UNCONSCIONABILITY & INVOLUNTARY ARBITRATION AGREEMENTS: THE SYSTEMIC EXPLOITATION OF IMMIGRANT LABOR IN THE UNITED STATES

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INTRODUCTION

The exploitation of Mexican and Central American workers for cheap labor in the United States became a popular topic of debate following Donald Trump's presidential campaign and election in 2016.[1] Trump's rhetoric and open hatred of these minority groups not only brought this issue to the forefront of the presidential election, but also enabled intolerant individuals to openly express their disdain for socially oppressed minority groups, exacerbating tensions and inequalities between races.[2] According to a study by the Pew Research Center, sixty-five percent of Americans, including Caucasians and other racial and ethnic minority groups, believe that "[since the 2016 election] it [is more] common for people to express racist or racially insensitive views."[3] Furthermore, forty-five percent of Americans claim that expression of racist views since Trump was elected "has become more acceptable."[4] Regardless of this recent surge in xenophobic and anti-immigrant attitudes in the past few years, such views, particularly against Latin Americans, did not originate during the Trump campaign.[5] Rather, these prejudiced beliefs have a deep-rooted history in the United States, dating back to at least the 1600s, when the British colonists kidnapped, trafficked, and enslaved people from African for labor.[6]

Today, social media has facilitated the rapid dissemination of political information and has become an essential tool for social change.[7] Social media engagement through comments, sharing, and likes has enabled people to discuss and expand their political views with their followers more easily.[8] Unfortunately, social media has also become a tool for spreading hateful and extremist views, particularly among far-right users, including domestic

[1] Claire Klobucista, Amelia Cheatham & Diana Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/us-immigration-debate-0 (last updated June 6, 2023, 1:35 PM) (stating that the Trump administration has amplified anti-immigrant sentiment, causing a wave of public debate concerning this topic).

[2] JULIANA MENASCE HOROWITZ, ANNA BROWN & KIANA COX, PEW RSCH. CTR., RACE IN AMERICA 2019 (2019) (available at: https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019).

[3] *Id.*

[4] *Id.*

[5] Erin Blakemore, *The Long History of Anti-Latino Discrimination in America*, HISTORY, https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america (last updated Aug. 4, 2023).

[6] David R. Roediger, *Historical Foundations of Race*, NAT'L MUSEUM AFRICAN AM. HIST. & CULTURE: SMITHSONIAN, https://nmaahc.si.edu/learn/talking-about-race/topics/historical-foundations-race (last visited Mar. 4, 2024).

[7] Neal Schaffer, *Social Media as a Catalyst for Social Change*, NEAL SCHAFFER, https://nealschaffer.com/social-media-catalyst-social-change (last revised Apr. 16, 2024).

[8] Dam Hee Kim, Brian E. Weeks, Daniel S. Lane, Lauren B. Hahn & Nojin Kwak, *Sharing and Commenting Facilitate Political Learning on Facebook: Evidence from a Two-Wave Panel Study*, 7 SOC. MEDIA & SOC'Y 1 (2021).

terrorists and mass shooters.[9] For instance, Dylann Roof, the Charleston Church shooter, was highly engaged in white supremacist rhetoric online.[10] His exposure to these hateful views ultimately drove him to murder nine innocent Black clergy members and churchgoers.[11] According to the Council on Foreign Relations, far-right extremists congregate online to reinforce one another's views as more people engage in social media discourse.[12] Specifically, "[i]n the United States, perpetrators of recent white supremacist attacks have circulated among racist communities online, and also embraced social media to publicize their acts."[13]

Such viewpoints impact immigrants in the United States because they encourage targeted hate and normalize the stigmatization of vulnerable groups.[14] Right-wing extremists dehumanize marginalized groups, including immigrants, which in turn places these groups in danger, because "'conceiving of people as subhuman often makes them objects of violence and victims of degradation.'"[15] Dehumanizing minority groups allows those with racist ideals to morally justify their hatred toward disenfranchised communities by portraying these groups as undeserving of equality.[16] Unfortunately, the online world has created an echo chamber for far-right extremists to collectively attack minority groups.[17] More specifically, far-right extremists target non-white immigrants online by depicting them as a

[9] Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons (last updated June 7, 2019, 3:51 PM); *Social Media and Political Extremism*, VA. COMMONWEALTH UNIV.: L. DOUGLAS WILDER SCH. GOV'T & PUB. AFFAIRS (Feb. 28, 2023), https://onlinewilder.vcu.edu/blog/political-extremism.

[10] Laub, *supra* note 9; Mark Berman, *Prosecutors Say Dylann Roof 'Self-Radicalized' Online, Wrote Another Manifesto in Jail*, WASH. POST (Aug. 22, 2016, 8:18 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online.

[11] Laub, *supra* note 9; Berman, *supra* note 10.

[12] Laub, *supra* note 9.

[13] *Id.*

[14] MICHAEL SHIVELY, RAJEN SUBRAMANIAN, OMRI DRUCKER, JARED EDGERTON, JACK MCDEVITT, AMY FARRELL & JANICE IWAMA, U.S. DEP'T JUST., UNDERSTANDING TRENDS IN HATE CRIMES AGAINST IMMIGRANTS AND HISPANIC-AMERICANS 55 (2013).

[15] Reginald Oh, *Dehumanization, Immigrants, and Equal Protection*, 56 CAL. W. L. REV. 103, 106 (2019) (quoting DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS 37 (2011)).

[16] Stephen M. Utych, *How Dehumanization Influences Attitudes Toward Immigrants*, 71 POL. RSCH. Q. 440, 441 (2018) ("[D]ehuminazed groups are assigned lower levels of worth than non-dehumanized groups, which allows individuals to morally justify harsh punishment against those who are dehumanized.").

[17] Matthew Costello, Salvatore J. Restifo & James Hawdon, *Viewing Anti-Immigrant Hate Online: An Application of Routine Activity and Social Structure-Social Learning Theory*, 124 COMPUTS. HUM. BEHAV. 1, 4 (2021).

threat to the survival of white people.[18] For instance, there are entire websites dedicated to spreading anti-immigrant hate and harassing immigrant groups by portraying them as a "burden to taxpayers, labor market threat, and colonizing force producing social, moral, and cultural decay."[19]

Notably, immigrants play a critical role in U.S. society and the economy as a driving force behind various industries, with entire economic sectors depending heavily on their labor.[20] For instance, immigrant women—who are often experienced in household management—are more likely to engage in domestic work in the United States, an industry which increasingly relies on their labor to fill these important and understaffed roles.[21] Moreover, Latin American immigrants are also often considered the ideal candidates to care for the needs of families in the United States, further encouraging their participation in these sectors.[22] "[T]he fact that the domestic worker does not speak English . . . is seen as an advantage because this avoids the possibility that the employee will divulge family matters to other members of the employer's community."[23] Despite their significant contributions to the economy and society, immigrants in the United States continue to face marginalization and racism.[24]

Given this marginalization, racism, and the limited legal protections provided to them, immigrants and immigrant workers are particularly vulnerable to exploitation in the workforce.[25] This exploitation often manifests itself in predatory employment contracts, which pose serious threats to their safety, freedom and human rights.[26] This context is crucial

[18] *Id.* at 1, 4.

[19] *Id.* at 4.

[20] *Why Do People Immigrate? - The Different Causes of Immigration*, GLOB. REFUGE (July 14, 2021), https://www.lirs.org/causes-of-immigration.

[21] Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67, 67-68 (2008).

[22] *Id.* at 78.

[23] *Id.*

[24] *See* HUM. RTS. WATCH, RACIAL DISCRIMINATION IN THE UNITED STATES (2022) (available at: https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission).

[25] Josselyn Andrea Garcia Quijano, *Workplace Discrimination and Undocumented First-Generation Latinx Immigrants*, UNIV. CHI. ADVOCATES' FORUM (2020) (available at: https://crownschool.uchicago.edu/student-life/advocates-forum/workplace-discrimination-and-undocumented-first-generation-latinx).

[26] *See* Byron v. Avant Healthcare Pros., LLC, No. 6:23-cv-1645-JSS-LHP, 2024 U.S. Dist. LEXIS 65616 (M.D. Fla. Apr. 10, 2024) (discussing immigrant workers facing requirements to pay contractual damages on early termination of employment); Geoffrey A. Mort, *The Courts and Contracts: Losing Patience with Unconscionable Agreements*, N.Y. STATE BAR ASS'N (May 19, 2022), https://nysba.org/the-courts-and-contracts-losing-patience-with-unconscionable-agreements.

when considering the history of programs such as the Bracero Program,[27] which, despite providing opportunities for legal work, also exposed laborers to significant risks and abuses.[28] The struggles faced by immigrant workers in the past and present underscore the need for greater protections and support for this essential part of the workforce.

This Note delves into the legal shortcomings of the doctrine of unconscionability and its impact on the exploitation of Latin American immigrant workers. This Note also sheds light on forced arbitration agreements as an obstacle to legal recourse, particularly in cases where power dynamics between employers and employees are severely disproportionate. Part II examines the social and economic challenges of domestic workers in the United States, as well as contract formation and unconscionability. Subsequently, Part III addresses the contribution of contract law on the exploitation of Black and Brown labor. This section also explores relevant cases illustrating the implications of arbitration agreements. Lastly, Part IV introduces the proposal, divided into three sections: (1) the regulation of arbitration agreements, (2) recognizing unconscionability as a tort, and (3) advocating for judicial accountability.

I. BACKGROUND

A. The Social & Economic Challenges of Domestic Workers in the United States

Today, there are 2.2 million domestic workers in the United States, 52.4% of whom are Black, Hispanic, Asian American, and Pacific Islander women.[29] However, the Economic Policy Institute estimates that the number of domestic workers may actually be much higher than believed since a substantial portion of domestic workers are paid informally, discouraging them from reporting these jobs, and many are undocumented immigrants, leading to their underrepresentation in such surveys.[30] Additionally, "[d]omestic workers are three times as likely to be in poverty and almost

[27] The Bracero Programs was a "series of diplomatic accords between Mexico and the United States [that] permitted millions of Mexican men to work legally in the United States on short-term labor contracts." *A Latinx Resource Guide: Civil Rights Cases and Events in the United States: 1942: Bracero Program,* LIB. CONG., https://guides.loc.gov/latinx-civil-rights/bracero-program (last visited Apr. 30, 2024).

[28] Francisco Guajardo, Stephanie Alvarez, Miguel Guajardo, Samuel García Jr., José Angel Guajardo, *Braceros, Mexicans, Americans, and Schools: (Re)imagining Teaching and Learning in Mexican America*, 23 RIO BRAVO: J. BORDERLANDS 9, 15-19 (2014).

[29] JULIA WOLFE, JORI KANDRA, LORA ENGDAHL & HEIDI SHIERHOLZ, ECON. POL'Y INST., DOMESTIC WORKERS CHARTBOOK (2020) (available at: https://files.epi.org/pdf/194214.pdf).

[30] *Id.*

three times as likely to lack enough income to make ends meet."[31] Domestic work encompasses various duties performed in private households, including child-rearing, cleaning, cooking, laundry, ironing, and any household-related errands.[32] This sector of immigrant domestic workers is one of the most vulnerable in the United States due to the absence of adequate social and legal protections concerning working conditions, resulting in issues including labor law violations, low wages, and unfavorable terms of employment.[33]

Such abusive practices have persisted due to the historical exclusion of domestic workers in the United States from protective legislation, such as: (1) the 1935 Social Security Act, granting workers the right to a pension and unemployment insurance;[34] (2) the 1935 National Labor Relations Act, guaranteeing the right of employees to organize into trade unions and bargain collectively;[35] and (3) the 1938 Fair Labor Standards Act ("FLSA"), providing workers with a minimum wage, forty-hour maximum work weeks, and overtime pay.[36] For many years, domestic workers were deprived of these fundamental protections; it was not until 1974 that Congress finally amended the FLSA to extend its protections to domestic workers.[37] However, this amendment excluded live-in domestic workers, leaving them without legal protections such as a guaranteed minimum wage and overtime pay.[38] In 2016, Congress proposed another amendment to the FLSA to prevent wage theft and increase employer liability in lawsuits concerning stolen wages.[39] Regrettably, the Wage Theft Prevention and Wage Recovery Act never advanced beyond the committee stage.[40] Consequently:

> Low-wage and time-intensive reproductive work is disproportionately performed by women of color and enabled by legal, political, and economic exclusions that have prevented people of color from organizing and competing for better paying jobs. The legacy of these exclusions helps to

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[31] *Id.* at 29.

[32] *Domestic Worker Definition*, U.S. IMMIGR., https://www.usimmigration.org/glossary/domestic-worker (last visited Mar. 25, 2024).

- [33] *Who Are Domestic Workers*, INT'L LAB. ORG., https://www.ilo.org/global/topics/domestic-workers/who/lang—en/index.htm (last visited Mar. 22, 2024); *Domestic Workers*, SOC. PROT. HUM. RTS., https://socialprotection-humanrights.org/key-issues/topical-issues/domestic-workers (last visited Mar. 25, 2024).

[34] 42 U.S.C. § 7.

[35] 29 U.S.C. §§ 151-169.

[36] Elaine Zundl & Yana van der Meulen Rodgers, *The Future of Work for Domestic Workers in the United States: Innovations in Technology, Organizing, and Laws*, 1, 3 (Rutgers U. Ctr. for Women & Work, Working Paper No. 2021-3, 2021).

[37] *Id.* at 1, 3; 29 U.S.C. § 203.

[38] Zundl & Rodgers, *supra* note 36, at 3-4.

[39] 29 U.S.C. § 203; Zundl & Rodgers, *supra* note 36, at 4.

[40] 42 U.S.C. § 7; 29 U.S.C. §§ 151-169; Zundl & Rodgers, *supra* note 36, at 4.

> explain why migrant women of color make up a substantial proportion of workers in these jobs.[41]

Domestic workers are also "disproportionately exposed to violence and harassment. The vulnerabilities experienced within the sector are also compounded by the fact that the sector often encompasses disadvantaged groups, including women, migrants, and children."[42] Fainess, a domestic worker from Malawi, is one of these vulnerable workers.[43] Fainess was brought from Malawi to the United States by her employers with the promise of a better life.[44] She worked for Jane Kambalame, an American diplomat stationed in Malawi, and later relocated to Silver Spring, Maryland with the Kambalame family.[45] She left behind her country, her mother, and everything she knew to seek a better quality of life in the United States.[46] According to Fainess, the Kambalames guaranteed her a better job, education, and a chance to travel and see the world.[47] However, to work for the family, she was pressured to hastily sign an employment contract despite her inability to communicate or understand English at the time.[48] "She gave me a contract and travel documents and rushed me to sign them even though I could not speak or understand English at the time."[49] Fainess recounted her experience as one of the many domestic workers documented by the American Civil Liberties Union ("ACLU") in an interview, revealing the inhumane conditions under which she was forced to live and work.[50] The interview, a collaboration between the ACLU and the Global Human Rights Clinic, aimed to shed light on the U.S. government's failure to protect the rights of domestic workers.[51] One of the ways the Kambalames exploited Fainess was through her wages.[52] At the time, Maryland mandated a minimum wage of $12.20/hour, and employees working over forty hours a

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[41] Zundl & Rodgers, *supra* note 36, at 5.

[42] *Domestic Workers*, *supra* note 33.

[43] Eva Lopez & Leila Rafei, *Behind Closed Doors: The Traumas of Domestic Work in the U.S.*, AM. C.L. UNION (Mar. 15, 2021), https://www.aclu.org/news/immigrants-rights/behind-closed-doors-the-traumas-of-domestic-work-in-the-u-s.

[44] *Id.*

[45] *Id.*; Zoe Tabary, *Malawian Housemaid Wins U.S. Human Trafficking Case After Three Years 'In Prison'*, REUTERS (Nov. 28, 2016, 12:02 PM), https://www.reuters.com/article/us-trafficking-usa-malawi/malawian-housemaid-wins-u-s-human-trafficking-case-after-three-years-in-prison-idUSKBN13N1SW.

[46] *Fainess Lipenga*, HUM. TRAFFICKING LEGAL CTR., https://htlegalcenter.org/our-impact/success-stories/fainess-lipenga (last visited Mar. 10, 2024); Lopez & Rafei, *supra* note 43.

[47] Lopez & Rafei, *supra* note 43.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

week (eight hours a day) were entitled to overtime pay for each additional hour worked.[53] However, upon her arrival to the United States, Fainess was forced to work sixteen-hour days for a meager forty cents per hour.[54] Fainess managed the domestic labor in the Kambalame home (the cooking, cleaning, laundry, and child-rearing) but was relegated to sleep on the basement floor and denied basic necessities like soap.[55] "I was refused medical care when I was sick. The only food I could eat [was] leftover scraps. Many times, I had to watch the family eat while I was starving and malnourished," Fainess told the ACLU.[56] Furthermore, she was denied phone access and could not communicate with her family, who were located abroad, for three years.[57]

Not only was Fainess deprived of necessities and exploited for labor, she was also sexually assaulted by a close family friend of the Kambalame family.[58] Fainess could not receive any help from the authorities regarding the assault because she "did not speak English [at the time] and did not know what to do."[59] When she attempted to speak with her employer, she was met with a dismissive attitude.[60] The Kambalame family accused Fainess of being unappreciative and reminded her that, without the family, she would still be living in her "poor home village," insinuating that she should be grateful to her traffickers for bringing her to the United States, despite the abuse she endured as a result.[61] Her employer frequently asserted, "I can do anything I want, I'm a diplomat, I have immunity."[62] Eventually, Fainess managed to escape when she found her passport and fled, leaving behind everything she had been promised.[63]

Remarkably, Fainess refused to let her traffickers assassinate her survivor's spirit; she is now a leader and activist.[64] She is an active member of the National Survivor Network and holds a position on the board of the Survivor Alliance.[65] Fainess has delivered speeches to Congress and at

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[53] *Labor and Employment Law Overview: Maryland*, BRIGHTMINE, https://hrcenter.us.brightmine.com/employment-law-guide/labor-and-employment-law-overview-maryland/229 (last visited Mar. 10, 2024).

[54] Lopez & Rafei, *supra* note 43.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* The National Survivor Network is dedicated to aiding survivors of human trafficking by "using an inclusive, evidence-informed, public health, human rights, [and] harm reduction approach." *National*

various conferences, has bravely shared her harrowing experience with the general public.[66] Crucially, she believes "the community should learn how to identify these situations and hold labor traffickers accountable."[67] "Domestic workers deserve fair treatment, decent pay, and benefits. The government, Congress, and our communities [must] ensure survivors always have a seat at the table."[68]

Stories like Fainess's are tragically common in the United States.[69] These stories involve undocumented immigrants initially hired by employers who later coerce them into signing unfair contracts, only to subject them to inhumane working conditions under the threat of legal retaliation.[70] Fainess was just one of the workers interviewed by the ACLU; four others shared comparable stories.[71] Each account involved a contractual agreement, either explicit or implied, with employment agencies.[72] In some cases, both parties fully drafted and signed the contracts.[73] For example, Melanie, a Filipino chicken factory worker, signed an employment contract but was let go shortly after, despite the contract providing a year's worth of work.[74] In other cases, there is no contract at all; Carlos, a Filipino man hired to work as a cook for a country club in Florida was promised an employment contract by his employers but later discovered there was no contract or paycheck.[75] For those workers who had a contract, their employers frequently breached the agreements by paying them below minimum wage, exploiting them for labor beyond their contractual responsibilities, and threatening them with deportation and criminal persecution.[76] In other cases, immigrant workers were deprived of a formal agreement and were never presented with a contract.[77] Both scenarios underline a pervasive issue for immigrant workers,

Survivor Network, NAT'L SURVIVOR NETWORK, https://nationalsurvivornetwork.org (last visited Mar. 18, 2024).

[66] *Historic Capitol Hill Briefing by Experts with Lived Experience*, FREEDOM NETWORK USA, https://freedomnetworkusa.org/2023/10/04/capitol-hill-briefing (last visited May 8, 2024).

[67] Lopez & Rafei, *supra* note 43.

[68] *Id.*

[69] *Id.*; Paul Harris, *Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation*, GUARDIAN (Mar. 28, 2013, 11:03 AM), https://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation#:~:text=%22The%20employer%20knew%20we%20were,to%20send%20immigration%20after%20me; Susan Ferriss & Joe Yerardi, *Wage Theft Hits Immigrants – Hard*, PBS NEWS HOUR (Oct. 14, 2021, 4:28 PM), https://www.pbs.org/newshour/economy/wage-theft-hits-immigrants-hard.

[70] Lopez & Rafei, *supra* note 43.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

who often have no legal recourse: American employers, empowered by the unfair balance of power inherent in these employer-employee relationships, exploit the language barrier and the complicated legal jargon, and instill a fear of deportation and the threat of criminal punishment.[78] The legal system must work to close the existing gaps that enable these employers to utilize the lack of accountability and legal protection to serve their interests. Indeed, Fainess had valid reasons to seek help from the authorities regarding the exploitation she endured.[79] Still, she was under the impression that diplomatic immunity would shield her abuser from legal responsibility.[80]

B. Contract Formation and Unconscionability

The law seeks to mitigate unfair contractual agreements through the doctrine of unconscionability.[81] The doctrine of unconscionability has both substantive and procedural elements.[82] Usually, both elements must be present for a determination of unconscionability.[83] Procedural unconscionability relates to the processes and circumstances of the bargain itself.[84] It occurs when unequal bargaining power induces one party to enter a contract without meaningful choice or involves an unfair surprise.[85] "The age, literacy, and business sophistication of the party claiming unconscionability are frequently taken into consideration, as [well as their] level of education and socioeconomic status."[86]

On the other hand, substantive unconscionability arises when the terms or clauses of the contract are highly unfair and unexpectedly one-sided.[87] The court must objectively analyze all the circumstances while "'considering the reasonable expectations of the average person entering into such an agreement.'"[88] In employer-employee relationships, there is an inherent

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Unconscionability*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/unconscionability (last visited Mar. 10, 2024).

[82] Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 1, 8 (2012).

[83] Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10 (1988) ("A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made[.]"); Mort, *supra* note 26.

[84] Lonegrass, *supra* note 82, at 9.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 10-11.

[88] Camilo A. Rodriguez-Yong, *The Doctrines of Unconscionability and Abusive Clauses: A Common Point Between Civil and Common Law Legal Traditions*, OXFORD U. COMPAR. L. F. (2001) (available at: https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-

unequal bargaining power.[89] To assess the inequalities in bargaining power between the parties, courts must consider the "'relative positions of the parties' and 'the adequacy of the bargaining position.'"[90] These evaluations are crucial in determining if a contract or specific clauses within it are unconscionable, and therefore unenforceable.

This doctrine operates as a defense against the enforcement of contracts that contain unfair and oppressive terms at the time of the contract's formation.[91] If a contract or a portion of the contract is deemed unconscionable, it is considered void.[92] The doctrine of unconscionability was developed to address issues that were not addressed by traditional contract doctrines such as duress, fraud, and mutual mistake.[93] "An unconscionable contract is one that is 'so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.'"[94] In simpler terms, an unconscionable contract is unreasonable, justifying the non-enforcement of its literal terms.[95] The primary purpose of this doctrine is to prevent the drafting and legal enforcement of "one-sided, oppressive or unfair contracts or clauses. It does not seek to punish the mere existence of an unequal bargaining position or a bad bargain by one of the parties."[96] It aims to restrict parties with more bargaining power from exploiting those with less power and who are less likely to be aware of the unfair nature of the agreement.[97] Courts consider the doctrine of unconscionability when determining the validity of contracts.[98] An unconscionable contract or clause is deemed invalid only in cases where it is "'so outrageous and unfair in its wording or its application that it shocks the conscience or offends the sensibilities of the court.'"[99]

between-civil-and-common-law-legal-traditions/#more-121) (quoting Cicle v. Chase Bank USA, 583 F.3d 549, 554 (8th Cir. 2009).

89 Julia Tomassetti, *Power in the Employment Relationship*, ECON. POL'Y INST. (Nov. 19, 2020), https://www.epi.org/unequalpower/publications/the-legal-understanding-and-treatment-of-an-employment-relationship-versus-a-contract.

90 Rodriguez-Yong, *supra* note 88 (quoting John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1573 (D. Kan. 1986)).

91 *Unconscionability*, *supra* note 81.

92 *Id.*

93 Paul Bennett Marrow, *Contractual Unconscionability: Identifying and Understanding Its Potential Elements*, 71 N.Y. STATE BAR ASS'N J. 18, 18 (2000).

94 *Id.* at 18 (quoting Mandel v. Liebman, 303 N.Y. 88, 94 (1951)).

95 *Id.*

96 Rodriguez-Yong, *supra* note 88.

97 Marrow, *supra* note 93.

98 *Id.*

99 Rodriguez-Yong, *supra* note 88 (quoting Adams v. John Deere Co., 774 P.2d 355, 357 (Kan Ct. App. 1989)).

This doctrine is particularly relevant when considering cases like Fainess's. If the terms of her employment contract were unfair, or if the circumstances of her employment constituted an unequal bargain, Fainess could have voided the contract and legally severed ties with her abusive employer without waiting for the right opportunity to escape. However, since the specific contract terms are not available, a concrete analysis of whether the agreement was unconscionable is not possible.[100]

C. The Contribution of Contract Law on the Exploitation of Black and Brown Labor

To comprehend the inherent power imbalances that exist in employer-employee relationships, it is crucial to explore the historical exploitation of marginalized groups in the United States. Labor exploitation of marginalized groups is far from an exclusively-modern phenomenon.[101] It is vital to recognize that the United States has a long-standing history of exploiting disenfranchised groups for cheap labor, a practice that has persisted into the twenty-first century.[102] Native Americans were the first victims of exploitation in the United States.[103] Apart from having their land ownership and indigenous identity forcibly taken from them, between the fourteenth and eighteenth centuries, an estimated two to five million Native Americans were enslaved, trafficked, and sold overseas.[104] One of the motivations for the enslavement of Native Americans by the colonists was to profit from their unpaid labor while "clearing land for colonists to claim."[105]

1. Labor Exploitation of the Black Community

In the seventeenth and eighteenth centuries, colonists turned to trafficking and enslaving African Americans for cheap labor, mainly forcing them to work on tobacco, rice, cotton, and indigo plantations.[106] Moreover, southern landowners prohibited enslaved Black people from learning to read

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[100] Lopez & Rafei, *supra* note 43. It can be assumed, based on the circumstances of her contract signing, that there was an unequal bargain between Fainess and her employer. *See id.* Thus, she could have had legal recourse if she had gone to court to break the contract under this doctrine.

[101] DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, CTR. FOR AM. PROGRESS, SYSTEMATIC INEQUALITY AND ECONOMIC OPPORTUNITY 1-3 (2019).

[102] *Id.* at 1-3.

[103] Gillian Kiley, *Colonial Enslavement of Native Americans Included Those Who Surrendered, Too*, BROWN U. (Feb. 15, 2017), https://www.brown.edu/news/2017-02-15/enslavement.

[104] *Id.*

[105] *Id.*

[106] *Slavery in America*, HISTORY, https://www.history.com/topics/black-history/slavery (last updated Apr. 25, 2024).

and write.[107] Enslaved Black people were also systematically divided based on the type of work they performed—house workers, plantation workers, or skilled artisans—to prevent organized resistance to their enslavers.[108] Regrettably, in the eyes of society and the law, enslaved Black people were not recognized as human beings.[109] To perpetuate their subjugation, the Slave Codes were enacted to regulate the relationship between enslaved people and their enslavers.[110] The Slave Codes made slavery a permanent legal status, wherein the children of enslaved Black people were also condemned to being enslaved.[111] The Slave Codes sought to restrict the social freedom of the Black community, dictating that "[enslaved Black people] could not be away from their [enslaver's] premises without permission; they could not assemble unless a white person was present; they could not own firearms; they could not be taught to read or write, or transmit or possess 'inflammatory' literature."[112] Enslaved Black people endured unspeakable forms of abuse, including whippings, lynchings, beatings, and even death.[113]

2. The Bracero Program and Latino Labor Exploitation

The end of World War II attracted immigrant laborers to the military and to non-farming jobs, causing labor shortages in the agricultural industry.[114] To combat this, the United States and Mexico collaborated to create the Bracero Program[115] to entice farm laborers with the promise of legal work in the United States.[116] The Bracero Program aimed to "prevent

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[107] *Id.*

[108] *Id.*

[109] Reginald Oh, *Black Citizenship, Dehumanization, and the Fourteenth Amendment*, 12 L. FAC. ARTICLES & ESSAYS 157, 163-165 (2021).

[110] *The Civil War Era*, BRITANNICA, https://www.britannica.com/topic/African-American/The-Civil-War-era (last visited Mar. 19, 2024).

[111] *Laws That Bound*, NAT'L PARK SERV.: PARK ETHNOGRAPHY PROGRAM, https://www.nps.gov/ethnography/aah/aaheritage/histContextsE.htm#:~:text=There%20were%20numerous%20restrictions%20to,or%20possess%20%E2%80%9Cinflammatory%E2%80%9D%20literature (last visited Mar. 19, 2024).

[112] *Id.*

[113] *The Civil War Era*, *supra* note 110; EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 18, 409 (2016).

[114] *Mexican Braceros and US Farm Workers*, MIGRATION DIALOGUE: RURAL MIGRATION NEWS (July 10, 2020), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Rural%20Migration%20News%20Blog%20167.pdf.

[115] The Bracero Program was a "series of diplomatic accords between Mexico and the United States [that] permitted millions of Mexican men to work legally in the United States on short-term labor contracts." *A Latinx Resource Guide: Civil Rights Cases and Events in the United States: 1942: Bracero Program*, *supra* note 37.

[116] *Mexican Braceros and US Farm Workers*, *supra* note 114.

the disruption of agricultural production and minimize food price inflation."[117] Ironically, illegal immigration from Mexico surged during this period, contributing to the exploitation of immigrant workers as farmers realized they could avoid paying transportation costs and sidestep the mandated thirty-cents-per-hour minimum wage required under the Bracero Program by hiring undocumented workers.[118] Consequently, Mexican immigrants who illegally entered the United States avoided bribing officials to enter the Bracero recruitment centers.[119] The bribes, which were prevalent in this program,[120] created additional financial barriers for Mexican laborers seeking legal work under the program.[121] For this reason, some laborers may have opted to enter the United States illegally, thus avoiding the bribes and the recruitment centers altogether.[122]

Although the Bracero Program guaranteed a set of worker protections such as "minimum wage, housing, and health care, many workers faced low wages, horrible living and working conditions, and discrimination."[123] Furthermore, working conditions were often harsh and dangerous.[124] Workers in the program, referred to as Braceros, were frequently assigned to physically demanding jobs in agriculture, facing long hours in extreme weather without adequate breaks or safety measures.[125] These conditions were exacerbated by the fact that there was little oversight or enforcement to ensure employers adhered to the program's stipulations.[126]

The Bracero Program had a substantial and permanent effect on Mexican immigration trends.[127] As a result of the program, some Mexicans from rural areas moved closer to the U.S.-Mexico border to improve their chances of being selected by American employers.[128] This migration led to

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[117] Ramón A. Gutiérrez, *Mexican Immigration to the United States*, OXFORD RSCH. ENCYC.: AM. HIST. (July 29, 2019), https://doi.org/10.1093/acrefore/9780199329175.013.146.

[118] *Mexican Braceros and US Farm Workers*, *supra* note 114.

[119] *Id.*

[120] *The Bracero Program*, 9 RURAL MIGRATION NEWS (2003) (available at: https://migration.ucdavis.edu/rmn/more.php?id=10_0_4_0).

[121] *Mexican Braceros and US Farm Workers*, *supra* note 114.

[122] *Id.*

[123] Sheila Blackford, *What Was the Bracero Program?*, MILLER CTR.: FIRST YEAR 2017 (June 28, 2016), http://firstyear2017.org/blog/what-was-the-bracero-program.html#:~:text=The%20Bracero%20program%20established%20many,employment%20opportunities%20than%20at%20home.

[124] Selene Rivera, *A Former Bracero Farmworker Breaks His Silence, Recalling Abuse and Exploitation*, L.A. TIMES (July 18, 2022, 5:00 AM), https://www.latimes.com/california/story/2022-07-18/former-bracero-farmworker-breaks-silence.

[125] *Id.*

[126] Blackford, *supra* note 123.

[127] Robert Longley, *The Bracero Program: When the U.S. Looked to Mexico for Labor*, THOUGHTCO., https://www.thoughtco.com/the-bracero-program-4175798 (last updated May 9, 2021).

[128] *Mexican Braceros and US Farm Workers*, *supra* note 114.

the emergence of large Mexican populations in those border areas.[129] This movement persisted beyond the Bracero Program's termination in 1964 as people continued to move north of the U.S-Mexico border, enticed by higher-paying job opportunities from U.S. employers.[130] This enduring pattern is evident today; more than one-hundred thousand people cross the San Diego-Tijuana border daily to go to work.[131] Living along the U.S.-Mexico border has remained a customary practice for many Mexicans seeking better employment and an improved standard of living via employment in the United States.[132]

After the end of the Bracero Program, research highlighted "the gaps between program promises and realities that allowed U.S. employers to take advantage of Mexican Braceros."[133] During the time of the Bracero Program, farmers ceased paying unauthorized workers for transportation costs and ignored the minimum wage stipulated in the contracts.[134] According to the Center for Public Integrity, "[g]arment manufacturing, with a 42% immigrant workforce, has the second highest number of per capita wage theft cases."[135] Although the Bracero Program primarily focused on the agricultural sector rather than the garment industry, wage theft has continued to grow ever since in a variety of industries.[136] Despite the Bracero Program being regulated by the U.S. government and ensuring minimum wage and legal status for its workers, farmers found ways to sidestep the legal protections and exploit immigrant labor.[137]

This historical background is crucial for comprehending why Mexican immigration is heavily concentrated to the United States, and why the United States is often targeted as a destination for Latino immigrants seeking an

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[129] *Id.*

[130] Pedro Paulo Orraca Romano, *Immigrants and Cross-Border Workers in the U.S.-Mexico Border Region*, 27 FRONTERA NORTE 5 (2015).

[131] Anna Wiernicki, *Tens of Thousands of U.S. Residents Cross the Border Every Day for Work*, BORDER REPORT, https://www.borderreport.com/hot-topics/border-report-tour/tens-of-thousands-of-u-s-residents-cross-the-border-every-day-for-work (last updated Sept. 24, 2019, 8:14 AM).

[132] *Id.*

[133] *Mexican Braceros and US Farm Workers*, *supra* note 114.

[134] *Id.* at 2.

[135] Ferriss & Yerardi, *supra* note 69.

[136] *Id.*:

> Multiple UCLA Labor Center reports have long warned of a "crisis" in wage theft that strips money from California's immigrant families. A 2010 report estimated that low-wage, mostly immigrant workers in L.A. County lost an average of more than $2,000 annually, adding up to more than $26 million per week.

Id.

[137] OREGON ADVOC. COMM'NS OFFICE, BRACERO PROGRAM LEGISLATIVE REPORT AND RECOMMENDATIONS 8 (2023).

improved quality of life. Ultimately, understanding the historical context of Latin American labor exploitation in the United States is fundamental for explaining and addressing present-day labor issues. By recognizing the deep-rooted nature of these issues, we can work towards comprehensive reforms that bring about lasting change.

II. PROBLEM

A. Imbalance of Power and Involuntary Arbitration Agreements

The employer-employee power imbalance renders immigrant employees highly susceptible to workplace abuse.[138] Marginalized groups often lack legal recourse for these abuses due to shortcomings in the doctrine of unconscionability in dealing with the exploitation of immigrant workers through unfair contract terms and involuntary arbitration agreements.[139] As a result of socioeconomic issues, immigrant workers are often afraid to report abuses, allowing them to go unnoticed and unaddressed by the legal system.[140] To address this, the legal system should offer straightforward solutions by rectifying the deficiencies of the doctrine of unconscionability and regulating the use of involuntary arbitration agreements.

One of the ways that the power imbalance between immigrant workers and employers becomes clear is in education levels.[141] Immigrant workers, especially those who are undocumented, typically have a significantly lower education level compared to their American employers, who are more experienced and well-established in the labor market.[142] Many immigrant workers may also believe that they have no legal rights as a result of their immigration status. [143] Thus, fearing retaliation (via things like deportation, dismissal, or harassment) and understanding this disparity in education and power with their employer, immigrant workers may find it difficult to advocate for themselves to be treated fairly and avoid exploitation.[144]

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[138] GRACE MENG, HUM. RTS. WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012).

[139] Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination*, ECON. POL'Y INST. (Jan. 19, 2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship.

[140] MENG, *supra* note 138.

[141] *See* Yang & Liu, *supra* note 139.

[142] Press Release, Ctr. for Am. Progress, Millions of Undocumented Immigrants are Essential to America's Recovery, New Report Shows (Dec. 2, 2020), https://www.americanprogress.org/press/release-millions-undocumented-immigrants-essential-americas-recovery-new-report-shows [hereinafter Press Release].

[143] Yang & Liu, *supra* note 139.

[144] *Id.*

Employers occupy positions of authority and often possess sophisticated knowledge and extensive experience in the fields they work in.[145] In contrast, immigrant workers possess limited bargaining power in employment contracts due to their lack of knowledge and experience, their immigration status, and their pressing need for a job to support their family.[146] This power imbalance can lead to challenges in negotiating fair wages and working conditions, making immigrant workers more vulnerable to accepting unfair terms and clauses that disproportionately benefit the employer.[147]

According to a report by the Center for American Progress, undocumented workers constitute 3.2 percent of the U.S. population but 4.4 percent of the U.S. workforce.[148] This means that there are around seven million undocumented immigrants working in the United States today.[149] Moreover, of these seven million, approximately 162,000 are engaged in domestic work, such as housekeeping.[150] Most undocumented laborers work in construction, food services, farming, landscaping, and housekeeping.[151] These statistics demonstrate the substantial presence of undocumented workers in the U.S. workforce, indicating that the power imbalance between employers and immigrant workers could become a widespread issue if not properly mitigated.

Contracts involving immigrant workers often present significant challenges (i.e., negotiating wages) due to the aforementioned disparities in bargaining power.[152] For example, suppose the employee had no real opportunity to negotiate or was coerced into signing their employment contract in order to secure an income. A court may void the entire contract

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[145] Press Release, *supra* note 142.

[146] Shannon Schumacher, Liz Hamel, Samantha Artiga, Drishti Pillai, Ashley Kirzinger, Audrey Kearney, Marley Presiado, Ana Gonzalez-Barrera & Mollyann Brodie, *Understanding the U.S. Immigrant Experience: The 2023 KFF/LA Times Survey of Immigrants*, KAISER FAM. FOUND. (Sep. 17, 2023), https://www.kff.org/report-section/understanding-the-u-s-immigrant-experience-the-2023-kff-la-times-survey-of-immigrants-findings/#:~:text=The%20predominant%20reasons%20immigrants%20say,escaping%20unsafe%20or%20violent%20conditions (discussing that "[t]he predominant reasons immigrants say they came to the U.S. are for better work and educational opportunities, a better future for their children, and more rights and freedoms.").

[147] DANIEL COSTA, ECON. POL'Y INST., EMPLOYERS INCREASE THEIR PROFITS AND PUT DOWNWARD PRESSURE ON WAGES AND LABOR STANDARDS BY EXPLOITING MIGRANT WORKERS (2019); RYAN NUNN, JIMMY O'DONNELL & JAY SHAMBAUGH, HAMILTON PROJECT, A DOZEN FACTS ABOUT IMMIGRATION (2018).

[148] Press Release, *supra* note 142.

[149] *Id.*

[150] NICOLE PRCHAL SVAJLENKA, CTR. FOR AM. PROGRESS, UNDOCUMENTED IMMIGRANTS IN THE CARE ECONOMY (2021).

[151] Press Release, *supra* note 142.

[152] *See* COSTA, *supra* note 147.

or only the unconscionable provision.[153] It is important to acknowledge that immigrant workers are frequently in highly stressful and precarious economic circumstances, leading them to make desperate choices regarding employment.[154] Therefore, in the context of contracts, they can be more vulnerable to accepting unfair terms and clauses that disproportionately benefit their employer.[155] In these unbalanced employee-employer relationships, a certain level of procedural unconscionability may be highly possible and difficult to avoid.

B. Arbitration

Arbitration is an alternative dispute resolution method in which the parties involved agree to resolve their case outside of court with the assistance of an arbitrator.[156] Employers often prefer arbitration due to its significantly lower cost in comparison to traditional litigation.[157] Presently, it is a common practice for employers to present mandatory employment arbitration agreements to their employees, irrespective of the employee's immigration status or social standing.[158] These agreements compel vulnerable parties like immigrant workers to adhere to complex dispute resolution terms, providing little to no chance of winning the case.[159] Research indicates "that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts."[160] This is because "employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers."[161]

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153 *Unconscionability*, *supra* note 81.

154 Julia Preston, *Migrants Desperate for Jobs Trapped in Asylum Maze*, MARSHALL PROJECT (Sept. 8, 2023), https://www.themarshallproject.org/2023/09/08/migrants-work-permits-adams-asylum#:~:text=Quickly%20deciphering%20the%20cultural%20mix,chops%20to%20opening%20another%20business. This feature dives into several stories of immigrants and their quest for legal work in the United States, outlining the challenges such as being displaced from shelters, struggling to find housing, turning to unauthorized work. *Id.*

155 Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1040 n.65 (1996) (specifically in the case of "Spanish-only victims of Unfair Bargains", their lack of English language proficiency made them the target of substantive unfairness).

156 *Arbitration*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/arbitration (last visited Mar. 21, 2024).

157 *Id.*

158 ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION (2017).

159 Stephen A. Plass, *Mandatory Arbitration as An Employer's Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity*, 33 CARDOZO L. REV. 195, 198 (2011).

160 COLVIN, *supra* note 158.

161 *Id.*

Arbitration agreements are also often hidden in contracts and signed without the employee's full knowledge; "because arbitration clauses often appear as 'fine print' in lengthy standard contracts, people often sign arbitration agreements without realizing that they are doing so."[162] Mandatory arbitration requires the employee to relinquish their statutory rights as a condition of employment.[163] Thus, because substantive unconscionability focuses on the terms of the contract,[164] these arbitration clauses being hidden in the "fine print" of employment contracts means that there is very little legal recourse for employees to avoid arbitration.[165] This is significant, because employees subject to mandatory arbitration lose the right to sue for employment law violations like minimum wage, overtime, breaks, discrimination, and family leave.[166] Employers win significantly more cases with repeat arbitrators, gaining an advantage over employees.[167] On the other hand, employees are forced to agree to these agreements and the disadvantages of giving up their rights to court litigation in order to work and earn much-needed wages.[168]

Further evidencing the inequalities of arbitration agreements, the arbitration process occurs in a setting of the employer's choosing, and, since the employer's attorney typically drafts the contract, the arbitration clause heavily favors the employer, again disadvantaging the employee.[169] The language in arbitration agreements is also problematic as it is often unclear about the gravity of the employee's acceptance of such terms.[170] Further, in the United States, the number of people unable to read English exceeds the number of people who cannot speak it.[171] Specifically, it is estimated that half of all Latino/a adults in the United States are "functionally illiterate in English."[172] Given these language challenges, immigrant workers can easily

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[162] Katie Shonk, *What is an Arbitration Agreement?*, HARV. DAILY BLOG (Feb. 29, 2024), https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement.

[163] COLVIN, *supra* note 158, at 15.

[164] Jackson Lucky, *Analyzing Unconscionability in Arbitration Agreements*, J. CONSUMER ATT'YS ASS'NS FOR S. CAL. 1, 4 (2022).

[165] *See generally* Christine Sterkel, *The Hidden Dangers of Forced Arbitration: A Closer Look*, ED WHITE L. (May 22, 2023), https://www.edwhitelaw.com/blog/the-hidden-dangers-of-forced-arbitration-a-closer-look.

[166] KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC (2015).

[167] *Id.*

[168] Plass, *supra* note 159.

[169] *Id.*

[170] *Id.* at 221.

[171] Bender, *supra* note 155, at 1033.

[172] *Id.* (citing NAT'L COUNCIL LA RAZA, THE EDUCATION OF HISPANICS: STATUS AND IMPLICATIONS 36 (1986)).

fall victim to predatory arbitration agreements.[173] Their inability to understand the arbitration agreements could potentially result in an element of substantive unconscionability.[174]

Despite the evident imbalances in the relationship between the employer and the immigrant employee, "the Supreme Court's pro-arbitration declarations are exceedingly 'irrationally' and 'unconscionably' biased against ordinary consumers and employees."[175] Even more disquieting, in the wake of the Court's assertedly unconscionably-biased arbitration rulings, rancorous judicial discourse and rulings among state and federal courts persist over whether the doctrine of unconscionability may defeat motions to compel arbitration.[176]

The doctrine of unconscionability, however, operates reactively—it addresses the aftermath of a bad deal rather than preventing harm.[177] Comprehensive reforms and legal protections are essential to level the playing field and ensure fair treatment and understanding for all parties involved, particularly the vulnerable and marginalized.

C. Arbitration Agreement Cases

1. *Prevot v. Phillips Petroleum Co.*

Prevot v. Phillips Petroleum Co. is a stark example of how immigrant workers can be disadvantaged through contractual and arbitration agreements.[178] In *Prevot*, six immigrant plaintiffs filed a personal injury

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[173] United States EEOC v. Vineyards, No. CV 22-6039 PA (RAOx), 2023 U.S. Dist. LEXIS 48985 (C.D. Cal. Mar. 17, 2023) (plaintiffs were native Spanish speakers and had a limited understanding of English, signed the contract and claimed in court that defendants did not provide them with a written Spanish version of the documents. The court ruled in favor of the plaintiffs, reasoning that one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and "'cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him.'" (quoting Randas v. YMCA of Metropolitan Los Angeles, 17 Cal. App. 4th 158, 163 (1993))); Vallerivas v. Staffmark Inv. LLC, 2023 Cal. Super. LEXIS 95177 (plaintiff did not understand the English arbitration agreement he signed, and no translations were offered by the defendant. Ultimately the court ruled that employee lacked knowledge as to the terms of the agreement and voided the contract for lack of mutual assent).

[174] Plass, *supra* note 159, at 221.

[175] Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?–Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143 (quoting David Korn & David Rosenberg, *Concepcion's Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1151 (2013)); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[176] Rice, *supra* note 175, at 150.

[177] *Unconscionability*, *supra* note 81. Unconscionability serves as a defense to the enforcement of a contract. This means that it addresses harm after it has occurred, rather than preventing potential harm beforehand. *See id.*

[178] *See* Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Tex. 2001).

action against Phillips Petroleum Company.[179] The personal injury claim alleged that an explosion at the Phillips facility injured the workers.[180] Phillips was a third-party beneficiary[181] to the arbitration agreements between the plaintiffs and their employer, BMI.[182] The plaintiffs and BMI signed dispute resolution agreements stipulating that any disputes arising from the agreement would be settled through mediation and binding arbitration.[183] However, a significant issue in the case involved the fact that these contracts were drafted in English, a language that the plaintiffs could neither speak nor read.[184] The plaintiffs testified that the documents were not translated to Spanish and that they were unaware of the nature of the agreement they were signing.[185] The plaintiffs also alleged that the contract was procedurally unconscionable given these facts.[186] The court recognized clear evidence of procedural unconscionability due to the language barrier.[187] The lack of a translation and the resulting lack of comprehension by the immigrant workers rendered the arbitration agreements procedurally unconscionable.[188]

The court's ruling partially denied Phillips Petroleum Company's Motion to Compel Arbitration, acknowledging the unfairness inherent in the contractual terms.[189] This case highlights the need for better protections and awareness of the rights of immigrant workers in such situations. *Prevot* also illustrates how courts manage cases involving contractual unconscionability.[190] The standard for establishing unconscionability can be quite high because, "[a]bsent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract, unless he was prevented from doing so by trick or artifice."[191] However, what sets the *Prevot* case apart from this standard is that the plaintiffs did not speak English and were denied access to a translator.[192] This language barrier prevents

[179] *Id.* at 937.

[180] *Id.*

[181] A third-party beneficiary is an entity that is not initially a party to the contract, but who can receive benefits from the contract's performance. *See Third-Party Beneficiary*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/third-party_beneficiary (last visited Mar. 19, 2024).

[182] *Prevot*, 133 F. Supp 2d at 937.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 939.

[186] *Id.* at 938.

[187] *Id.* at 939-40.

[188] *Id.* at 939.

[189] *Id.* at 940.

[190] *Id.* at 937-39 (this case follows the procedural reasoning and framework courts use when evaluating unconscionable contracts, especially those involving arbitration agreements).

[191] Vera v. N. Star Dodge Sales, Inc., 989 S.W.2d 13, 17 (Tex. App. 1998) (quoting Associated Employers Lloyds v. Howard, 156 Tex. 277, 281 (1956)).

[192] *Prevot*, 133 F. Supp 2d at 938.

immigrants from understanding contractual terms and contributes to unconscionability, especially when contracts are laden with legal jargon.[193]

2. *Castillo v. CleanNet USA, Inc.*

Another leading case in the area of unconscionability is *Castillo v. CleanNet USA, Inc.*, in which Luis Castillo, the plaintiff who faced language and educational barriers, entered into a franchise agreement with D&G Enterprises and CleanNet USA.[194] The franchise agreement contained an arbitration clause indicating that disputes must be settled "by the American Arbitration Association ("AAA") at its office closest in proximity to the Franchisor's office[.]"[195] Interestingly, the agreement also contained a provision, written in English, that required Castillo to acknowledge that the agreement was in English.[196] The clause stated that even if English was not the franchisee's native language, the franchisee confirmed that they had the opportunity to translate the contract and that its contents were explained and understood as written.[197] This provision posed a challenge for Castillo, whose primary language was Spanish.[198] Despite the language barrier and his limited understanding of the complex terms in the contract, he proceeded with the agreement.[199] Castillo had never owned a business, and prior to purchasing a CleanNet franchise, he worked as a janitor for over ten years.[200] He was in a desperate job search after being laid off, and the promise of potential earnings from the franchise added pressure to his decision-making process.[201] He was also denied a Spanish translation of the contract and relied upon the defendant's franchise representative to translate the contract.[202] The defendants in this case entered a contract with knowledge of Castillo's language deficiencies.[203]

Castillo asserted claims under "the federal Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1959, and the California Trafficking Victims Protection Act ("CTVPA"), Cal. Civ. Code § 52.5."[204] In response, defendants filed a Motion to Compel Arbitration and

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193 Lauren E. Miller, *Breaking the Language Barrier: The Failure of the Objective Theory to Promote Fairness In Language-Barrier Contracting*, 43 IND. L. REV. 175, 187-192 (2009).

194 Castillo v. CleanNet USA, Inc., 358 F. Supp. 3d 912 (N.D. Cal. 2018).

195 *Id.* at 919.

196 *Id.* at 920.

197 *Id.*

198 *Id.* at 921.

199 *Id.* at 928.

200 *Id.* at 920.

201 *Id.*

202 *Id.* at 928.

203 *Id.* at 921-26.

204 *Id.* at 918-19.

Stay the Proceeding citing the arbitration clause in the franchise agreement between Castillo and D&G.[205] According to Castillo, he used a significant portion of his life savings to pay the $8,500 down payment on the same day he signed the contract, as well as a promissory note for $5,000.[206] Additionally, Castillo's annual income was barely sufficient to cover his family's basic needs, leaving him unable to save money.[207] Thus, being required to mediate his case in arbitration would impose a significant financial burden and exacerbate his financial difficulties.[208] This financial disadvantage may have contributed to his decision to sign a contract which contained unfair terms. Compelling arbitration would worsen the financial harm caused by D&G but voiding the contract on the grounds of unconscionability would still not fully remedy the financial harm caused to Castillo.[209]

The court reasoned that the arbitration agreement was presented to Castillo in a manner that was procedurally unconscionable.[210] The contract was a standard form contract, drafted solely by the franchisor, essentially leaving Castillo with no bargaining power.[211] The power imbalance meant that Castillo had no meaningful opportunity to negotiate the terms of the agreement, creating a take-it-or-leave-it situation.[212] The court also found the contract to be substantively unconscionable for the following reasons: (1) the agreement contained a one-sided limitation on damages, thus favoring the franchisor;[213] and (2) the agreement imposed substantial costs on Castillo that could potentially deter him from pursuing claims, such as splitting arbitration fees.[214] This case exemplifies how businesses use complex contractual terms and language barriers to their advantage, potentially exploiting individuals like Castillo. The lack of access to translation assistance and external pressures to secure employment could lead individuals to agree to terms they do not fully comprehend, further exacerbating inequalities and hindering fair participation in commercial transactions, especially for communities with limited proficiency in English, such as Latin American immigrants.[215]

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[205] *Id.*

[206] *Id.* at 922.

[207] *Id.*

[208] *Id.*

[209] This highlights the importance of proposed solutions such as tort-based remedies, judicial accountability and statutory intervention because the doctrine of unconscionability, being a defensive mechanism rather than an affirmative claim, does not currently allow for a restitutionary approach.

[210] *Castillo*, 358 F. Supp. 3d at 946.

[211] *Id.* at 922-23.

[212] *Id.* at 946.

[213] *Id.* at 944.

[214] *Id.* at 942-44.

[215] *See generally id.*

Ultimately, both *Prevot* and *Castillo* serve as examples of the systematic issues surrounding unconscionability, particularly when involving immigrant workers and consumers.[216] For instance, each case highlights how immigrant workers, who lack English proficiency and legal acumen, can be vulnerable to unfair contract terms.[217] In *Prevot*, the language barrier and lack of translation rendered the arbitration agreements procedurally unconscionable, demonstrating the court's acknowledgment of the inherent unfairness in such contracts.[218] In *Castillo*, complex contractual terms, as well language and educational barriers, were manipulated to exploit individuals like Castillo who may already be in a precarious situation.[219] These cases underscore the urgent need for greater legal protections and comprehensive review of business practices that exploit language and knowledge disparities.

III. PROPOSAL

A. Regulation of Arbitration Agreements

Due to the unbalanced power dynamics of the employer-employee relationship discussed previously,[220] it is crucial for the legislature to draft a law prohibiting involuntary arbitration agreements as a condition of employment. A great example of this can be seen in how the Ninth Circuit Court of Appeals, in *Chamber of Commerce of the United States of America v. Bonta*, upheld "portions of California Labor Code section 432.6, which prohibits employers from making arbitration agreements a condition of employment and imposes significant criminal and civil sanctions for violations."[221] The decision affirmed that signed arbitration agreements remained enforceable, but that individuals who refused to sign the agreement may still seek remedies against their employer.[222] Furthermore, the court held that employers who violate the statute may face criminal and civil

[216] *See generally id.*; Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937 (S.D. Tex. 2001).

[217] *See generally Castillo*, 358 F. Supp. 3d.; *Prevot*, 133 F. Supp 2d.

[218] *Prevot*, 133 F. Supp 2d.

[219] *See generally id.*

[220] *See infra* Part IV(A).

[221] Jack S. Sholkoff & Spencer C. Skeen, *Ninth Circuit Upholds Portions of California Law Prohibiting Use of Mandatory Arbitration Agreements*, OGLETREE DEAKINS (Sept. 17, 2021), https://ogletree.com/insights-resources/blog-posts/ninth-circuit-upholds-portions-of-california-law-prohibiting-use-of-mandatory-arbitration-agreements; *See also* Chamber of Com. of the United States of Am. v. Bonta, 62 F.4th 473 (9th Cir. 2023).

[222] *Bonta*, 62 F.4th at 473; Sholkoff & Skeen, *supra* note 221.

sanctions.[223] However, "[s]ection 432.6 may not be used by a signatory to an arbitration agreement as a way to escape the agreement."[224]

The Ninth Circuit's decision explains how a state legislature can draft a law to address involuntary arbitration agreements which disproportionately favor employers.[225] The law should specify that the prohibition applies when the power imbalance between the parties is so disproportionate that the employee had no meaningful choice or understanding of the bargain and the terms of the agreement. While it is important to preserve the freedom to contract, specifying that the power imbalance must be disproportionate grants the employee the freedom to litigate employment violations and abuses in court with an impartial judge, not a biased arbitrator. The legislatures and courts must proactively work to decrease the exploitation and abuse that can arise from unfair contract terms and the absence of meaningful choice through legal measures, such as prohibiting involuntary arbitration agreements in certain contexts. This would help ensure a fair and just employment landscape, especially for vulnerable immigrant workers.

To address the deficiencies in the legal system, various state legislatures and the federal legislature have already enacted statutes that prevent "powerful employers from violating unsophisticated employees' interests."[226] "States have also enacted statutes which bar powerful and sophisticated business and financial entities from violating the rights of legally unsophisticated consumers."[227] These statutes demonstrate a concerted effort to close the gaps in the doctrine of unconscionability and rectify the issues within contracts that give rise to abusive and exploitative relationships between employees and their employers.[228] By enforcing legislation that protects the rights of vulnerable individuals, especially within the context of employment agreements, the legal system can significantly contribute to fostering fairness and equality. This proactive approach is essential for creating a more balanced and just playing field for all parties in contractual relationships, particularly addressing the imbalances of power that often exist between employers and employees.

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[223] Sholkoff & Skeen, *supra* note 221.

[224] *Id.*

[225] *See Bonta*, 62 F.4th at 473.

[226] Rice, *supra* note 175, at 146; *See, e.g.*, IDAHO CODE ANN. § 48-603C(2)(a) (West 1990); KAN. STAT. ANN. § 50-627(b)(1) (West 1998); W. VA. CODE § 46B-8-2(c)(5) (1993).

[227] Rice, *supra* note 175, at 146-47; *See* IDAHO CODE ANN. § 48-603C(2)(a); KAN. STAT. ANN. § 50-627(b)(1); W. VA. CODE § 46B-8-2(c)(5).

[228] *See, e.g.*, IDAHO CODE ANN. § 48-603C(2)(a); KAN. STAT. ANN. § 50-627(b)(1); W. VA. CODE § 46B-8-2(c)(5).

B. Unconscionability Recognized as a Tort

Unconscionability is invoked as a defensive measure rather than an affirmative remedy.[229] In fact, most courts adhere to the majority view that fails to provide an adequate remedy to parties harmed by unconscionable contract terms.[230] This view holds that the doctrine of unconscionability "'is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery.'"[231] This view "defies logic, violates basic principles of fairness and moral responsibility, promotes inefficiency, and fails to adequately deter contractual overreach."[232] To resolve this problem, some legal scholars have argued that unconscionability should parallel a tort-based claim in remedies provided which would promote "'consumer justice.'"[233] This perspective is based on the idea that unconscionability involves the potential of collective greater harm, such as the delegitimization of the contract formation process.[234] "'Unconscionable contract formation is an affront to the logic of a legal system that assumes rationality in the contract-formation process and potentially undermines our system of contract enforcement as a whole.'"[235] Without these conditions, there would typically be no legal dispute concerning the terms or circumstances of the agreement. Thus, proponents of the idea to recognize unconscionability as a tort contend that this approach could influence public policy by imposing tort remedies that promote fairness and justice.[236] Particularly, procedural unconscionability would be treated as a tort because it challenges the fundamental principles of contracts, highlighting the need for equal bargaining power in contract law.[237] Recognizing unconscionability as a tort "heightens attention on the social harm that unconscionable contractors cause beyond the damage inflicted upon the other party."[238] Notably, the exploitation suffered by low-wage immigrant employees at the hands of their

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[229] Brady Williams, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CAL. L. REV. 2015, 2026-27 (2019).

[230] *See* Super Glue Corp. v. Avis Rent A Car Sys., Inc., 132 A.D.2d 604 (1987); Williams *supra* note 229, at 2017-18.

[231] Williams, *supra* note 229, at 2017-18 (quoting *Super Glue Corp.*, 132 A.D.2d at 606); *Super Glue Corp*., 132 A.D.2d 604.

[232] Williams, *supra* note 229, at 2027.

[233] Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1034 (2015) (quoting Donald B. King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U. L.J. 97, 124-25 (1979)).

[234] *Id.* at 1034-35.

[235] *Id.* (quoting Paul Bennet Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 15 (2003)).

[236] *Id.*

[237] *Id.* at 1035.

[238] *Id.* at 1035.

employers often remains.[239] Treating procedural unconscionability as a tort "'recognize[s] that overreaching can inflict actual damage on the victim and on society's interest in the contracting process.'"[240] By recognizing this, employees can be provided with substantial remedies, including punitive damages.

If unconscionability was considered a tort, individuals like Fainess could sue their employers for the abuse they endured. In cases where employment contract terms were procedurally unconscionable (as in Fainess's situation, where she could not comprehend the terms due to the language barrier[241]), the immigrant employee could seek compensation for lost wages and punitive damages. Even if the punitive damages were relatively small, the precedent set by such actions could deter employers from exploiting vulnerable employees.[242]

C. Judicial Accountability

One aspect of the doctrine of unconscionability is that it permits a court to enforce the remainder of the contract without the unconscionable clause(s).[243] In such cases, the unconscionable terms are eliminated from the contract, but the employee remains bound by the rest of the agreement.[244] To address this limitation, judges should be more flexible when applying the doctrine of unconscionability to certain cases.[245] The doctrine of unconscionability and the Uniform Commercial Code already grant the court discretion to decide whether the contract should be voided in part or in whole.[246] But, "[r]ather than evoking fear of unconscionability as a rule devoid of principle, judges should embrace unconscionability's flexibility as a necessary counterweight to mindless formalism and rigidity."[247]

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239 STONE & COLVIN, *supra* note 166.

240 Beh, *supra* note 233, at 1035 (quoting Marrow, *supra* note 235, at 16).

241 Lopez & Rafei, *supra* note 43.

242 Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810 (Ct. App. 1981) ("The primary purposes of punitive damages are punishment and deterrence of like conduct by the wrongdoer and others."); Joseph W. Cotchett & Mark C. Molumphy, *Punitive Damages: How Much Is Enough?*, 20 CIV. LITIG. REP. (1998) (available at: https://www.cpmlegal.com/publication-Punitive_Damages_How_Much_Is_Enough).

243 *See* U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 1977). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

244 Lang v. Skytap, Inc., 347 F. Supp. 3d 420 (N.D. Cal. 2018). In this case, unconscionable terms were eliminated from the contract, but the employee remained bound by the rest of the agreement. The court found that there were substantively unconscionable terms in the arbitration agreement, but instead of declaring the entire agreement void, the court simply removed the unconscionable terms and enforced the rest of the agreement. *See generally id.*

245 Beh, *supra* note 233, at 1040.

246 *Id.* at 1022.

247 *Id.* at 1039.

The doctrine of unconscionability was established on the principle that fairness is fundamental to civil behavior and essential for society's proper functioning.[248] Parties entering a contract should have confidence that honesty and fairness are essential parts of the bargain. Hence, judges should regard "unconscionability as a judicial *responsibility*, rather than limiting it to an affirmative defense that must be raised by a party. Judges can and should raise it sua sponte, lest the judiciary become complicit in allowing unconscionable results."[249] This implies that the responsibility to shield vulnerable parties from entering unjust and unfair contracts lies not only with the parties involved, but also with the judge reviewing the contract's terms. For instance, immigrant workers may not be aware of how to void a contract under the doctrine of unconscionability. By placing some responsibility on judges to mention that this defense exists, it shifts the burden to the party causing the harm to prove the contract is not unconscionable, rather than placing the onus on the injured party to demonstrate its unconscionability.

CONCLUSION

Ultimately, unscrupulous contract terms often deceive vulnerable parties into exploitative work.[250] Furthermore, these contracts frequently contain involuntary arbitration clauses, heavily favoring employers and leaving employees with no viable legal recourse.[251] The doctrine of unconscionability enables a court to reject the enforcement of unfair provisions or an entire agreement, aiming to mitigate unjust terms.[252] However, while unconscionability aims to empower vulnerable parties to void unfair contracts, merely canceling an agreement is an insufficient punishment, especially concerning low-wage immigrant workers. These workers may be left without proper compensation for their losses and exposed to further exploitation, highlighting the need for stronger measures, such as penalties for employers who engage in these practices.[253] Moreover,

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[248] *Id.* at 1040.

[249] *Id.* at 1041.

[250] Moreno v. Universal Servs. of Am., 2022 Cal. Super. LEXIS 67016; Crowell v. Browning, 2023 Cal. Super. LEXIS 30925; Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269 (3d Cir. 2004). These cases discuss how unscrupulous contract terms can deceive vulnerable parties into exploitative work situations, especially concerning adhesion contracts which contain terms that are unreasonably favorable to the stronger party.

[251] Plass, *supra* note 159.

[252] U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 1977); Marrow, *supra* note 93, at 19.

[253] Jeffrey M. Haber, *The Doctrine Of Unconscionability and Fraudulent Inducement*, FREIBERGER HABER LLP (Apr. 10, 2023), https://fhnylaw.com/the-doctrine-of-unconscionability-and-fraudulent-inducement/#:~:text=In%20other%20words%2C%20unconscionability%20can%20only%20be,not%20as%20a%20claim%20for%20money%20damages. Since "unconscionability can only be asserted as a defense to the enforcement of a contract and not as a claim for money damages", merely voiding a contract

unconscionability necessitates both procedural and substantive elements, making it challenging to establish.[254] It is essential to offer alternative legal recourse specifically designed to bridge the gaps left by the doctrine of unconscionability. This Note has highlighted the legal deficiencies of the unconscionability doctrine and its implications for the exploitation of immigrant workers. Regulating arbitration agreements, recognizing unconscionability as a tort, and promoting judicial accountability present viable solutions to address the gaps in the legal protection of immigrant workers by providing a more robust framework for protecting vulnerable workers from exploitation and abuse.

or the unfair terms does not remedy the harm caused by the unconscionable contract. *Id*. This leaves parties to an unconscionable contract with uncertainty as to the losses suffered.

[254] Rodriguez-Yong, *supra* note 88 ("With regard to the requirements that must be fulfilled in order to find a clause or contract unconscionable, the case law has made clear that there must be both procedural and substantive unconscionability.")