fairness of a contract than those dozens of degrees removed from it. But the court is, by the same token, equally ill-equipped to create generally applicable law. We do not want to mislead and suggest that this is what the Church had in mind, but we do believe a judge, and certainly a jury, can act as a "neighbor" or from a neighborly bearing when considering a case and whether or not to employ unconscionability. Another "safety valve" may be seen in the useful function of unconscionability in that its exercise provides the impetus for eventual legislative action, when appropriate.[41] This again relates to the dual directionality of subsidiarity; sometimes a legislative solution *is* best and this

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[37] For a careful analysis, *see* Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 109 (2001), who makes plain the critical point: "To invoke subsidiarity in public policy debates without acknowledging and exploring its Catholic roots is to cut off the principle from the particular priorities."

[38] QUADRAGESIMO ANNO, *supra* note 35, at X.

[39] *C.f.*, Treaty on the European Union at. 3(b), Council of the European Communities-Commission of the European Communities, Feb. 7, 1992.

[40] CENTESIMUS ANNUS, *supra* note 16, § V.48.

[41] *C.f.*, Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor*,' 120 GEO. L. J. 1383, 1422-1432 (2014). I must make particular note of this impeccable study, which has been invaluable in my own research.

ought to figure in the court's thinking and, thereby, limit the legislative over-application of unconscionability as Leff worried about.[42]

The principle of solidarity, and the assumptions that surround it, likewise inform the limits of the application of unconscionability. Instead of maintaining a sometimes-limited formal commitment to the equality of bargaining power — or, alternatively, recognizing that this inequality must be stomached for the sake of efficiency — a recognition of the presence of the concept of solidarity at the heart of unconscionability could provide a much-needed remedy to those experiencing the worst of this inequality. We see language in the various definitions of unconscionability either stating or implying what "no man" would do or ought to do; at its core, the doctrine asks us to place ourselves in the shoes of the wronged and determine if his or her dignity has truly been offended or if that were the explicit or implicit intent of the other party. It asks us, perhaps, following the words of Pius XI, to step in "as occasion requires and necessity demands."[43] With some limiting guidelines provided by subsidiarity, solidarity can help inspire the "neighborliness" of those, such as judges and juries, who might not be neighbors in a stricter sense. It also inspires a line of thought that offers an alternative orientation towards the common good as a more paramount end in itself. By expanding the court's discretion in its ability to acknowledge the absence of *commutative* justice in a contract through unconscionability, the problems engendered by our legal system's formal commitment to freedom of contract and equality before the law might be curtailed.

The "Peril" of Unconscionability

The American legal system's approach to unconscionability is a fascinating window onto shifting views on the role of the courts, and, indeed, the law more generally. Admittedly, the application of the doctrine of unconscionability by American courts with regular frequency would be tantamount to the acceptance of several key critiques of the philosophical foundations of the American legal system; it would mean a further weakening of the freedom of contract, if the courts weighed the relative bargaining power of contracting parties when determining the validity of a contract, and, perhaps most audaciously, weighing a contract's *value* to the parties to it.

Such steps away from what is taken today as legal orthodoxy, however, would lead us to ground which is familiar to Catholic social teaching. These teachings recognize the inequalities and inequities that operate within a

[42] Leff, *supra* note 5.

[43] QUADRAGESIMO ANNO, *supra* note 35, at para. 80.

moderately regulated free market economy.[44] In *Rerum novarum*, for example, we see Pope Leo XIII seek to "define the relative rights and mutual duties of the rich and of the poor, of capital and of labor," articulating the Church's belief that the duties of members of certain groups are distinct from those of the individual alone.[45] Moreover, the Church recognizes that "there naturally exist among mankind manifold differences of the most important kind; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition."[46] We must note the Church's willingness to recognize the very idea of distinction openly and weigh its import when considering economic fact. This is perhaps even better illustrated by observing how the Church understands an individual's membership in a certain *class*, i.e., a purely social phenomenon, to define his or her social position and "relative" equality: "…the laboring man is, as a rule, weak and unprotected…."[47] Here, a man is *necessarily* weak insofar as he is a member of a particular class — not because of an essential or innate limitation in his person. American contract law does have some formal constructs that take into account the relative capacities of parties to a contract — literally, capacity — but the definition, at least today, is quite limited.[48] One of the criticisms of adding special legal protections for those in lower socioeconomic strata is that the market corrects for the disadvantages levied by one's position in that strata better than the legal system could.[49] For example, banks will typically only make loans to asset-poor individuals with a high interest rate, however possibly so high that it could be held usurious by law. Critics of so-called "usury laws" argue that but for the higher reward

44 RERUM NOVARUM, *supra* note 32, at I.19. Notably, while the Church views the classes—simply defined as labor and capital—as immutable facts of modern economic life, the proposition promoted most famously by Marxism that they are in perpetual conflict is viewed by the Church as "the great mistake." For more on the Marxist conception of class see Karl Marx, Manifesto of the Communist Party (1848), https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#a1.

45 RERUM NOVARUM, *supra* note 32, at I.2.

46 *Id.* at I.17. Note the repeated use of the qualifying adverb "naturally," which suggests the existence of these inequalities prior to society.

47 *Id.* at I.20.

48 This idea will be discussed further below. RESTATEMENT, *supra* note 1, § 12:

> (1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances. (2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated."). For example, in most cases, reflecting their "capacity," minors can disaffirm contracts.

49 This idea often manifests itself in critiques of welfare legislation. For a cutting review, as well as a historical comparison, of this debate, see Margaret R. Somers and Fred Block, *From Poverty to Perversity: Ideas, Markets, and Institutions over 200 Years of Welfare Debate*, 70 No. 2 AM. SOC. REV. 260 (2005).

to the lender due to the risk, loans to asset-poor individuals would not be made.[50] Too often, however, the loans or financing mechanisms available to asset-poor individuals do not lead to upward mobility and, in fact, can further solidify financial hardship — thereby causing a great deal of damage to the common good.[51]

If we take one of the fundamental tensions in our economic system to be between whether market-based or legal-based corrections offer better resolutions to social ills, we ought to consider how a broader application of the doctrine of unconscionability could provide an antidote to this basic tension perhaps obviating the need for further state regulation. That is, does application of the doctrine of unconscionability provide a way to protect the disenfranchised without drastically altering the broader legislative framework and legal system?

The Formation of the Doctrine of Unconscionability, and its Two Parts

An exclusive orientation towards legislative remedies is, however, not entirely the issue. It was recognized that some contracts would simply be too lopsided or injurious to one of the parties, despite the presence of a limiting statutory framework, that the court should be able to exercise some manner of discretion. The notion of an unconscionable contract has been with us since at least the codification of Roman law and comes to us more directly from the Courts of Equity that developed in the early modern English legal system.[52] The modern doctrine of unconscionability was, in many respects,

[50] Another interesting example is microlending. Microlending, which, almost as a rule, deals with asset-poor individuals, would seem to hold high interest rate loans as particularly noxious. However, because of the number of small loans issued by a typical micro lender, interest rates must rise in order to meet the lender's fixed costs. Christian E. Weber, *In Defense of Apparently 'Usurious' Interest Rates for Micro Loans: A Pedagogical Note*, SSRN ELEC. J. 1, 7 (2007).

[51] *C.f.*, the deception that many mortgage lenders used in the run up to the 2008 financial crisis, which led, in one case, to a $ 7 *billion* settlement. Eric Tucker, *Citigroup Agrees to Pay $7 Billion for Mortgage Deception*, (July 14, 2014), http://www.mercurynews.com/business/ci_26144827/citigroup-pay-7-billion-subprime-mortgages-probe. Consider also payday lending, which almost exclusively focuses on asset-poor individuals and has well-known deleterious impacts. Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 THE Q. J. OF ECON. 517-55. The rationale behind the development of the Grameen bank by Muhammed Yunus was to break the financial dependence of women basket-makers and other crafts people on usurious short term lending. MUHAMMAD YUNUS, BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY (NEW YORK: PUBLIC AFFAIRS, 1999).

[52] W. S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 294-95 (1915) (tracing how ideas of equity from canon jurists, especially regarding "conscience," made their way into the Court of Chancery,

> Conscience must decide how and when the injustice caused by the generality of rules of law is to be cured. It is, in fact, the executive agent in the work of applying to individual cases the dictates of the law of God and of reason upon which these ecclesiastical chancellors considered equity to depend.

developed for and codified in the Uniform Commercial Code ("UCC") as an antidote to this basic problem; § 2-302 of the UCC states:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[53]

Naturally, the interpretation of this section and its application in an actual legal case hinges on the court's more specific interpretation of the meaning of "unconscionability" itself; indeed, the definition in the above clause is essentially tautological. That being said, a clear and formal definition of unconscionability would be problematic but from the other side of the horizon; that is, a strictly defined definition of unconscionability would mean the adoption of a standard moral system that would have to be uncomfortably shoehorned into any number of particular cases. And the surprising inclusion of the broad phrase "*any* unconscionable result" (emphasis added) seems to widen and muddle its scope even more; we must ask: what is a result? To whom can we apply this unconscionable result — only the parties to the contract? Their children? Their business associates? And so forth, *ad infinitum*. It is mystifying that there is a codified suggestion that a judge be permitted to introduce her own understanding of what is unconscionable in a court of law. This is particularly true for a legal system that attempts to operate outside of a set moral paradigm.[54]

The first step is to break the concept down into its constituent parts before arriving at a working understanding. Although not abundantly clear from the codified version of unconscionability, it, almost necessarily, requires that one break the concept down into procedural ("bargaining

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[53] We must also look to the Restatement of Contract's (Second) similar language, though not having the force of law, is important in the consideration of those contract disputes outside the scope of the UCC. RESTATEMENT, *supra* note 1, at § 208

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

[54] Consider the converse: legal systems operating *within* a particular system—e.g., Islamic law (Iran) or Marxism-Leninism (the USSR, in principle). CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, DEC. 3, 1979, CH. 1, ART. 4.

> All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.

naughtiness") and substantive (the "evils in the resulting contract") parts.[55] The basic distinction emerged most prominently from Arthur Allan Leff's seminal article on the subject, which appeared relatively soon after unconscionability's codification in the UCC. Today, when courts review a contract for the presence of unconscionability, they will typically perform the "Leff" Test — i.e., they will attempt to discern if the contract is *both* procedurally and substantively unconscionable; most courts do not hold it enough for one or the other to be met alone.[56] In summary, Courts focus on "the size and commercial setting of the transaction . . ., whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." On the "substantive" side, the courts analyze whether the actual terms of the contract "unreasonably favor" the party against whom unconscionability is urged.[57]

It is not hard to map the idea of substantive unconscionability on to the corpus of Catholic social teaching. It is unsurprising that the Church, if it were put in a position to do, would be far more willing to make value judgments on a given transaction than the American courts.[58] Somewhat less obviously, the idea of procedural unconscionability is also at home in Catholic social teaching. In *Rerum novarum*, Pope Leo XIII writes that, when entering into a contract to perform labor, a worker must only perform the terms of the agreement if it is made "freely and equitably."[59] This would seem to meet Leff's standard of procedural unconscionability, barring the practice of "bargaining naughtiness."[60]

Just as Leff's article has colored much of the proceeding discourse on unconscionability, so too has Judge J. Skelly Wright's opinion on the case of a shifty Washington, DC used-furniture dealer dominated the modern

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[55] UCC § 2-302 (1962); Arthur Allen Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

[56] Leff, *supra* note 55, at 487.

[57] Day Op of N. Nassau, Inc. v. Viola, 2007 N.Y. Slip Op. 51542(U) (quoting Gillman v. Chase Manhattan, 73 N.Y.2d 1 (1988)).

[58] *C.f.*, POPE JOHN PAUL II, LABOREM EXERCENS: ENCYCLICAL LETTER TO HIS VENERABLE BROTHER BISHOPS IN THE EPISCOPATE THE PRISTS AND DEACONS FAMILIES OF MEN AND WOMEN OF GOOD WILL ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM § 8 (1981)*;* CENTESIMUS ANNUS, *supra* note 16, at IV. 40

> It is the task of the State to provide for the defence and preservation of common goods such as the natural and human environments, which cannot be safeguarded simply by market forces. Just as in the time of primitive capitalism the State had the duty of defending the basic rights of workers, so now, with the new capitalism, the State and all of society have the duty of defending those collective goods which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual.

[59] RERUM NOVARUM, *supra* note 32, at I. 20.

[60] Leff, *supra* note 55, at 487.

consideration of unconscionability's application. Indeed, the seminal case on modern unconscionability is often considered to be *Williams v. Walker Thomas Furniture*, presided over by Judge Wright.[61] Wright found the contract to be unenforceable on account of its unconscionability, which he essentially defined as "to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[62] In his opinion, Wright also emphasized the need for the court to have an understanding of the *context* of a transaction and that a test to determine unconscionability could never be "mechanically applied," stating, "the terms [of a contract] are to be considered in the light of the general commercial background and the commercial needs of the particular trade or case."[63]

Echoing Judge Wright's opinion, it is widely held that there is no "bright line" or "mechanical" means by which the court can define unconscionability, even if it were to be uniformly accepted that the court's powers allow it to *uneventfully* void a contract according to this doctrine.[64] Uncovering a metric for how to apply unconscionability in such a way that it might serve the social purpose envisioned by Judge Wright without altering too many of the fundamental principles of American law presents a challenging question. It is, however, a question that Catholic social teaching can help us answer by serving as a touchstone towards an understanding of the doctrine's foundational principles and applicability within broader society.

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[61] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (In this case, Ms. Ora Lee Williams entered into several lease agreements for various pieces of furniture from a discount furniture concern, Walker Thomas Furniture, over a six-year period. Though Ms. Williams made her payments regularly, according to an obscure provision of the contract, she could only take title to an item after all of her balances were paid off for each item. When she did eventually default on a stereo payment, the company attempted to repossess all of the furniture she thought she held title to).

[62] *Id*. at 449 (Note the passage of the Leff Test in this case).

[63] *Id*. at 450. In retrospect, it is rather odd—or perhaps fitting—that one of the most unconventional, perhaps radical, lower court judges would hold such a pivotal place in the history of such an unconventional concept. Indeed, there is perhaps no better exemplar of the liberal school of judicial thought in the 3rd quarter of the 20th Century than Judge Wright. As Louis Seidman writes, a former clerk of Judge Wright himself,

> it would have been hard to find any judge, sitting on any court in the United States, who was to the left of Judge Wright."[63]Even in era of a more liberal bench, as things were at that time, Judge Wright was considered to be on the "fringe."[63]Today, it is far rarer for members of the bench to openly espouse overtly political or social goals, as Judge Wright had no qualms doing.[63] Indeed some of his statements can be rather shocking: "[the Supreme Court is] more than a law court – it is a policy court, or, if you will, a political court. It is an instrument of government, and while most judges have the habit, through long years of precedent, of looking backward, the Supreme Court must look forward through a knowledge of life, of people, of sociology, of psychology.

[64] *See generally* Leff, *supra* note 55.

THE CHALLENGE OF UNCONSCIONABILITY:

Nevertheless, such an application of the doctrine of unconscionability would certainly call into question the broader application of a truly historic concept in the American legal system: freedom of contract. In the most basic of terms, the primary barrier to the common application of unconscionability is our commitment to the freedom of contract and our corresponding belief that such freedoms should only be limited through a formally democratic process—i.e., through *general* legislative action.[65] However, and important for our analysis, is the basic point that a contract, even if it contains apparently unequal terms, constitutes a kind of a legislative process in itself. The legal scholar Karl Llewellyn believed that a one-sided contract constituted "the exercise of unofficial government of some by others, via private law."[66] Even though the *Lochner* Era, which maintained a baseline "belief" in the freedom of contract, is now long passed, our society, nonetheless, bends towards the abstract idea of freedom of contract and the right of the consumer to choose and the provider to entertain that choice despite the moral implications of the act — which may be deleterious to the consumer, the provider, both, and/or the common good.[67] It must also be said that our commitment to this idea is quite dubious. In a capitalist economy, negotiating one's wages is clearly a fundamental activity and may be one of the most important contracts an individual enters into. However, the court saw that the naming of a minimum wages was within a state's "police power."[68] Again, the question is not so much *whether* freedom of contract can be limited, but by whom?

In short, for the purposes of our discussion of contracts, it is not terribly problematic to conflate freedom and equality — if only in a limited way. The

[65] One example of such law, as will be discussed below, are regulations that define the boundaries of labor contracts (e.g., minimum wage, maximum hours, and etc.). For now, *see Adair v. United States*, 208 U.S. 161 (1908); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (original case invoking individual freedom of contract, and ushering in the Lochner era of cases).

[66] Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931). Note the extra legal implications, as well a gesture towards the deviation from the American commitment to general law.

[67] *See* Lochner v. New York, 198 U.S. 45 (1905). (The opening paragraphs of the *Lochner* decision sum up the case—and the basic ideological orientation—nicely:

> The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power. Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor. There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker.

See also Carter v. Carter Coal Co., 298 U.S. 238 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[68] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 389 (1937).

reality of freedom of contract is often based on the relative position of each party to the contract; freedom of contract, strictly speaking, does not exist in situations in which inequality of bargaining power is evident (e.g., in contracts of adhesion wherein the superior party offers the other a "take it or leave it" proposition).[69] Unsurprisingly, then, our society's commitment to freedom and equality *before the law* can sometimes limit the genuine presence of these very same principles. Our freedoms when dealing with each other are, on the one hand, zealously guarded, and, on the other, quite limited and carefully regulated. Daniel Finn uses the concept of the "character of freedom" to describe a way in which we might approach and explain this problem.[70] That is, the idea of freedom (or commitment to it) has little value in itself unless we are willing to qualitatively evaluate it and determine what its character is. This consideration arises in tandem with observations of the presence or absence of genuine equality. Here, it is important to remember Judge Wright's exhortation to never mechanically apply a test of unconscionability and to remember the "mores" surrounding the transaction.[71]

A rather typical example, the "standard" or "form" contract, allows us to see the inherent tensions between freedom of contract and equity within a capitalist system. Except in very rare cases, and certainly in most everyday ones, a form contract represents a clear imbalance of bargaining power.[72] And it is not as if this fact is a mystery to either party. Indeed, one of the most common limitations on freedom of contract is through the form contract, which is accepted as both a necessity for a complex and large capitalist society and, in fact, as something that helps keep the "cost of doing business" down through its efficiencies (imagine the professional costs if every contract for things as diverse as a parking garage ticket to an insurance

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[69] *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 UNIV. OF COLO. L. REV. 139, 201-02 (2005); Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943). To take from the canonical study, Kessler writes,

> In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. . .Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

[70] Daniel K. Finn, *The Unjust Contract: A Moral Evaluation*, *in* THE TRUE WEALTH OF NATIONS: CATHOLIC SOCIAL THOUGHT AND ECONOMIC LIFE 143, 149-50 (Daniel K. Finn ed., 2010).

[71] Williams, *supra* note 58, at 450.

[72] Finn, *supra* note 67.

policy had to be negotiated each and every time).[73] Thus it is clear that the purveyor of the form contract has a clear advantage over the recipient.[74]

Perhaps one solution to this inequality of advantage is to define certain limitations to form contracts by statute, which would limit unconscionable behavior according to a quantitative metric. For example, some states have instituted "caps" on interest rates (usury laws) or named a minimum wage.[75] Under this theory, the application of unconscionability *in the courts* becomes unnecessary, as a legislative fix can be supplied for an ever-increasing number of issues that *could* be deemed unconscionable. It is far harder, however, to determine a "cap" for contract terms after which point the contract becomes unconscionable or otherwise morally repugnant. Indeed, this is exactly the danger Judge Wright spoke to when he pointed out the impossibility of a "mechanically applied" solution to unconscionability.[76] Indeed, as Judge Jasen writes — notably in the same general era of the "liberal" Judge Wright — "Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide *against the background* of the contract's commercial setting, purpose, and effect."[77] Ironically, our commitment to *formally* universal law, and equality before it, sometimes limits our ability to void these sorts of contracts even if we find them damaging and morally suspect. According to this paradigm, we must typically assume, on the one hand, a neglect of the particulars of a given case, and, on the other, the basic assumption that every person, despite his or her socioeconomic status, is approaching the law equally.

Unsurprisingly, providing solutions to this problem using the strategies characteristic of the legislature are highly problematic. A law, which, for example, said that all individuals lacking a high school diploma could not enter into contracts would, at best, be highly paternalistic, and, at worst, a plain and unambiguous violation of our society's commitment to equality.

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[73] Leff, *supra* note 53, at 504 (Once again, Leff puts it well, in discussing how unconscionability might affect form contracts more broadly, "If this new device, however, is making all printed forms open to after-the-fact ad hoc judicial second guessing, there is the danger that the efficiency of mass transactions will be seriously impaired.").

[74] See Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 106, 112-13 (2013) (For a novel take on this issue, see Riley's discussion of contracts in reality television:

> Contestants [on reality shows] have less familiarity with the language of the industry and are less able to negotiate individual contracts. Most sign form contracts that are essentially contracts of adhesion created by production companies and networks …. There is little to no bargaining power for the contestants in the contract signing process for reality television.

[75] *See* WASH. REV. CODE ANN. § 19.52 (West 2019) (on interest and usury); VA. CODE ANN. § 6.2-300 (2010) (on interest and usury).

[76] *Williams*, *supra* note 58, at 450.

[77] Wilson Trading Corp v. Ferguson, Ltd., 23 N.Y.2d 398, 403 (1968).

Today, barring certain individuals, based on a carefully defined set of characteristics, from entering into contracts or engaging with the law by other means, is acceptable and called "capacity."[78] Today, capacity seems like a relatively straightforward and innocuous concept. However, up through the early 20th century, married women, for example, were not viewed as having capacity.[79] Expanding who may or may not have capacity to contract would recall a period of immense paternalism and *positively* limit autonomy in a backwards manner. A better solution would consider capacity in a non-technical sense *if necessary*, but not to *make* capacity *necessary* for one's entrance into a contract.

The potential for the unconscionability doctrine to serve as a protective mechanism for those in lower socioeconomic strata is further highlighted by the court's extension of its use to those cases where inequality of bargaining power is evident.[80] Once again, on speaking of the formulation of a "test" for the application of unconscionability, Judge Wright states, "In determining reasonableness or fairness, the primary concern must be *with the terms of the contract* considered *in light of the circumstances existing when the contract was made*."[81] Though recognizing that this is a departure from the widely held belief that the court should never judge the "terms" or the *value* of a contract, Judge Wright viewed it is a necessity.[82] Of course, the knowledge of the circumstances of each particular contract cannot be known to a legislature; rather, they can only be known to the court hearing the case. The court's exercise of its right to declare contracts unenforceable due to their unconscionability is a unique solution to a problem that cannot help but exist under general law, unless we were to greatly expand our application of capacity or be more comfortable with a more universal, paternalistic approach. Moreover, it allows for the differentiation of actors and circumstances in a way that the law cannot (and ought not).

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[78] Hermalin et. al., *supra* note 34. POLINSKY ET. AL., *supra* note 34. POSNER, *supra* note 34.

[79] GEORGE JAMES BAYLES, WOMAN AND THE LAW 200-01 (1901)

> As it is of the essence of a contract that there shall be at least two parties capable of giving their consent, and as at the common law husband and wife are one person, we see the chief reason why contracts between husband and wife are invalid, and as under that system of law the wife is regarded as having no will of her own, but as being under the power and control of her husband, we see also the chief reason why the contracts of married women with third parties are also invalid at the common law…But the common law rule that all the contracts, agreements, covenants, promises, and representations of married women are null and void, although for the greater part done away with by the developments of equity and by statutes, still exist to the extent that any capacity of a married woman to contract is regarded as exceptional and must be asserted and proved.

[80] *See Williams, supra* note 59; Jones v. Star Credit Corp., 59 Misc.2d 189 (N.Y. Sup. Ct. 1969); *Day Op of N. Nassau, supra* note 55.

[81] *Williams, supra* note 59.

[82] *Id*.

APPLICATIONS:

Mandatory Arbitration and Non-Disclosure Agreements

Mandatory arbitration agreements are prevalent in employment and commercial contracts in organization of over 1000 individuals. Non-disclosure agreements typically are part and parcel of mandatory arbitration agreements. A problem with non-disclosure agreements is that the bad behavior, which formed the basis of a settlement, not being disclosed, can continue unabated. Serial sexual harassment and predatory behavior, such as what happened at the Weinstein Co.[83] and at Fox News creates a toxic culture. In the cases of the Weinstein Co and Fox News, the toxic culture came from the top.[84] Serial settlements, hidden from view except by Counsel and HRM, protect toxic leaders at the top, and ironically permit the bad behavior to continue unabated.

The editorial board of the New Jersey Lawyer, the official newspaper of the New Jersey State Bar Association Labor and Employment Law Section, published an editorial opining that mandatory arbitration agreements with accompanying non-disclosure agreements are contracts of adhesion.[85] This is quite extraordinary, as the plaintiff bar and the defense bar agreed that these contracts were unconscionable: [86]

Mandatory Arbitration Clauses Are Contracts of Adhesion

Mandatory arbitration agreements fit the classic hornbook definition of an unlawful contract of adhesion. Given the present climate, we regret not much can be done except voluntary surrender of mandatory pre-dispute arbitration by companies such as Uber and Microsoft. At best, we caution our readers to know what they are signing, and if they have any bargaining power, resist such clauses.[87]

Ever since the Federal Arbitration Act was enacted in 1925, the Supreme Court and state courts routinely remind us that they have adopted a "liberal federal policy favoring arbitration agreements." *Moses Cone*

[83] *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (Apr. 7, 2021) https://www.bbc.com/news/entertainment-arts-41594672.

[84] Jill Disis and Frank Pallotta, *Roger Ailes Sexual Harassment Scandal: A Timeline*, CNN MONEY (May 18, 2017), https://money.cnn.com/2017/05/18/media/timeline-roger-ailes-last-year/index.html;Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html.

[85] Law Journal Editorial Board, *Mandatory Arbitration Clauses Are Contracts of Adhesion*, N.J. L.J. (Nov. 2, 2018), https://www.law.com/njlawjournal/2018/11/02/mandatory-arbitration-clauses-are-contracts-of-adhesion/.

[86] *Id.*

[87] *Id.*

Memorial Hosp. v. Mercury. However, there is no legislative history or court dicta favoring or presumptively upholding mandatory arbitration agreements, which are found in most standard consumer contracts. We dare say that most of our readers do not realize that their credit card agreements mandate arbitration of any dispute they might have. One cannot buy or sell a publicly traded security without signing a boiler-plate client agreement mandating arbitration of any broker-client dispute. The Economic Policy Institute in a report a year ago found that 53.9 percent of the nonunion private sector, 65 percent of those hired by companies with more than 1,000 employees, must arbitrate any employment dispute. Employees not only waive the usual benefits of civil litigation, but like the plaintiffs in *Epic Systems v. Ernst & Young,* about which we recently commented, also give up the right to initiate a class action. This drastic waiver has severe consequences with regard to consumer contracts because individual claims usually are so small that they are not worth pursuing.

New York, New Jersey, and California legislators have passed laws that prohibit mandatory arbitration and non-disclosure agreement in sexual harassment claims.[88] However, the state laws that prohibit mandatory arbitration clauses possibly conflict with Federal Arbitration Law. In fact, Governor Jerry Brown vetoed California's law prohibiting mandatory arbitration and non-disclosure agreements in cases involving sexual harassment, on the grounds that it conflicts with the Federal Arbitration Act. A recent U.S. Supreme Court decision, Epic Systems, ruled that individual mandatory arbitration agreements are enforceable, notwithstanding the National Labor Relations Act, which provides for collective action by employees, including collective arbitration.[89] The "solution" to the possible conflict between state law prohibiting mandatory arbitration of sexual harassment claims and the Federal Arbitration Act may be that companies revise their employment policies to delete the provision requiring mandatory

[88]S. 121, 1242nd Gen. Assemb., Reg. Sess. (N.J. 2018) (New Jersey Senate No. 121 and Assembly No. 1242 prohibit mandatory arbitration of discrimination charges and non-disclosure agreements. The NJ Senate passed No. 121 on June 11, 2018. It provides that any:

> provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable." It also prohibits non-disclosure agreements "relating to a claim of discrimination, retaliation, or harassment.

New York State passed legislation prohibiting mandatory arbitration of sexual harassment claims, and non-disclosure agreements unless the complaining party prefers to include a non-disclosure agreement. Governor Cuomo signed the law on April 1 8, 2018 and it took effect on July 11, 2018. NYC also passed the Stop Sexual Harassment in Employment Act, on May 9, 2018.

[89] *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

arbitration. Google, Facebook, Microsoft, and Uber have abandoned mandatory arbitration clauses in their employment contracts.[90]

Living Wage and Guaranteed Basic Income

John Rawls' *A Theory of Justice* [91] posits that society is just when the wealth, power and privilege that accrues to the top dogs work to the benefit of the less advantaged, the under dogs. In other words, the less advantaged are **better off** because of the differentials in wealth power and privilege in society. Such arrangements can be accomplished through public policy including the tax system. It is interesting to consider the social arrangements whereby the less privileged are better off because of the advantages experienced by the more privileged. And interestingly enough, even the more privileged are better off in societies where there is less of a gap between rich and poor.[92] Several initiatives are currently underway to reduce poverty among the less advantaged, the sector of particular concern in the application of the doctrine of unconscionability.

Universal basic income is one approach to poverty alleviation. However, in its "pure" form extends a "guaranteed" income to all sector of the population irrespective of financial need.[93] Annie Lowrey recently published her book, *Give People Monday: How Universal Basic Income Would End Poverty, Revolutionize Work, and Remake the World*, advocating universal basic income.[94] Moreover, the cost of implementing a basic income of $1000 per month for every individual in the US, would amount to the entire current federal budget.[95] She advocates the funding of UBI via taxes on the very wealthy and on corporations. It is unlikely whether the costs of implementing UBI is politically feasible, and indeed whether it is an improvement over the current safety net policies.[96] An experiment with

[90] Douglas MacMillan, *Facebook Drops Arbitration Mandate for Harassment Claims* WALL ST. J., (Nov 10, 2018), https://www.wsj.com/articles/facebook-to-end-forced-arbitration-for-sexual-harassment-claims-1541799129.

[91] JOHN RAWLS, A THEORY OF JUSTICE 22 (rev. ed. 1999).

[92] RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2009) (provides evidence that even the more privileged are better off, including in terms of health outcomes, in societies where there are less disparity between the more privileged and the less privileged.).

[93] Michelle Chen, *Could a Universal Basic Income Work in the US?* NATION (Aug. 15, 2017), https://www.thenation.com/article/archive/could-a-universal-basic-income-work-in-the-us/

[94] ANNIE LOWERY, GIVE PEOPLE MONEY: HOW UNIVERSAL BASIC INCOME WOULD END POVERTY, REVOLUTIONIZE WORK, AND REMAKE THE WORLD (2018).

[95] *Id*.

[96] Robert B. Reich, *What if the Government Gave Everyone a Paycheck?*, N.Y. TIMES (Jul. 9, 2018), https://www.nytimes.com/2018/07/09/books/review/annie-lowrey-give-people-money-andrew-yang-war-on-normal-people.html (book review by Robert Reich, former secretary of labor).

universal basic income in Finland was discontinued after two years.[97] Living wage legislation has been passed in certain cities and counties in California, which mandated a $15 minimum wage with possible cost of living increases.[98] See for example, the living wage legislation passed in Anaheim, CA.[99] Recently, universal basic income has been implemented by a pilot project of the Center for Guaranteed Income Research at the University of Pennsylvania in Ulster County, an upstate county of New York.[100] People who earn less than $46,000, 80% of the county median wage, will receive $500 per month for a year.[101] There are not restrictions on how the income payments can be spent. During the COVID-19 pandemic, the COVID relief bills targeted support to lower- and middle-income families and children, incorporating aspects of universal basic income.[102]

The urgent need for a living wage has been brought out by the COVID-19 pandemic, which has revealed the disparities in risks and outcomes by socio-economic status and among minority groups.[103] Fifteen dollars per hour minimum wage is considered the minimum for a "living wage."[104] A $15 minimum wage has been enacted in some states, including California, New York, and New Jersey.[105] Even though the federal minimum wage is set at $7.25 an hour, a "Fight for $15" campaign has been underway for fast

[97] Grace Donnelly, *Finland's Universal Basic Income Experiment Will End in 2019*. FORTUNE (Apr. 19, 2018), http://fortune.com/2018/04/19/finland-universal-basic-income-experiment-ending/.

[98] County Living Wage Ordinances, UC BERKELEY LABOR CENTER (Jul. 7, 2015), http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/california-city-and-county-living-wage-ordinances/.

[99] ANAHEIM, CAL., CODE §§6.99.010-6.99.110 (2018), https://www.anaheim.net/DocumentCenter/View/21954/2018-Initiative-Measure-Text?.

[100] *'It Lessens My Bills': $500 Payments Tested in Upstate NY*, U.S. NEWS (Jun. 20, 2021), https://www.usnews.com/news/us/articles/2021-06-20/it-lessens-my-bills-500-payments-tested-in-upstate-ny.

[101] *Id.*

[102] Deirdre Walsh, *Congress Passes $900 Billion Coronavirus Relief Bill, Ending Months-Long Stalemate*, NPR (Dec. 21, 2020, 9:15 PM), https://www.npr.org/2020/12/21/948862052/house-passes-900-billion-coronavirus-relief-bill-ending-months-long-stalematev.

[103] CENTER FOR DISEASE CONTROL, HEALTH EQUITY CONSIDERATIONS AND RACIAL AND ETHNIC MINORITY GROUPS (Apr. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

[104] Eric Ravenscraft, *What a 'Living Wage' Actually Means*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html.

[105] David Siders, *Jerry Brown Signs $15 Minimum Wage in California*, SACRAMENTO BEE (Apr. 5, 2016, 7:47 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article69842317.html; NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE'S MINIMUM WAGE, https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage; *Governor Murphy Signs Landmark Legislation Raising Minimum Wage to $15 Per Hour*, NJ.GOV (Feb. 4, 2019), https://www.nj.gov/governor/news/news/562019/20190204b.shtml.

food workers.[106] In October of 2018, Amazon raised wages to $15 an hour.[107] The "Call for Fifteen" has now become a national issue, currently under debate in Congress.[108] The Congressional Budget Office recently released an analysis of the economic effects of the proposed Raise the Wage Act of 2021.[109] It concludes that a raise of the federal minimum wage to $15 by 2025, is a double-edged sword, raising people out of poverty but increasing unemployment.[110]

Poverty is not good for people, especially children; and the pandemic has both revealed and exacerbated poverty and its effects. Neither is unemployment, which undermines the dignity of the individual and stresses families. Moreover, unemployment often affects the least privileged in society, and conflicts with what Francis calls "the preferential option for the poor" in the Jewish and Christian traditions.[111] Why not adopt a minimum wage increase, while mitigating the effects on unemployment which are projected to occur? Both an increase in the minimum wage, and policies of economic expansion, incentivizing the private sector to offset negative employment effects and supporting states with the development of full employment programs are required to meet concerns for the least privileged among us.

Workers who are raised out of poverty by an increase in the minimum wage but who would still be earning near the national poverty guidelines pose concerns. A net gain in social good would not be generated if said increased earnings simply disqualified them from poverty alleviation programs such as the Earned Income Tax Credit, nutrition programs, and Medicaid. There is precedent and lessons learned in the welfare-to-work initiatives of the 1990s.

Economists have long been concerned with possible unemployment effects created by raising minimum wages, at either the state or federal level. Incentives and partnerships need to be created to match workforce readiness and skills with employment opportunities, such as the development and production of renewable power and the transition to all-electric vehicle production in the auto industry. Initiatives developed in response to the

[106]Yannet Lanthrop, *Impact of the Fight for Fifteen: $68 Billion in Raises; 22 Million Workers*, NATIONAL EMPLOYMENT LAW PROJECT (Nov. 29 2018), https://www.nelp.org/publication/impact-fight-for-15-2018/.

[107]However, Amazon changed its compensation system, taking back stock options and bonuses. Karen Weise, *Amazon to Raise Minimum Wage to $15 for All U.S. Workers*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/2018/10/02/business/amazon-minimum-wage.html.

[108] CONGRESSIONAL BUDGET OFFICE, THE BUDGETARY EFFECTS OF THE RAISE THE WAGE ACT (Feb. 2021)

[109] *Id.*

[110] *Id.*

[111] EVANGELII GAUDIUM, *supra* note X, at 186.

disruption in the tire, rubber and steel industries can provide guidance for the development of a workforce ready for such emergent opportunities.[112]

The possibility that less advantaged groups will become unemployed because of the increase in the minimum wage is of particular concern. Unemployment resulting from an increase in the minimum wage is likely to fall on those groups least prepared to succeed in the workforce.[113] Supporting states in the development of infrastructure improvements as well as career training programs and adult education and incentivizing the private sector to expand employment, creates work opportunities for individuals who might be on the losing end of the minimum wage increase. Concerns for racial and economic justice mandate a holistic approach to wage and employment issues, so that people and families rise out of poverty and employment expands.

Living wage and perhaps some form of guaranteed basic income are among the social arrangements that meet Rawls' criterion for a just society.[114] A living wage has long been called for by Catholic Social Teaching, and Pope Francis has lately reinforced the call for a living wage, based on the dignity of the individual, support for families and economic and social justice: "Just as the commandment 'Thou shalt not kill' sets a clear limit in order to safeguard the value of human life, today we also have to say 'thou shalt not' to an economy of exclusion and inequality.[115] Such an economy kills (Evangelli Gaudium)."[116] Along with the application of the doctrine of unconscionability developed above by the courts, ending mandatory arbitration and non-disclosure agreements in cases of sexual harassment, and legislative enactment of living wage, the social ills associated with inequality in society, addressed in Rerum Novarum and Centesimos Annus, can be mitigated.[117]

[112] *See* Paula Becker Alexander, PLANT CLOSINGS IN THE TIRE AND RUBBER INDUSTRY (1987).
[113] DAVID COOPER, ECONOMIC POLICY INSTITUTE, RAISING THE FEDERAL MINIMUM WAGE TO $15 BY 2024 WOULD LIFT PAY FOR NEARLY 40 MILLION WORKERS (Feb. 5, 2019), https://www.epi.org/publication/raising-the-federal-minimum-wage-to-15-by-2024-would-lift-pay-for-nearly-40-million-workers/.
[114] RAWLS, *supra* note 85.
[115] EVANGELII, *supra* note 6, at I.53.
[116] *Id*.
[117] RERUM NOVARUM, *supra* note 32; CENTESIMUS ANNUS, *supra* note 16.