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Jennifer Nadler
Osgoode Hall Law School

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Unconscionability, Freedom, and The Portrait of a Lady

Jennifer Nadler*

The doctrine of unconscionability allows a court to refuse to enforce a contract because of its unfairness. Although well settled in contract law, the doctrine remains controversial. Critics of the doctrine argue that it is impermissibly paternalistic: it rescues responsible agents from the consequences of their own mistakes.1 Defenders of the doctrine admit its paternalism but insist that the unfairness in cases of unconscionability makes paternalist intervention legitimate.2 Critics say that the doctrine is sentimental3 and wonder if the resort to expressions such as “shocks the conscience” conceals the defenders’ inability to articulate the standard these agreements supposedly transgress.4 Defenders say that the doctrine is intentionally open-ended, allowing for a judge’s sympathetic attention to the complaining party’s circumstances.5

The controversy over unconscionability’s legitimacy and proper interpretation reflects a deeper disagreement about the meaning of freedom.6 More specifically, it reflects a disagreement about whether

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* Jennifer Nadler has a B.A. with high distinction in English and Political Science from the University of Toronto, a J.D. with honours from the University of Toronto, an LL.M. from New York University, where she was a Vanderbilt Scholar, and an S.J.D from the University of Toronto. She teaches Contract Law and Property Law at Osgoode Hall Law School.


3. FRIED, supra note 1, at 105.


5. See West, The Anti-Empathic Turn, supra note 2, at 269. In A&M Produce Co., Justice Wiener wrote that “[u]nconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process.” A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Ct. App. 1982).

6. Philip Bridwell also notices that the controversy about the unconscionability doctrine reflects the philosophical controversy between proponents of a negative understanding of liberty and proponents of a positive understanding of liberty. See Philip Bridwell, Philosophical Dimensions of the Doctrine of Unconscionability, 70 U. CHI. L. REV. 1513, 1514 (2003). However, Bridwell argues that there is no account of positive freedom that will lead to a principled and coherent application of
freedom is best understood as the abstract capacity for choice or as the realization of that capacity in a life that reflects a thought-out scheme of commitments and values. When critics say that unconscionability unravels freely formed agreements, they mean that the agreements were not extracted by duress or fraud. When defenders say that where the doctrine applies, the choice to enter the agreement was not really free, they mean that the choice, though voluntary, fails to reflect the individual’s deliberatively formed and valued ends. This disagreement means that in order to evaluate the arguments made by the doctrine’s critics and defenders, we must evaluate the conceptions of freedom that underlie them. Moreover, if we can show that the conceptions of freedom behind these arguments are actually constituent parts of a complete conception of human freedom, then perhaps we can arrive at an understanding of unconscionability that resolves the current controversy.

But how can we evaluate competing conceptions of freedom so as to arrive at a fuller understanding? One possibility is moral or political philosophy. Impersonal argument, beginning from that which cannot be doubted and ending with logically derived truths, is one way to proceed if we wish to resolve a moral question. But it might be that there are certain truths that cannot be established by way of standard philosophical argument because we cannot reason our way into their authority beginning from a point of critical doubt and detachment. It might be, moreover, that the truth about the kind of beings we are and the kind of respect and concern owed us is a truth of this kind. If that is the case, then we must take a different approach to thinking about these questions. We must begin with an act of assent rather than of skepticism, with an exploration of human lives that already assumes that they matter rather than with a philosophical probing for that which cannot be doubted. Observing how a certain conception of freedom works itself out in a concrete human life, we ask ourselves what truth that conception seems to capture and what it seems to miss. If the lived implications of a particular conception of freedom undermine its own starting point, that will give us good reason to regard that conception as false or incomplete. We will then have to try out an alternative conception that captures what the other missed, observe its consequences in a life lived in accordance with it, and again ask ourselves whether these consequences adequately reflect the ideal it is supposed to embody.

What I have just described is an act of the moral imagination as distinct

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7. This explains why the debate so often seems to be a disagreement over the meaning of the word “voluntarily.” For example, see Thomas Scanlon’s criticism of Nozick in Nozick on Rights, Liberty, and Property, 6 PHIL. & PUB. AFF. 3, 14 (1976). It also seems to explain why, as Seana Shiffrin notes, arguments about whether an agreement was “truly voluntary” often reach an impasse. See Seana Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 PHIL. & PUB. AFF. 205, 209 (2000).
from one of moral ratiocination. It is the sort of act involved in reading a work of literature as an exploration of the meaning of freedom. An exploration of this kind is what Henry James gives us in *The Portrait of a Lady*. At the novel’s center is the problem of Isabel Archer’s independence and of what it means to live a life of one’s own. The novel’s movement reflects the development of Isabel’s idea of freedom from freedom as the abstract capacity for choice to freedom as the effort to discover an identity and set of commitments from within the community and relationships that are a part of one’s life. Isabel’s story is the story of the partiality of each of these conceptions as an understanding of what it means to lead a life of one’s own.

Read as an exploration of the meaning of freedom, *The Portrait of a Lady* illuminates what is at stake in the controversy around the doctrine of unconscionability and suggests a way of resolving that debate. James’s novel reveals that the conception of freedom as freedom of choice is inadequate, not from some other perspective (say, from the perspective of care or equality), but from the perspective of freedom itself. It thus suggests the need for a richer understanding of human freedom and so for private law doctrines, like unconscionability, that embody such an understanding. However, as we see what goes wrong in Isabel’s effort to lead a life of her own, *Portrait* warns us of the problems with simply replacing a thin conception of freedom with a richer one. This deepens our understanding of unconscionability’s normative foundation and resolves the disagreements regarding its interpretation. In particular, it helps us understand why unconscionability must be an exception to, not a substitute for, the usual rule that a voluntary agreement between two responsible parties is binding, why it must not apply to bargains just because they are onerous or unevenly divide the gains of trade, and why it must not apply to one who, with full knowledge and understanding, chooses to enter a contract that is contrary to an objective conception of what her well-being requires. Moreover, this understanding of the unconscionability doctrine suggests a new way of thinking about the two


9. Although many critics have treated *Portrait* as essentially a psychological study, others agree that this is not its primary focus. For example, Arnold Kettle notes that in *Portrait’s* Preface, James writes that the novel is about “the conception of a certain young woman affronting her destiny,” indicating that the interest “is not primarily a psychological one, not a matter of mere personal analysis.” Arnold Kettle, An Introduction to the English Novel: Henry James to the Present 19 (1951). Richard Poirier writes, “[t]his is a novel of ideas more than of psychology; an imitation of moral action more than a drama of motive.” Richard Poirier, Drama in *The Portrait of a Lady*, in Twentieth Century Interpretations of the Portrait of a Lady 35 (Peter Buitenhuis ed., 1968); see also Robert Pippin, *Portrait*, in *Henry James and Modern Moral Life* 126-43 (2001) (for an exploration of *Portrait’s* philosophical meaning); Robert Weisbuch, *James and the Idea of Evil in The Cambridge Companion to Henry James* 112 (Jonathan Freedman ed., 1998) (arguing that “everything [in *Portrait*] is pointed toward a defining of freedom”). Sigi Jöttkandt has also recognized that the novel’s overriding concern is “the philosophical problem of Isabel’s freedom” in *Portrait of an Act: Aesthetics and Ethics in The Portrait of a Lady*, 25 Henry James Rev. 67, 67 (2004).
landmark American unconscionability cases, *Henningsen v. Bloomfield Motors, Inc.* and *Williams v. Walker-Thomas Furniture Co.* It suggests that while *Williams v. Walker-Thomas Furniture Co.* was rightly decided, *Henningsen v. Bloomfield Motors* was not.

1. **HENNINGSEN V. BLOOMFIELD MOTORS AND WILLIAMS V. WALKER-THOMAS**

In *Henningsen v. Bloomfield Motors*, Mr. Henningsen purchased a new Plymouth sedan for his wife as a Mother’s Day present. The purchase order signed by Henningsen was a one-page printed form. On the front of the page, in small type, it said that the front and back of the form constituted the entire agreement between the parties. It also stated that the purchaser had read the back of the form and agreed to it. The back of the form contained an express warranty from the manufacturer, promising to replace defective parts within ninety days of the car’s purchase and concluding with the following words: “this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on [the manufacturer’s] part.” While Mrs. Henningsen was driving the car ten days after its delivery, she heard a loud crack from the bottom of the hood. The steering wheel spun in her hands and the car crashed, injuring Mrs. Henningsen and wrecking the car. The evidence was that a mechanical defect or failure caused the accident. At trial, the claim of negligence against the manufacturer was dismissed. The case proceeded on the question of whether the manufacturer was liable for breach of an implied warranty of merchantability—an implied warranty that the car was fit for use—and for the injuries caused by the breach. In other words, the question for the New Jersey Court of Appeals was whether the contract’s disclaimers of the warranty of merchantability and liability for consequential damages were enforceable.

Justice Francis of the New Jersey Court of Appeals began by acknowledging the general rule that a person is bound by what he signs even though he has not read the document. Nevertheless, Justice Francis thought that two features of this case took it outside the scope of the general rule. The first was that this was a take-it-or-leave-it standard form contract in which the purchaser had no real bargaining power and “no real freedom of choice.” The second was the fact that defective cars pose a grave danger to the public. If we want to minimize the danger, Justice Francis argued, we have to ensure that the financial burden of defects falls on those who are in the position to control them. Justice Francis concluded

12. 161 A.2d at 74.
13. Id. at 84.
14. Id. at 94.
that the manufacturer’s “attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.”

The plaintiff in *Williams v. Walker-Thomas Furniture Company* was Ora Williams, a single parent of seven children whose only income was a $218 monthly stipend from the government. From 1957 to 1962 she purchased sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, and a washing machine, all on credit, from Walker-Thomas Furniture. In making these purchases, Williams signed a total of fourteen contracts. Each contract had a paragraph in very fine print. This paragraph provided that the customer’s payments to the balance owed would be pro-rated on all of the customer’s purchases. In other words, until the customer paid off the amount owing on all the items, a balance would remain due on each of them. If Williams defaulted on her payments, Walker-Thomas retained the right to seize all the items she had ever purchased there. There was also a clause that provided that the transaction between Williams and Walker-Thomas was a lease rather than a purchase. Although Williams was taking possession of the items, Walker-Thomas retained title until she paid off the total value of all the items she had received. In April 1962, Williams bought a stereo set that was priced at $514.95. At the time of that purchase, she had made a total of $1400 worth of payments to Walker-Thomas and the balance still owed on her account was $164. Shortly after purchasing the stereo, she defaulted on her payments and Walker-Thomas sought to repossess all the items she had bought since 1957. At trial, Williams sought to have the contracts she signed with Walker-Thomas declared unenforceable.

In the lower court, the judge relied upon a classical understanding of contractual freedom: a voluntary agreement between competent persons is sufficient to vary their interpersonal rights and duties. There was, the judge found, no evidence of duress, fraud, or mistake in Williams’ case. It was Williams’ own responsibility to read the contract and seek outside help if she found that she could not understand it. Since she had voluntarily signed the contract, the judge found that there were no grounds for setting aside the bargain. In the Court of Appeals, however, Judge

15. *Id.* at 95.
17. Richard Epstein, for example, notes that “[t]he classical conception of contract at common law had as its first premise the belief that private agreements should be enforced in accordance with their terms . . . there was no place for a court to impose upon the parties its own views about their rights and duties.” Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975). This was the view the courts took at the time James was writing. As Atiyah writes in his description of the courts’ approach to contracts in the late 1800s: “The justice of the contract, the fairness of a bargain, was, indeed, not a matter which concerned the courts at all. It was for the parties to choose their own terms and make their own bargains, and if one chose skillfully while the other chose foolishly, this was merely the working of the free market system.” P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 389 (1979).
18. 198 A.2d 914 at 916.
Wright disagreed that fraud, duress, and mistake exhaust the grounds for setting aside a bargain. He found that a court may refuse to enforce a contract that it finds unconscionable in the sense that, concluded in the absence of meaningful choice by one party, it contains terms that are unreasonably favorable to the other.  

2. CRITICS OF UNCONSCIONABILITY AND FREEDOM AS CHOICE

*Henningsen* and *Walker-Thomas* expand the grounds of contractual non-enforcement to include unconscionability and they have been criticized as infringements of the classical principle of contractual freedom. The freedom-based criticism of the doctrine of unconscionability may be summarized as follows: property law recognizes the individual’s exclusive rights in her person and her property by enforcing rules of non-interference. Contract law, on its classical understanding, carries to its logical conclusion the idea that the individual has exclusive rights over her person and her property by enforcing a regime of contractual freedom. Contractual freedom means, first, that absent an agreement, individuals owe one another no positive obligations. Second, individuals may incur positive obligations to one another by agreeing to such obligations on the terms that seem best to them. These freely formed agreements about how individuals will use and exchange their rights in their persons and property command respect and are thus enforced through the law of contracts.

Against this background picture of private law, the doctrine of unconscionability appears problematic. This is so because in invoking the doctrine the court refuses to enforce the obligations that two responsible parties have freely agreed to. The court says that the individual is not under the obligation she chose to assume and therefore doesn’t take her choice to assume it seriously, doesn’t take her seriously as a person who bears responsibility for her own choices. And not only that. Because of *stare decisis* the effect of the rulings in *Henningsen* and *Walker-Thomas* is that no party can ever choose to be bound by certain sorts of agreements no matter how deliberate the choice. No one can choose to accept legally binding onerous credit terms in exchange for cheaper goods; no one can choose to forgo a warranty for the sake of obtaining a lower priced car. The development of the unconscionability doctrine therefore seems to mean that individuals are no longer free to set the terms of their interaction. The courts become, in Richard Epstein’s phrase, “roving commissions” that “set aside agreements whose substantive terms they find objectionable.” Unconscionability thus appears as an “assault upon

20. See FRIED, supra note 1, at 2; Barnett, supra note 4, at 292.
22. Barnett, supra note 4, at 286.
23. Epstein, supra note 18, at 294.
private agreements," an "open-ended invitation to rearrange the understandings people have reached." What of the claim, made by the judges in both Henningsen and Walker-Thomas, that bargains like the ones made by Henningsen and Williams should not be enforced because they were made in the absence of "meaningful choice"? On the view of contract law I have been discussing, this claim is vague and unpersuasive. Classical contract law—the contract law that preceded the development of the modern doctrine of unconscionability—already refused to enforce bargains made under conditions of duress, fraud, or incapacity. Absent these conditions, what does a lack of "meaningful choice" mean? Does it mean that the party was faced with limited options? Does it mean that the choice was motivated by a strong want or need whose satisfaction the party was unwilling to forgo? Does it mean that the party was blind to the consequences of her choice? But limited options, choices motivated by wants and needs given by our physical and psychological makeup, and blindness to the likely consequences of our choices are all constant features of the human situation. The consumer who wants to purchase a certain product in a competitive market has either to pay the market price or forgo the product, and the seller must demand the market price or else forgo the sale; our everyday transactions in supermarkets and drugstores are motivated by needs we did not choose; and every choice we make to act in a world external to us is a choice made under conditions of uncertainty about what the consequences of that action will be. If we want to preserve the idea that human beings are free agents capable of choice and responsibility, we have to recognize that limited options, internal motivations, and uncertainty about consequences comprise the circumstances of choice, the background conditions against which human beings must shape their lives and make their choices. Thus the problem with unconscionability, on the view we are now considering, is that it is paternalistic. It fails to treat the individual as an agent capable of leading her own life—capable, that is, of making her own choices and taking

24. Id.
25. FRIED, supra note 1, at 93.
27. FRIED, supra note 1, at 104.
28. As Duncan Kennedy notes, the refusal to enforce agreements made under conditions of fraud, duress or incapacity is not an exception to the idea of free contract but is rather constitutive of the idea of free contract. See Kennedy, supra note 2, at 577; see also Alan Wertheimer, Unconscionability and Contracts, 2 Bus. Ethics Q. 479, 484 (1992) ("If unconscionable contracts were involuntary, there would be no need to develop a principle of unconscionability. The standard defenses could do all the work").
29. For discussion of this point, see Wertheimer, supra note 29, at 487. For a thorough discussion of the fact that there is nothing inherently suspect about take-it-or-leave-it standard form terms, see Douglas Baird, The Boilerplate Puzzle, 104 Mich. L. Rev. 933 (2006).
responsibility for the consequences.

The critique of unconscionability that I have just elaborated is a critique based on a certain conception of human freedom. That conception of human freedom is freedom as the capacity for choice. On this view, the core meaning of freedom is best expressed in terms of the distinction between persons and things. A person is capable of determining his or her own purposes, whereas a thing is something that is used for the purposes of others. Someone is treated as a person when she is left to make her own choices; someone is treated as a thing when another person’s choices determine her actions. Freedom is here conceived as independence, as not being subject to the choice of another, and domination is just the coercion of another’s will. Moreover, freedom understood as choice or independence means not only that I am not subject to the choice of any other person, but also that I set my own purposes. Interests and aims are not simply given to me by God or nature, leaving me a passive receptacle with nothing to decide except how best to pursue them. Rather, the capacity for free choice is the capacity to abstract from and reflect upon immediate inclination and subjective desire and decide which ends I will pursue.

The capacity to abstract from particular preferences, interests, and goals reveals a self that is distinct from its ends, a chooser prior to all the particular things that might be chosen. This capacity thus reveals a source of value—the choosing self—that is distinguishable from its empirical circumstances and prior to all the things that are instrumentally and contingently valued. Dignity, understood as that which distinguishes the realm of instrumental value from the realm of ultimate value, resides in this capacity for choice. On this view, then, freedom is not a good to be fostered or a goal to be realized. It is simply the abstract capacity for choice that endows human beings with ultimate worth and commands respect from everyone.

Freedom so conceived has important implications for private law. Since (on this view) human beings are treated as persons when they are left to make their own choices, they cannot be coerced by a law that embodies the choice of another. In other words, they cannot be coerced by a law that serves the needs, interests, or ends of other human beings, for this would make them a means to the pursuit of others’ goals. Law’s content must therefore abstract from all particular choices—from all particular needs and subjective interests—to that which is non-contingently shared by all. What is non-contingently shared by all is just that feature that distinguishes human beings from things: the capacity for choice. Human beings can respect one another’s capacity for choice without deferring to one another’s particular choices. They can respect one another’s capacity

32. Id. at 29.
for choice without becoming a means to one another's ends.\textsuperscript{33} Private law is therefore consistent with human freedom when it elaborates the requirements of mutual respect for free choice. It is inconsistent with human freedom when it serves a need, interest, or end that is not universally and identically shared by all.

As we have seen, a consequence of this conception of freedom is that it leaves no room for the modern doctrine of unconscionability. On the view I have just been elaborating, the only possible measure of a contract's fairness is its voluntariness, with voluntariness understood as the absence of fraud or coercion. All other measures of fairness involve considerations of the parties' interests, but subjective interests have been excluded as legitimate grounds of coercive obligation.\textsuperscript{34} Of course, in cases like those of \textit{Walker-Thomas} or \textit{Henningsen}, there is no question of fraud or coercion. The contracts were voluntarily signed. The problem, rather, is that Henningsen and Williams chose to sign contracts with onerous terms, terms they perhaps did not fully understand. As a result, Henningsen had to bear the losses caused by a defective vehicle and Williams lost her basic household items, items she would not be able to replace because of her extremely limited resources. But from the perspective of a theory that regards mutual respect for free choice as the sole ground of private law, these plaintiffs' failure to understand the full implications of their contracts' terms and their resulting financial hardship do not give rise to legally recognizable claims. Their choices, though made in unfortunate circumstances, are their own and the consequences are their burden to bear.

3. DEFENDERS OF UNCONSCIONABILITY AND FREEDOM AS REALIZED AUTONOMY

Supporters of the modern doctrine of unconscionability usually justify it as promoting human welfare. In \textit{Taking Preferences Seriously}, for example, Robin West argues that unconscionability responds to situations where the party seeking non-enforcement has made a bargain that is contrary to his or her well-being.\textsuperscript{35} The judge, she argues, "discerns the individual's true interest by sympathetically 'placing herself in the individual's shoes' and seeing how it would feel to live with the choices


\textsuperscript{34} For this point, see \textsc{Alan Brudner}, \textit{The Unity of the Common Law} 132 (1995). James Gordley also writes: "If value is subjective, then there is no source outside of the agreement of the parties by which one could judge the fairness of exchange. Interference by a court would not only be improper but arbitrary." James Gordley, \textit{Equality in Exchange}, 69 CALIF. L. REV. 1587, 1600 (1981); \textit{see also} Barnett, \textsc{supra} note 4, at 284 (arguing that a theory of substantive fairness in contract assumes an objective standard of value, which has yet to be articulated and defended).

\textsuperscript{35} West, \textsc{supra} note 2, at 696-97.
that person has made." On West's interpretation, the judge in Walker-Thomas concluded that the suffering the credit terms would cause in cases of default was just too great relative to the benefit derived from the ability to buy the goods more cheaply. In Duncan Kennedy's formulation, the unconscionability doctrine is justified as a moral response to false consciousness. It is a response to buyers' tendency to misinterpret or ignore information as well as to their willingness to take risks they cannot afford to take. The judge may use the doctrine to force buyers to give up the fleeting satisfaction that a commodity, such as a stereo, can bring for the sake of avoiding financial catastrophe. In Anthony Kronman's slightly different defense of the doctrine, unconscionability is a tool that allows judges to redistribute material resources from those who have more to those who have less; the goal is equality of welfare.

Seana Shiffrin's defense of unconscionability appears quite different. She argues that when the state refuses to enforce contracts it finds unconscionable, it need not necessarily be acting out of concern for the weaker party's well-being and so need not be acting paternalistically. Shiffrin's point is that the state's reasons for refusing enforcement may be reasons relating to its own good, its own moral stature, and not to the good of the parties to the transaction. The state may simply be refusing to lend its support to an agreement it finds morally repugnant so as to avoid implicating itself in immorality. But this argument does not succeed. In a liberal democracy, the good of the state must be the good of its individual members; the state's interest is the interest of its citizens. When the state acts or refuses to act, it doesn't do so in the pursuit of a conception of its own interest in the way that a private individual does; it acts or refuses to act on the basis of a conception of the interest of its citizens. Thus, just as Shiffrin understands the enforcement of contracts as a mechanism whereby the state supports the moral and material well-being of its members, so the refusal of enforcement can have no justification other than the moral and material well-being of its members. When the state refuses to enforce an unconscionable contract, it must do so because it thinks enforcement would be contrary to the real interests of the weaker party.

But perhaps this reading of Shiffrin's argument treats her discussion of

36. Id. at 676.
37. Id. at 688.
38. Kennedy, supra note 2, at 627.
39. Kronman, supra note 2, at 770.
40. Shiffrin, supra note 7, at 205.
41. Id. at 221-30.
42. Shiffrin, supra note 7, at 221.
43. Shiffrin writes: "I want to begin by taking it for granted that the institution of contract is an institution in which the community assists people who make agreements by providing a measure of security for those agreements. . . . This allows us to cooperate more easily and to secure our common welfare in a number of respects." Id.
the state’s “self-regarding refusal” to enforce an immoral agreement too simplistically. Although Shiffrin analogizes from interactions between private individuals pursuing their own goals and moral commitments to interactions between the state and its citizens, perhaps she nevertheless recognizes a fundamental difference between these two forms of interaction. Perhaps Shiffrin means that when the state acts out of regard for its own moral stature, it is acting out of regard for the moral well-being of all its citizens and their interest in the moral stature of the state to which they are committed. Even on this interpretation, however, the court is refusing to enforce a contract based on its moral view of what the terms of the agreement ought to be. The only difference here is that the court does this, not for the sake of the well-being of the particular parties to the contract taken in isolation, but for the sake of the moral well-being of the community as a whole. But although this argument may avoid paternalism in its defense of unconscionability, it does not avoid moralism. The court refuses to respect the choices of individual free agents when it thinks that respect for those choices threatens the moral well-being of all.

Both critics and defenders of the unconscionability doctrine thus agree that it allows the court to refuse to enforce the parties’ agreement on the basis of the court’s moral view of what the terms of their relationship ought to be. We have seen why the critics regard this as problematic. To see why the defenders find this unproblematic, we have to understand the conception of freedom that underlies the defense of unconscionability as a moral doctrine.

There is a conception of freedom implicit in the moral defense of the unconscionability doctrine, one that rivals the conception of freedom as choice. The rival conception of freedom points out that the freedom we care about must be the freedom, not of philosophical abstractions, but of real human beings living determinate lives. And what matters for real human beings living determinate lives is whether or not they are able to realize their capacity for choice, whether or not their actual lives reflect their own sense of what would give life point and meaning. Freedom is thus to be understood as the individual’s autonomous flourishing, as living a life one can regard as one’s own, a life that reflects one’s deliberative scheme of commitments and values. But freedom so conceived is an achievement, a goal, and it may be realized imperfectly or not all. This sort of freedom may be frustrated by circumstances, such as poverty, or by the actions of others, particularly by their manipulation of vulnerability. Realized freedom may also be threatened by the choices individuals make about their own lives, for not all choices are adequate to the ideal of living a life that reflects a thought-out scheme of commitments and values. If an individual enters a relationship in which her agency is subordinated,

44. For a full discussion of this understanding of freedom, see BRUDNER, supra note 36, at 135-36.
allows herself to be a slave to her moment-to-moment passions or to be
overtaken by an obsession, or turns control of her life over to chance, then
she will have failed to lead a life in which her freedom is realized.
Realized freedom thus has material conditions. It requires a minimum
amount of money and education and the positive support of a moral
community that makes autonomous ways of life possible.

If the realized freedom of all is our goal, this has important implications
for law. Realized freedom requires, not only boundaries of non-
interference, but obligations of care for the autonomy of those united
within law’s moral community. Law’s focus ought to be, not simply on
protecting people from intrusion by others, but on providing the conditions
of freedom’s realization and structuring relationships so as to promote
autonomous flourishing. Where private law’s normative foundation is
understood as the achievement of the realized freedom of all, the rights
and duties that govern private transactions must fall out of the
requirements of achieving that goal. Contract law supports autonomy by
facilitating complex interdependence in the achievement of projects and
plans. Moreover, the unconscionability doctrine is not an exception to
the ordinary rules of contract but merely an extension: if that complex
interdependence in the achievement of projects and plans undermines
rather than promotes autonomy, there is no longer a reason for the law to
act as facilitator. There is nothing problematic from the perspective of
freedom about a court’s refusal to enforce an agreement that threatens the
realized freedom of the parties because, on the view we have now been
considering, freedom means realized freedom.

A significant consequence of this understanding of unconscionability’s
normative foundation is that there is no reason to respect a transaction
simply because it was voluntarily chosen. Shiffrin, for example, writes:
“We are not compelled to further (or to make possible) the projects of
promisors, just because those agents act freely.” West goes further: “The
morality of any of these consensual transactions depends upon the value of
the worlds they create, which in turn depends in part upon the worth of the
relationships they contain.” This means that on this account of
unconscionability, there is no room for an exception for one who, with full
knowledge and understanding of what she is doing, enters a contract that
is contrary to the authoritative conception of her moral well-being. There
is no room for an exception for someone who, with independent advice
and full knowledge and understanding of the contract’s terms, chooses to
take the risk of the burdensome terms in exchange for cheaper goods.

45. See Shiffrin, supra note 7, at 221.
46. Id. at 222.
47. Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and
48. Shiffrin writes that the unconscionability doctrine may apply even when “these contracts are
made voluntarily, by responsible agents, and under conditions of sufficient information.” Shiffrin,
For West and Kennedy, for example, no one can be permitted to risk that suffering. A willingness to do so simply reflects a false consciousness that calls for a paternalist intervention in the name of that individual’s well-being. Since realized autonomy has replaced free choice as the meaning of freedom, the autonomy-based account of unconscionability permits a judge to overrule the fully informed choices of human beings capable of rational deliberation when their choices threaten their autonomous flourishing.

All this brings us to the following conclusion: Freedom as individual choice gives us a contract law that has no room for a doctrine of unconscionability and freedom as the realized autonomy of all gives us a rich doctrine of unconscionability that undermines the individual’s freedom to choose. The questions we must now ask are: what, if anything, is wrong with a contract law that protects the individual’s freedom to choose but fails to recognize a doctrine of unconscionability? What, if anything, is wrong with a doctrine of unconscionability that protects human welfare but pays no respect to their free choices? As I hope to show, James’ The Portrait of a Lady offers a new way of thinking about these perennially troubling issues of private law.49

4. ISABEL’S WORLDVIEW: FREEDOM AS CHOICE

The features of Isabel Archer’s moral character that are most emphasized in the first half of the novel are the importance she attaches to her own freedom and the real firmness with which she guards it. Isabel regards the world as a place “of free expansion, of irresistible action.”50 To her suitor, Caspar Goodwood, she says: “If there’s a thing in the world I’m fond of... it’s my personal independence.”51 If we consider how Isabel understands freedom, we first notice that it means for her the rejection of all that is “stupidly conventional,”52 in particular of conventional views about what a woman ought to do with her life. We thus find Isabel refusing two marriage proposals in the first part of the novel and, though regretful of the pain she causes, rejoicing in the way her rejection of men “nineteen women out of twenty”53 would have accepted seems proof of her freedom—of her capacity to reject the influence of

49. As Atiyah’s history of contract law suggests, the ideas that underlie the doctrine of unconscionability were in the air when James was writing. Oxford political thinker T.H. Green delivered his lecture on Liberal Legislation and Freedom of Contract in 1881, arguing that: “To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from the helplessness of one of the parties to them, instead of being a security for freedom become an instrument of disguised oppression.” See WORKS OF T. H. GREEN (R.L. Nettleship ed., 1888) cited in ATIYAH, supra note 18, at 585.
50. JAMES, supra note 8, at 53.
51. Id. at 140.
52. Id. at 59.
53. Id. at 101.
convention in shaping her life.\textsuperscript{54}

Whereas other women in the novel are likened to empty vessels or blank slates\textsuperscript{55}, Isabel is most frequently imagined as the bird in flight or the ship at sea. Isabel is “as free as the bird on the bough”\textsuperscript{56}, has “wings and the need of free beautiful movements.”\textsuperscript{57} Her friend Henrietta describes Isabel as “drifting away—right out to sea”\textsuperscript{58} and her cousin Ralph wishes “to put a little wind in her sails” so that he might “see her going before the breeze.”\textsuperscript{59} Of course, the bird in flight and the ship at sea are both images of detachment from land. They are metaphors for one who manages to transcend social conventions, to float unmoored from oppressive customary norms. They are also images of movement, activity, suggesting Isabel’s refusal of the attitude of passivity and her rejection of the idea that her agency is porous to external impositions. Isabel is determined to shape a life that she can regard as her own because it is the one that she has chosen.

As we consider Isabel’s character more carefully, however, we see that her rejection of the shaping influence of convention is part of a larger self-conception, and that is her conviction of self-sufficiency. The refusal of dependence on other things or other people—on anything outside herself—is an important part of what Isabel means when she insists upon her freedom. Thus, we first meet her as a young woman without parents or property, pointedly warning Ralph that she is “not a candidate for adoption”\textsuperscript{60}, believing that “one should try to be one’s own best friend,”\textsuperscript{61} and that she has an “orbit of her own.”\textsuperscript{62} We see that Isabel keeps her distance from other human beings, acknowledging no need of them. While she displays a keen interest in others, her interest is the interest of a detached observer. She thinks of other people as “specimens”\textsuperscript{63} and her desire to know them seems just a part of her general desire for knowledge of human behavior. Moreover, Isabel is constantly “planning out her development, desiring her perfection, observing her progress.”\textsuperscript{64} We notice that she views her development, perfection, and progress as all of her own

\textsuperscript{54} The rejection of Lord Warburton’s marriage proposal gives Isabel a “sweet...feeling of freedom.” \textit{Id}. at 125.

\textsuperscript{55} Madame Merle is the empty cup with a crack in it \textit{Id}. at 428; Pansy is “like a sheet of blank paper” \textit{Id}. at 233, “a blank page, a pure white surface” \textit{Id}. at 262, “transparent” \textit{Id}. at 343; the Countess Gemini is “a bright rare shell...in which something would rattle when you shook it.” \textit{Id}. at 368.

\textsuperscript{56} \textit{Id}. at 187.

\textsuperscript{57} \textit{Id}. at 140-1. She seems to her cousin Ralph to be “soaring far up in the blue,” “sailing in the bright light, over the heads of men” \textit{Id}. at 285; and he encourages her to “[s]pread...[her] wings; rise above the ground.” \textit{Id}. at 189.

\textsuperscript{58} \textit{Id}. at 108.

\textsuperscript{59} \textit{Id}. at 158-59.

\textsuperscript{60} \textit{Id}. at 29.

\textsuperscript{61} \textit{Id}. at 53.

\textsuperscript{62} \textit{Id}. at 94.

\textsuperscript{63} \textit{Id}. at 64.

\textsuperscript{64} \textit{Id}. at 55.
making, and that her sense of worth requires for its confirmation nothing more than an exercise in introspection. Believing that her happiness requires nothing beyond her control, Isabel even thinks that her “fate” is something she will “choose.”65

Finally, we must notice the real note of fear, even of terror, in Isabel’s reactions to her suitors’ declarations of love. The thought of a marriage proposal from Lord Warburton fills Isabel with a “certain alarm”66 and the coldness of her response, the narrator tells us, comes from fear.67 She reacts to Lord Warburton’s proposal as “some wild, caught creature in a vast cage”68 and views Caspar Goodwood as a man “naturally plated and steeled, armed essentially for aggression.”69 This fear we find in Isabel’s reactions to declarations of love cannot simply be explained by her unwillingness to make a conventional marriage, for in that case we would expect her to find these proposals merely unwelcome, annoying but not terrifying. The reason for Isabel’s fear, I think, is that love implies a need for something beyond oneself, and marriage appears to be a confession of the individual’s incompleteness. Because love threatens the conviction of self-sufficiency and the idea of an invulnerable agency, it is incompatible with Isabel’s conviction that she has “an orbit of her own.”70 For not only does love seem to be something that happens to us rather than something we choose, but in loving another, we make our happiness and the shape of our lives vulnerable to the agency of a person who is beyond our control. This, perhaps, is the meaning of the similarity Isabel feels between loving someone and spending a sum of money once stored safely in a bank; the agency that was once carefully guarded and invulnerable is, in loving another, porous, no longer safely protected.

We now begin to see the connection between freedom and the conviction of self-sufficiency. The self-sufficient agent is free because a life that requires nothing external to it is a life that is fully under that agent’s control. To acknowledge the need of something external—particularly another human being—is to acknowledge that one’s life is not purely self-authored. A life whose completion requires others is a life that is necessarily dependent upon, and so shaped and influenced by, the others that one needs, others that are beyond one’s control. Freedom, for Isabel, thus excludes the possibility of such neediness; she thinks that to be free is to be self-sufficient. Isabel’s rejection of the authority and shaping influence of conventional norms may thus be understood as an aspect of her more general conviction of self-sufficiency, her general rejection of the influence or need of anything external.

65. Id. at 141.
66. Id. at 93.
67. Id. at 77.
68. Id. at 99.
69. Id. at 136.
70. Id. at 94.
I want now to suggest, however, that Isabel’s sense of her own self-sufficiency is part of an idea that is still more foundational in her conception of freedom—the idea that freedom is nothing more than the freedom "to choose."\(^{71}\) This idea of freedom is connected to a particular theory of human personality, which Isabel articulates in the following often-quoted exchange with Madame Merle:

"I don’t care anything about his house," said Isabel.

"That’s very crude of you. When you’ve lived as long as I you’ll see that every human being has his shell and that you must take the shell into account. By the shell I mean the whole envelope of circumstances. There’s no such thing as an isolated man or woman; we’re each of us made up of some cluster of appurtenances. What shall we call our ‘self’? Where does it begin? Where does it end? It overflows into everything that belongs to us—and then it flows back again. I know a large part of myself is the clothes I choose to wear. I’ve a great respect for things! One’s self—for other people—is one’s expression of one’s self; and one’s house, one’s furniture, one’s garments, the books one reads, the company one keeps—these things are all expressive."

This was very metaphysical; not more so, however, than several observations Madame Merle had already made. Isabel was fond of metaphysics, but was unable to accompany her friend into this bold analysis of the human personality. "I don’t agree with you. I think just the other way. I don’t know whether I succeed in expressing myself, but I know that nothing else expresses me. Nothing that belongs to me is any measure of me; everything’s on the contrary a limit, a barrier, and a perfectly arbitrary one. Certainly the clothes which, as you say, I choose to wear, don’t express me; and heaven forbid they should!"

"You dress very well," Madame Merle lightly interposed.

"Possibly; but I don’t care to be judged by that. My clothes may express the dressmaker, but they don’t express me. To begin with it’s not my own choice that I wear them; they’re imposed upon me by society.\(^{72}\)

Isabel’s theory of personality is here juxtaposed with its opposite. Madame Merle regards the self as entirely bound up with the public world and its identity as inseparable from its things, preferences, and circumstances. For Madame Merle, the idea of one’s own life is indistinguishable from “one’s appearance, one’s movements, one’s

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71. Id. at 67. The idea of choice thus resonates throughout the first half of the novel. "I can do what I choose," Isabel insists. Id. at 141; "The world lay before her—she could do whatever she chose. There was a deep thrill in it all . . ." Id. at 267. Others have noticed the centrality of the idea of choice in this novel. See, e.g., Jottkandt, supra note 9, at 70.

72. Id. at 172-173.
engagements, one’s society.” Isabel disagrees. She argues that none of these things constitutes the essential self, for they are all arbitrary. Nothing that simply “belongs” to her is her; she insists upon a distinction between what she is and what she merely has, what is her and what is merely hers. We see elsewhere that Isabel includes among the things she merely has, the things that are merely hers, not only her clothing and other material possessions, but all the features of her history and circumstance, her values and her beliefs. Thus she has a constant desire to “begin afresh” and thinks that she can “leave the past behind her.” Moreover, Isabel’s sense that her values and beliefs are not essential features of her person explains, I think, why she seems to efface herself when she first meets Gilbert Osmond, minimizing the importance of her own ideas and moral commitments.

Isabel thus conceives of human personality as an abstract, essential self that is separable from its circumstances, relations, and all the determinate features of its character. The idea that the essential self is undetermined means that human beings are capable of self-determination; they are not the passive victims of circumstances or the receptacles of impulses given by nature. The idea that the essential self is distinct from its relations and circumstances means that human beings are separate persons, bounded rather than porous. Because they are separate and capable of self-determination, human beings are inviolable moral agents and bearers of absolute worth. The moral agent refuses to be used as the tool of others’ purposes, assumes responsibility for her actions, and treats others with the respect that other, equally free, moral agents deserve; she regards them as free and dignified persons, not as objects ministering to her ends or as needy victims requiring her care.

Justice is thus central in Isabel’s thinking. She has a “passionate desire

73. Id. at 201.
74. For a discussion of this distinction in relation to conceptions of the self, see MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 55 (1998).
75. JAMES, supra note 8, at 39.
76. This is what Isabel later realizes: “She had effaced herself when [Osmond] first knew her; she had made herself small, pretending there was less of her than there really was.” Id. at 350.
77. Philip Sicker describes this feature of Isabel’s theory of the self as the idea that identity “is a mystically elusive property of individual consciousness” in LOVE AND THE QUEST FOR IDENTITY IN THE FICTION OF HENRY JAMES 54-55 (1980). Arnold Kettle writes that freedom, for Isabel, is “an abstract quality inherent in the individual soul.” KETTLE, supra note 9, at 28. On this view, no alteration in one’s external circumstances, attachments or preferences can alter the essential self. Osmond also expresses this view in conversation with Madame Merle: “Don’t you know the soul is an immortal principle? How can it suffer alteration?” JAMES, supra note 8, at 427.
78. Isabel the American thus shares the conception of human freedom as “boundary” that Jennifer Nedelsky argues was the central metaphor for the framers of the U.S. Constitution. See Jennifer Nedelsky, Law, Boundaries, and the Bounded Self, 30 REPRESENTATIONS 162 (1990).
79. “Whatever happens to me let me not be unjust,” she said; “let me bear my burdens myself and not shift them upon others.” JAMES, supra note 8, at 333. Isabel has a spirit that wishes always “to hold fast to justice” and a “general determination to be just.” Id. at 333-334. Adam Parkes points out that justice is a central theme in Portrait that has largely been neglected by critics in A Sense of Justice: Whistler, Ruskin, James, Impressionism, 42 VICTORIAN STUD. 593, 611 (1999-2000).
to be just,"\textsuperscript{80} and insists upon the same treatment for herself: "I want to be treated with justice; I want nothing but that."\textsuperscript{81} It might be noticed, however, that Madame Merle also insists upon justice, telling Isabel that "[j]ustice is all [she] want[s]."\textsuperscript{82} For Madame Merle, however, to ask for justice is to ask for sympathy,\textsuperscript{83} for mercy in the face of neediness, and we see that justice means something very different to Isabel. When Lord Warburton speaks to her in the language of love, for example, Isabel responds with the language of justice: "‘I care nothing for Gardencourt,’ said her companion. ‘I care only for you.’”\textsuperscript{84} Isabel responds. She later promises, in considering his proposal, to "do it justice."\textsuperscript{85} By doing the proposal justice, however, Isabel means only that she will find some way to reject the proposal while treating Lord Warburton with the respect he deserves; she does not mean that she will make his neediness, the fact that his happiness is in her hands, a reason for action on her part.\textsuperscript{86} Similarly, Isabel informs Caspar Goodwood that he has "no right to talk of losing what’s not [his]"\textsuperscript{87} and insists that she can’t marry Caspar simply to please him.\textsuperscript{88} Justice, for Isabel, is the idea that each person is a moral agent entitled to respect for her dignified freedom. This respect requires a kind of distance between persons, a distance that affirms their inviolability, agency, and self-sufficiency.\textsuperscript{89} Isabel’s sense of justice is the Kantian idea of rightful honor, the readiness to assert one’s own claims and the willingness to acknowledge a like entitlement in other human beings.\textsuperscript{90} Ralph thus notices in Isabel an impenetrable, edifice-like quality,\textsuperscript{91} and Lord Warburton senses that in her relations with others, Isabel bestows "stern justice"\textsuperscript{92} rather than love, and judges “only from the outside,” without care.\textsuperscript{93}

In contrast to the distance Isabel maintains between herself and others,
Madame Merle's self, as Osmond says, "includes so many other selves—so much of every one else and of everything." But where human personality is conceived as inseparable from its things, circumstances, and relations, there can be no idea of a self that commands respect for its agency and makes claims to inviolability. Thus, rather than shaping a life of her own, Madame Merle allows herself to function as the tool of others' purposes: "She laid down her pastimes as easily as she took them up; she worked and talked at the same time, and appeared to impute scant worth to anything she did. She gave away her sketches and tapestries; she rose from the piano or remained there, according to the convenience of her auditors, which she always unerringly divined." Madame Merle is the porcelain pot, "shockingly chipped and cracked," the empty teacup with a crack in it. These are images suggesting hollowness, utility, and violation. Moreover, just as Madame Merle is herself lacking in dignity, her conception of the self leaves nothing to which a sense of responsibility to others could attach and gives her no reason to regard others as dignified, inviolable subjects. Willing to be treated as a means to others' ends, she finds no reason not to treat others as means to her own ends: "I don't pretend to know what people are meant for," she declares; "I only know what I can do with them."

We thus begin to see that Isabel's theory of human personality is also a theory of human freedom. The idea that the self is not constituted by its circumstances, its relations with others, or by the impulses, preferences, and goals that are given to it by nature or convention means that human beings are choosers, free agents, actively willing their circumstances and preferences and not simply being made by them. They choose to follow particular impulses; they choose to adopt certain commitments and goals. Isabel's conception of personality is thus a conception of freedom as the capacity for choice. It is freedom as the capacity to stand apart from our concrete values, goals, relations, impulses, preferences, and circumstances, regarding them as "arbitrary" or only contingently ours, ours only because we have chosen them.

We can now see, moreover, that this understanding of freedom is the basis for Isabel's rejection of the influence of conventional values and for her conviction of self-sufficiency. The rejection of the conventional is, for Isabel, evidence of her freedom to reject external influences upon her

94. Id. at 201.
95. Id. at 165.
96. Id. at 166.
97. Id. at 428.
98. Id. at 203.
99. Id. at 172.
100. In conversation with Henrietta, Ralph expresses a contrary view of human personality: "Ah, one doesn't give up one's country any more than one gives up one's grandmother. They're both antecedent to choice—elements of one's composition that are not to be eliminated." Id. at 84.
choice and action, evidence that she is the agent of her life and not a passive conduit for the dictates of convention. Isabel thus informs her aunt that she “always want[s] to know the things one shouldn’t do,” “so as to choose” whether or not she will do them.\(^1\) Freedom as choice and the conviction of self-sufficiency are connected as well. Human beings with concrete needs, preferences, and goals are dependent upon other human beings for care and assistance in fulfilling them. As we noted earlier, such dependency challenges the agent’s freedom, for it challenges her control over the shape of her life. But when the self is conceived in abstraction from such needs, preferences, and goals, when these things are regarded as inessential, as mere choices capable of repudiation, then dependency also becomes inessential. It too is a choice rather than part of the core that constitutes human personality. Abstract personality, having no determinate needs, preferences, or goals, is self-sufficient.

As we have seen, Isabel’s rejection of the conventional and her conviction of self-sufficiency go some way toward explaining her rejection of the marriage proposals of Caspar Goodwood and Lord Warburton. Her broader conception of freedom as the capacity for choice sheds further light on her actions. Isabel’s rejection of the marriage proposals of Lord Warburton and Caspar Goodwood may be viewed, not only as her rejection of these particular men, but also as characteristic of her general attitude toward life. This attitude might be described as one of negation, an attitude for which any commitment can only be viewed as a limitation of one’s capacity for perfect liberty, one’s capacity for “free expansion.”\(^2\) When the essential self is conceived in abstraction from concrete choices and when freedom is conceived as the possibility of choice, any definite commitment threatens the self’s indeterminacy and looks like a restriction of its freedom. We have already noted that the images associated with Isabel, the bird in flight and the ship at sea, are images of detachment from social convention. They are, however, also images of restless movement, suggesting detachment, not only from a conventional way of life, but from any particular way of life. They thus suggest to us the way Isabel’s insistence upon the freedom to choose is an insistence upon a certain capacity—choice—and not itself a commitment to any particular thing. Isabel rejects conventional ideas about what constitutes a good life, not in favor of some other conception of that life, but in favor of sheer indeterminacy. She falls in love with “suddenly perceived possibilities, with the idea of some new adventure.”\(^3\) Isabel’s aspiration to freedom is in this sense content-less. She rejects her suitors’

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1. Id. at 67.

2. For this point see Pippin, supra note 9, at 132. See also Tony Tanner, The Fearful Self: Henry James’s the Portrait of a Lady, 7 CRITICAL Q. 205, 207 (1965) (arguing that Isabel’s “most characteristic response in the real world is one of refusal and rejection”).

3. James, supra note 8, at 330.
proposals simply because she doesn't want to be "tied" or to "give up other chances." Isabel's idea of freedom is thus emptily abstract and formal. Focused as it is on sheer capacity or potential, her conception of freedom abstracts from actual engagement with, or commitment to, the concrete.

5. ISABEL'S MISTAKE: THE PROBLEM WITH CHOICE

We have thus far developed a picture of Isabel's early conception of freedom. We saw it first as the rejection of passivity before the shaping influence of conventional expectations and then as the broader rejection of any dependence on external things beyond one's control. Finally, we saw that beneath this conviction of self-sufficiency is a conception of the self as abstract personality and of freedom as the capacity for choice. Here, as I have suggested, the essential self is conceived as prior to, and capable of standing apart from, its concrete choices and determinate relations and circumstances, dignified in its free agency and noble in its moral responsibility.

Readers, particularly modern readers, must admire Isabel's ideal. But as we consider Isabel's thought and action more carefully, I think we must also begin to sense, not merely that something has gone wrong with the realization of that ideal here, but that there are flaws inherent in the ideal itself.

When freedom is conceived as the capacity for choice—the capacity to accept or reject external influences—all choices appear equal because all are equally reflective of that capacity. We have already noted that Isabel rejects the conventional view of the good life, not in favor of some other particular view, but in favor of sheer indeterminacy. The result of her refusal of commitment, of her failure to order her life according to some principles, values, or goals, is that Isabel's choices have nothing for their content but "capricious forces" and "happy impulse." But while it is true that all choices are equally reflective of the capacity to choose, something seems to have gone wrong here. The difficulty is implicit in the following exchange between Isabel and Henrietta. "Do you know where you're drifting?" Henrietta asks. "No, I haven't the least idea, and I find it very pleasant not to know," Isabel replies. "A swift carriage, of a dark night, rattling with four horses over roads that one can't see—that's my idea of happiness."

104. Id. at 133.
105. Id. at 117.
106. Id. at 53. Pippin makes this point as well. See PIPPIN, supra note 9, at 132.
107. JAMES, supra note 8, at 40.
108. This point is also made by Jottkandt. See Jottkandt, supra note 9, at 72.
109. JAMES, supra note 8, at 144.
image of a thinking agent shaping a life for itself. It is rather, an image of a person being blindly pulled along by her impulses. Similarly, during her travels in Europe, we find Isabel in “the vagueness of unrest,”110 her action reflecting restlessness and “incoherence.” As she acquires an increased sense of “the absolute boldness and wantonness of liberty,”111 Isabel moves “rapidly and recklessly...like a thirsty person draining cup after cup.”112 This is another image that suggests, not the freedom of thought and reflection required for deliberately shaping a life of one’s own, but the power of impulses that are simply presented to us by nature.

Living by immediate impulse is unproblematic from the perspective of choice since it remains true that one could have rejected the impulse had one thought about it. And yet, so long as one acts as a conduit for ends externally given (in this case, by nature), we can say that one is poorly realizing the human potential for shaping a life in accordance with self-chosen ends, in other words, for shaping a life of one’s own. Thus, during her restless travels in Europe, Isabel finally discovers that there is no dignity in “[d]oing all the vain things one likes,”113 and the narrator tells us that there has been an important change in Isabel’s worldview: “[t]he desire for unlimited expansion had been succeeded in her soul by the sense that life was vacant without some private duty that might gather one’s energies to a point.”114 Isabel sees that a life that can be viewed as genuinely one’s own is a life that reflects a scheme of commitments chosen upon reflection, and not merely the capacity for choice; for that capacity turns out to be consistent with a life lived in accordance with whatever impulses and whims are given to us by our nature.

Isabel’s marriage to Gilbert Osmond introduces a further problem with freedom conceived as the bare freedom to choose. All readers of James’ novel must feel that there is an important sense in which Isabel’s marriage to Osmond is contrived by others. Ralph persuades his father to leave Isabel a large inheritance, partly out of concern for Isabel, but also for his own amusement.115 Isabel’s fortune attracts Madame Merle, who wants to put it in the hands of her former lover—Osmond—so that it might serve as their daughter Pansy’s dowry. But Madame Merle does not tell Isabel that Osmond is her former lover and that she knows him to be cold and heartless; she does not tell Isabel that Pansy is her daughter, and that she brings Osmond and Isabel together, not out of concern for Isabel’s well-being, but only for her own purposes. Madame Merle and Osmond make Isabel a cog in their plan, and so fail to treat her as a human being with a mind and life of her own. As Isabel finally realizes, “she had been an

110. Id. at 265.
111. Id. at 267.
112. Id. at 268.
113. Id. at 257.
114. Id. at 291.
115. Id. at 159.
applied handled hung-up tool, as senseless and convenient as mere shaped wood and iron.” 116 And yet it is also important to notice that when Isabel says that her choice of Osmond was perfectly free, she is not entirely wrong. For there was no coercion here and of course, Isabel could have chosen otherwise; she decided to marry Osmond in the face of her family’s repeated warnings of his selfishness because she was in love with him. Nevertheless, Isabel’s decision to marry Osmond, though the product of a free choice, is the result of others’ manipulation of her and their exploitation of her innocence and vulnerability for their own ends, whether only carelessly in the case of Ralph or maliciously in the cases of Osmond and Madame Merle. Thus, a life in which one’s choices are manipulated by others, in which one’s vulnerabilities are exploited for the purposes of others, turns out to be perfectly consistent with the presence of the bare capacity to choose, for that capacity is nothing but a fact of human consciousness, the bare possibility of choosing something else. That, however, is surely a problem for the conception of freedom as the capacity for choice, for it is a conception that was based on the difference between persons and things, on the idea that a person is a dignified agent and not to be used as an instrument for the purposes of others.

This suggests the following: where freedom is conceived as the abstract capacity for choice, the sheer capacity for negation, freedom is nothing but a fact of consciousness that has no worldly reality. The presence of the capacity for choice is as compatible with a life whose shape reflects fleeting impulses or the purposes of others as it is with a life whose shape reflects one’s own thought-out values and commitments. But if the freedom of human beings and not merely the freedom of philosophical abstractions is our ideal, then our understanding of freedom must include a conception of its realization in lived human lives. The reality of human freedom depends not merely on the presence of an abstract capacity, but on the realization of that capacity in our concrete lives. It depends, in other words, on our ability to lead lives that we can regard as our own.

But once we see that human freedom entails a life that meaningfully realizes the capacity for choice, we begin to undermine the picture of human independence and self-sufficiency that was so closely linked to the freedom to choose. In Osmond we see that the effort to lead lives that we can regard as our own makes us dependent. Osmond is poor. He has “no property, no title, no honours, no houses, or lands, nor position, nor reputation, nor brilliant belongings of any sort.” 117 Yet the life he can regard as a life of his own choosing is one dedicated to art and beauty. What we see in The Portrait of a Lady is that human freedom, because it is not merely a fact of consciousness or quality of the human soul, has material conditions. It requires money. Without a minimum amount of

116. Id. at 451.
117. Id. at 228.
money, we are forced to live our lives meeting the needs that are simply
given to us by nature—our needs for food, clothing, and shelter—and so
cannot shape lives that reflect a self-chosen conception of what we want to
do and who we want to be. Osmond’s way of life, and so his freedom,
depends on money and because he doesn’t have any, he depends on Isabel.
He is not the self-sufficient chooser he pretends to be. But that, James
seems to suggest, is not because something has gone wrong with the
realization of that ideal in this particular case; it is because the ideal itself
is not one befitting the lives of human beings.

6. ISABEL’S REVISED WORLDVIEW: FREEDOM AS SELF-UNDERSTANDING

In Chapter 51, Isabel receives a telegram from her Aunt Lydia: “Ralph
cannot last many days. . . and if convenient would like to see you. Wishes
me to say that you must come only if you’ve no other duties. Say, for
myself, that you used to talk a good deal about your duty and to wonder
what it was; shall be curious to see whether you’ve found it out.” The
Portrait of a Lady concludes as Isabel decides to return to her marriage
after visiting Ralph on his deathbed in open defiance of her husband’s
wishes. We thus arrive at the question that has most troubled readers and
puzzled critics of James’ novel: why does Isabel return to Osmond? Why
does she return to the house she now acknowledges as the “house of
darkness, the house of dumbness, the house of suffocation”? What
conception of duty, we must now ask, is reflected in this decision and
what is its relation to the conception of freedom we have thus far been
exploring?

Many critics have tried to understand Isabel’s return to Osmond as a
philosophic triumph, a triumph of freedom. They have argued that when
Isabel returns to Osmond, she chooses him for a second time, this time
with eyes open. Thus, they argue, the novel ends with Isabel finally
becoming truly free, free because she freely chooses her “determined
status.” But this reading, I think, faces at least two difficulties. The first
is that it fits uncomfortably with the ordinary reader’s experience of the
novel’s ending as a tragedy. Isabel, once vibrant and brimming with youth,
confident in her worth and dignity, full of ideas about her own freedom
and determined to shape a valuable life she can regard as her own, in the
end returns to a man who is cold, selfish, and—as we see in his final

118. Id. at 436.
119. Id. at 353.
120. Jottkandt refers to this as Isabel’s “free choice of her determined status.” See Jottkandt,
supra note 9, at 80. She further writes, “If, as Isabel now discovers, her first choice had been unfree,
hers decision to choose the same choice again might be conceived as a remaking of that first choice.”
Id. Robert Weisbuch also explains Isabel’s final decision in terms of free choice: “. . . the magic of
James’s art here is to make freedom meaningfully itself only when it confronts—and even may appear
like—necessity. Isabel chooses to make her world.” Robert Weisbuch, James and the American
banishment of Pansy to the prison of the convent—evil. Life with Osmond, we know, is “a dark, narrow alley with a dead wall at the end”\(^{121}\); his house is one of “darkness,” “dumbness,” and “suffocation”\(^{122}\) and it is thus hard to see Isabel’s final decision as something other than a kind of suicide. To interpret the novel’s end as a triumph of freedom is to transform James’ novel into an allegory, so that Isabel’s final decision to return to Osmond becomes nothing but a symbol for something else. But this is to ignore the way James has, in Isabel Archer, given us a concrete human subject and asked us to regard her with the sympathetic attention of a friend. The reader of James’ novel cares for Isabel’s happiness, is concerned with her particular suffering, and so cannot regard her individual pain as a moral triumph.

There is a second difficulty with reading Isabel’s final decision as a triumph of choice. This reading misses the change in Isabel in the years following her marriage. It misses the fact that Isabel’s disenchantment with her husband is at the same time a disenchantment with the ideal of choice she once embraced. I have argued that in Osmond, Isabel sees that the dignified freedom of the concrete human being is not a self-sufficient abstract capacity for choosing, for free choice turns out to be compatible with a life whose shape reflects the purposes and aims of others. Moreover, the meaningful realization of the capacity for choice in a life of one’s own has material conditions and these conditions make us needy and dependent. And so in the years following her marriage to Osmond, we see an important change in Isabel’s self-conception, a change that is most explicit in the novel’s famous Chapter 42, where Isabel sits alone by the fire late into the night, reflecting, not only on the marriage she has made, but on the person she is.

As Isabel considers what has gone wrong with her marriage to Osmond, we see that she acknowledges a much more robust conception of personality—a richer conception of who she is—than she earlier admitted.

She had effaced herself when he first knew her; she had made herself small, pretending there was less of her than there really was. . . . It was a wonder, perhaps, in view of this, that he didn’t hate her more. She remembered perfectly the first sign he had given of it—it had been like a bell that was to ring up the curtain upon the real drama of their life. He said to her one day that she had too many ideas and that she must get rid of them. . . . She had too many ideas for herself; but that was just what one married for, to share them with someone else. One couldn’t pluck them up by the roots, though of course one might suppress them, be careful not to utter them. . . . What he had meant had been the whole thing—her character, the way she felt, the way she judged. This was what

\(^{121}\) JAMES, supra note 8, at 349.
\(^{122}\) Id. at 353.
she had kept in reserve; this was what he had not known until he had found himself—with the door closed behind, as it were—set down face to face with it. She had a certain way of looking at life which he took as a personal offence.\(^\text{123}\)

While Isabel earlier argued with Madame Merle for an abstract conception of human personality and regarded herself as an abstract will detachable from its particular circumstances and concrete commitments, we now see Isabel as a woman deeply touched by her circumstances and embracing a conception of selfhood inseparable from its values. She now acknowledges that she has a worldview, a distinct character, a way of feeling and judging, and that these features of her personality cannot simply be “pluck[ed]...up by the roots.”\(^\text{124}\) As she finds that she cannot simply give up her ideas, cannot judge things as Osmond judges them, cannot see the world as Osmond sees it, Isabel realizes that in conceiving of her essential self as “unencumbered,”\(^\text{125}\) nothing but the abstract capacity for choice, she had “effaced herself...made herself small, pretending there was less of her than there really was.”\(^\text{126}\) Isabel now discovers that she has a history, a “vital principle,”\(^\text{127}\) and a conception of what it is to be a moral, responsible, and dignified human being. Now Isabel recognizes that her moral ideas are part of her essential nature, commitments she cannot stand apart from or regard as merely contingent, and cannot forsake while remaining herself.\(^\text{128}\)

Moreover, while Isabel once insisted upon her essential separateness from others—Ralph compared her to an edifice to which he couldn’t find the key—she now seems to see herself as an inseparable part of a larger whole:

[In old Rome]...she dropped her secret sadness into the silence of lonely places, where its very modern quality detached itself and grew objective, so that as she sat in a sun-warmed angle on a winter’s day, or stood in a mouldy church to which no one came, she could almost smile at it and think of its smallness. Small it was, in the large Roman record, and her haunting sense of the continuity of the human lot easily carried her from the less to the greater...[S]he had grown to think of [Rome] chiefly as the place where people had suffered. This was what came to her in the starved churches, where the marble columns, transferred from pagan ruins, seemed to offer her a companionship in endurance.

\(^{123}\) Id. at 350-52.

\(^{124}\) Id. at 351.

\(^{125}\) This is Sandel’s phrase. See Michael Sandel, The Procedural Republic and the Unencumbered Self, 12 POL. THEORY 81 (1984).

\(^{126}\) JAMES, supra note 8, at 350.

\(^{127}\) Id. at 349.

\(^{128}\) See Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts, and Possibilities, 1 YALE J.L. & FEMINISM 7, 10 (1989), for the idea that “one’s own law” is something we “find” and “recognize” rather than something we “choose.”
and the musty incense to be a compound of long-unanswered prayers. There was no gentler nor less consistent heretic than Isabel; the firmest of worshippers, gazing at dark altar-pictures or clustered candles, could not have felt more intimately the suggestiveness of these objects nor have been more liable at such moments to a spiritual visitation.  

No longer conceiving of herself as wholly separate and bounded, Isabel senses among the Roman ruins and in the ancient churches "the continuity of the human lot." Her personal suffering seems to speak of universal suffering and so of universal human aspirations and needs. In Rome, Isabel sees herself as a person in history, the question of who she is expanding beyond her personal attachments and values to the question of her place in the world and her relation to other human beings.

We saw earlier that the abstract conception of the person was also a conception of human freedom. The idea that the self is not constituted by its circumstances and relations, or by the impulses, preferences, and goals that are given to it by nature or convention means that human beings are free agents, actively willing their circumstances and preferences and not simply being made by them. The abstract self is free in the sense that she holds the world at bay and then chooses freely from a position of critical detachment. Isabel's revised conception of her self as partly constituted by its attachments, moral values, circumstances, and relations is also implicitly a conception of what it means to be a free agent, what it means to shape a life of one's own. When we see Isabel during her midnight meditation, reflecting on the moral commitments that make up her identity and the circumstances that have shaped her character, we see her in "a passion of thought, of speculation, of response to every pressure." Her mind, the narrator tells us, is in "a state of extraordinary activity" as she tries to work out an understanding of who she is, of which relations, circumstances, and values are central to her being, of how she should think about her life and her obligations to others, and what she should do in light of this deeper understanding of her self. We must see this as an expression of agency. It is agency conceived as a process of thought and reflection that begins with the recognition of one's immersion in the world—in relations, circumstances, values—and then asks, who am I? Which relations, circumstances, and values are central and constitutive, distinguishing me as a separate human being and making me the particular person that I am? Isabel expresses her agency here, not by denying her constitutive nature, but by reflecting upon it, endorsing it as her own, and

129. JAMES, supra note 8, at 423.
131. JAMES, supra note 8, at 349.
132. Id. at 357.
so achieving a more complete self-understanding.133

We saw the conception of duty that was implicit in the abstract conception of human personality. There duty referred to the requirement of respect for the boundaries of the moral agent, for the agent’s inviolability and capacity for free choice. But where human personality is conceived as constituted by its relations, its history and moral tradition, there is room for a richer conception of duty. Now our duties need not be limited to the requirement that we keep our distance from one another; they can include duties that sustain our common life and moral values and make us the people we are. Whereas Isabel insisted upon justice in the first half of the novel, she now insists upon her duty in marriage: “constantly present to her mind were all the traditionary decencies and sanctities of marriage. The idea of violating them filled her with shame as well as with dread. . . .”134 Here marriage functions, I think, both as a symbol for the idea of law-based community135 and as an instance of moral tradition sustained in a particular way of life. Thus, when Osmond tells Isabel that she should not go to Ralph in defiance of his wishes, telling her that what he values most in life “is the honour of a thing,”136 his words strike an important chord: “they represented something transcendent and absolute, like the sign of the cross or the flag of one’s country. He spoke in the name of something sacred and precious—the observance of a magnificent form.”137 The use of the word “form” is of course important here, for it suggests that Isabel’s commitment is not to Osmond but to the duties that comprise the moral tradition in which she finds her self-orientation, to the fulfillment of her matrimonial duty without thought to its content.

Critics thus miss the point, I think, when they say that Isabel in the end chooses her marriage with open eyes, for the narrator is explicit about the fact that Isabel does not regard her duty to Osmond as a matter of choice: “He was not one of the best husbands, but that didn’t alter the case. Certain obligations were involved in the very fact of marriage, and were quite independent of the quantity of enjoyment extracted from it.”138 Wife

133. Sandel argues that
Where the ends of the self are given in advance, the relevant agency is not voluntarist but
cognitive, since the subject achieves self-command not by choosing that which is already given
(this would be unintelligible) but by reflecting on itself and inquiring into its constituent nature,
discerning its laws and imperatives, and acknowledging its purposes as its own.
Sandel, supra note 77, at 58; see also ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL
social identity. I am someone’s son or daughter. . . . I am a citizen of this or that city, a member of this
or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has
to be the good of one who inhabits these roles. . . . I inherit from the past of my family, my city, my
tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These
constitute the given of my life, my moral starting point.").
134. JAMES, supra note 8, at 379.
135. Jottkandt, supra note 9, at 77.
136. JAMES, supra note 8, at 438.
137. Id. at 439.
138. Id. at 474.
of Osmond, mother of Pansy now appear as part of her very substance, not contingencies to be stripped away. Isabel doesn’t choose her obligations to her husband; she rather recognizes the authority of those obligations, an authority grounded in the moral tradition she now acknowledges as constitutive of the person she is.

Following Ralph’s death, Isabel has a final encounter with Caspar Goodwood during which he begs her to leave her husband and pleads the cause of freedom: “We can do absolutely as we please; to whom under the sun do we owe anything? What is it that holds us, what is it that has the smallest right to interfere in such a question as this? Such a question is between ourselves—and to say that is to settle it!” The narrator’s description of this encounter and Isabel’s reaction to it is one of the novel’s most difficult passages:

The world... seemed to open out, all round her, to take the form of a mighty sea, where she floated in fathomless waters. She had wanted help, and here was help; it had come in a rushing torrent. I know not whether she believed everything he said; but she believed just then that to let him take her in his arms would be the next best thing to her dying. This belief, for a moment, was a kind of rapture, in which she felt herself sink and sink. In the movement she seemed to beat with her feet, in order to catch herself, to feel something to rest on... He glared at her a moment through the dusk, and the next instant she felt his arms about her and his lips on her own lips. His kiss was like white lightning, a flash that spread, and spread again, and stayed... So had she heard of those wrecked and under water following a train of images before they sink. But when darkness returned she was free. She never looked about her; she only darted from the spot. There were lights in the windows of the house; they shone far across the lawn. In an extraordinarily short time—for the distance was considerable—she had moved through the darkness (for she saw nothing) and reached the door. Here only she paused. She looked all about her; she listened a little; then she put her hand on the latch. She had not known where to turn; but she knew now. There was a very straight path.

The next day, we learn, Isabel returns to Rome and to Osmond. How should we understand this complicated description of Isabel’s reaction to Goodwood and her realization that she must return to her marriage? The first thing to notice is the significance of the water imagery. In the first half of the novel, Isabel was frequently likened to the ship at sea. She was “sailing in the bright light” and Ralph thought of putting “a little wind...
in her sails” and seeing her “going before the breeze.” The image of the ship sailing away from land, we said, is an image for one who is detached from social conventions and free from the oppression of customary moral norms. It is just this kind of freedom, the freedom of Isabel’s early conception, that Caspar insists upon when he tells her that they can do absolutely as they please. But while the conception of herself as perfectly independent with unfettered powers of choice once thrilled Isabel, it now fills her with the sense, not of sailing, but of sinking in a “mighty sea,” of having nothing to hold onto and nothing solid to rest upon. The reason for this change must be what Isabel learned in her marriage to Osmond. The freedom to do as one pleases, the freedom of the self abstracted from its particular life, needs, values and commitments, is in the end without concrete reality; it leaves us wanting “something to rest on.” Thus freedom, for Isabel, is now found, not in the sea’s “fathomless waters,” but in the house, an image for the moral traditions and values of a particular way of life, a moral framework within which the individual shapes an identity and a life of her own.

7. ISABEL’S TRAGEDY: THE LIMITS OF RECOGNITION

This is where the novel leaves Isabel and yet it is not, in my view, the whole story. The reader sees something in Isabel’s final decision that Isabel does not see, something signaled by the narrator’s language. We notice that the narrator describes the “straight path” as a path of darkness—“when darkness returned she was free”—and Isabel’s movement toward the straight path as a kind of blindness—“she saw nothing.” This recalls something we noted earlier—the fact that Isabel’s commitment to her marital duty is a commitment to a “magnificent form.” She accepts her duty in marriage to Osmond without questioning its content. In thinking of her duty, we see that she focuses on her marriage as an aspect of a moral tradition, as a sacred ceremony: “What he thought of her she knew, what he was capable of saying to her she had felt; yet they were married, for all that, and marriage meant that a woman should cleave to the man with whom, uttering tremendous vows, she had stood at the altar.” But what Isabel shuts her eyes to as she moves through the darkness is what the moral tradition means for her particular life, what marriage to a man who wishes her to have no ideas and no independent mind means for her individual happiness and flourishing. Isabel’s final decision is obedience to a moral law that makes Osmond her “appointed and inscribed master.” We must

142. Id. at 158-59.
143. Id. at 482.
144. Id. at 439.
145. Id. at 441.
146. Id. at 379.
wonder how Isabel could possibly regard this law—and her life under it—as her own.

In her repudiation of her earlier conception of freedom as detached from human lives, Isabel seems to miss the kernel of truth that lies at the heart of that conception. It is that human beings, though touched by circumstance and constituted in part by relations and values they acknowledge, are also separate centers of value and self-determining activity, bearers of ultimate worth and entitled to respect.\(^\text{147}\) And while it is true that duty cannot be coherently limited by the idea of unfettered choice, duty can be limited by the individual’s demand that the law’s substance respect her worth as a determinate individual, a separate human being with the capacity for agency and a life and mind of her own. Isabel’s failure to see this is, in my view, her tragedy. Thinking that she has found a conception of freedom compatible with a robust sense of duty, she ends up with a conception of duty incompatible with the ideal of living a life one can recognize as one’s own.

8. UNCONSCIONABILITY REVISITED

We can now return to the problem with which we began, the doctrine of unconscionability and the competing conceptions of freedom that shape the debate about its justification. There are important parallels between Isabel’s early conception of freedom and the conception of freedom underlying the criticism of the unconscionability doctrine. The early Isabel and the critics share a singular focus on the moral significance of the agent’s bare capacity for choice. As Isabel discovers the inadequacy of this conception of freedom, the flaws in the critics’ argument are put before us as well. Where freedom is conceived as the capacity for choice, freedom turns out to be consistent with a life lived in accordance with whatever impulses or whims are thrown at us by our nature and so with a life that fails to realize the human capacity for choice in a thought-out conception of how to live. Moreover, in Isabel’s marriage we see that the freedom to choose may co-exist with manipulation. On this conception of freedom, one may be perfectly free even as one is reduced to an instrument of another’s purpose. Finally, we saw that our ability to lead lives that reflect our own choices has material conditions; without a minimum amount of money and security in our ability to eat, sleep, and clothe ourselves, we won’t have the freedom to think about and act upon a conception of what we want to do and who we want to be. All this suggests that where freedom is conceived as the abstract capacity for

\(^{147}\) Isabel’s final decision is thus an illustration of why some feminist scholars have worried about the communitarian tendencies in feminist thought. Like Isabel, communitarians often seem to accept without question the moral authority of a community’s traditions and practices, which can be oppressive and exploitative. See Marilyn Friedman, Feminism and Modern Friendship: Dislocating the Community, 99 ETHICS 275-90 (1989).
choice, it is an ideal that lacks any worldly meaning or reality. But if human freedom is our ideal, then our understanding of freedom must include a conception of its realization in lived human lives. An ideal of freedom that lacks such a conception must be incomplete as an ideal for human beings. The Portrait of a Lady thus ought to prompt our reconsideration of the sufficiency of the unconscionability critics’ account of freedom because it, like Isabel’s early conception, fails to attribute normative significance to freedom’s realization in concrete human lives.

The revealed deficiency of freedom as the bare capacity for choice in The Portrait of a Lady begins to illuminate the normative foundation of the doctrine of unconscionability, for the doctrine seems to respond to just this deficiency. Consider again the facts in Walker-Thomas. The Walker-Thomas Furniture Company operated its business in a neighborhood where one quarter of the families lived in poverty. It operated by sending out aggressive door-to-door salesmen, who presented customers with the household items they badly needed and contracts with very small print. The salesman told the customer to “just sign here” and did not point out the contract’s lease and pro rata provisions or explain their meaning. During one of these salesman’s visits, Ora Williams signed a contract wherein she risked losing her family’s basic household items in exchange for credit on the purchase of a stereo.

Critics of the unconscionability doctrine will say that Mrs. Williams made a bad bargain, but the bad bargain was the product of her free choice. She didn’t have to sign the contract for the purchase of a stereo. If she didn’t understand the contract’s terms, she could have sought outside advice as to their meaning. She chose not to do so. Critics will say that moral agents are respected when their choices are respected, even when those choices turn out badly for them. To this we can now reply. First, we can now notice that this was not simply a bad bargain. The problem with Mrs. Williams’ contract was not that she purchased a stereo on onerous credit terms. The problem, rather, was that Mrs. Williams risked her household necessities—beds, mattresses, cookware, a washing machine—in order to purchase a stereo on credit. Since it was clear that Mrs. Williams, who was supporting herself and seven children on two hundred dollars a month, would not be able to make the thirty-six dollar monthly payments on the stereo, we might even say that she traded her household necessities in exchange for a few months’ use of a stereo. That is not simply a bad bargain the result of which is merely an unsatisfied personal preference or a frustrated subjective goal; Williams traded away the material conditions of human freedom, the material conditions of living a life she can regard as her own.


149. For this distinction see BRUDNER, supra note 36, at 224.
Moreover, at trial, Williams testified that she would not have purchased the stereo if she had understood that she was thereby risking the loss of her basic household items. She thought that all her payments over the years meant that those items were hers. Thus although there is no doubt that Williams chose to sign the contract, we can say that her choice, though free, was non-deliberative. She did not intend to trade her family’s basic household items for credit on the purchase of a stereo. Of course, individuals act without thought or understanding all the time and we often hold them responsible for their actions nevertheless. But where a contract reflects one individual’s non-deliberative alienation of the material conditions of her freedom, a court may refuse to enforce it without disrespect to the individual’s moral agency. For here the court merely recognizes what Portrait has taught us: the free moral agent is not a philosophical abstraction but a human being with a life of her own to lead. But the realized freedom of human beings has material conditions and is threatened by the manipulation of ignorance and need. It therefore depends upon the law’s support and concern for its flourishing.

Justice Wright’s ruling that a court may find a contract unenforceable when it was made in the absence of meaningful choice for one party and resulted in terms unreasonably favorable to the other party has been criticized as vague. But our discussion of Portrait suggests an analytically precise interpretation of Justice Wright’s vague references to “meaningful choice” and terms “unreasonably favorable to the other party.” We might now suggest that the unconscionability doctrine allows the judge to set aside a bargain that, though the product of a free choice, nevertheless results in one party’s non-deliberatively alienating the material conditions of living a life reflective of self-authored ends. Now the question is whether unconscionability must be interpreted in this limited way, so that it is applicable only where the fact situation exhibits both an absence of deliberation and a contract wherein the vulnerable party has alienated the conditions of her realized autonomy. Our reading of Portrait suggests that the answer to that question is yes.

Isabel’s recognition of the falsity of her conviction of independence leads to her final conception of free agency as the reflective endorsement of one’s place within a moral order, a set of duties embodied in a common way of life. In the end, she recognizes the authority of the moral law that makes her the person she is and that provides the context within which she can regard her life as valuable. But as we have seen, the moral tradition Isabel now recognizes as defining her duties as a responsible subject is one

150. See FRIED, supra note 1, at 103; John E. Murray Jr., Unconscionability: Unconscionability, 31 U. Pitt L. REV. 1, 2 (1969-1970). Bridwell criticizes Justice Wright’s failure to explain what constitutes a lack of meaningful choice and writes that the vagueness of the unconscionability doctrine has allowed judges to rely simply on their “intuitive notions of fairness.” Bridwell, supra note 6, at 1522.
that makes Osmond her “appointed and inscribed master.”151 This means that the law to which Isabel finally defers is indifferent to her independence of mind, to her separate and individual worth, and to her ability to regard her life as her own. This, I think, is why Isabel can only stare at her marriage with “a sort of incredulous blankness,” why the path she chooses is described as a path of “darkness” and why her movement along it is presented as a kind of blindness.

Many defenders of the unconscionability doctrine have made Isabel’s mistake. They have interpreted unconscionability as a declaration of unenforceability based on the judge’s moral conception of human well-being, one that is indifferent to the individual’s own view of the matter. As we saw, Duncan Kennedy has interpreted unconscionability as a judicial license to save people from themselves, to step in whenever there is a danger that people will make agreements that are contrary to their well-being.152 Anthony Kronman treats the doctrine of unconscionability as a way for the judge to equalize welfare between the rich and the poor. In response to the argument that the rich manufacturer will simply pass his new cost on to the poor purchaser by charging a higher price for a vehicle with a non-disclaimable warranty, Kronman writes that there is nothing wrong with forcing people to buy protection they do not want.153 Seana Shiffrin would allow a judge to refuse to enforce a one-sided bargain even when made “under conditions of sufficient information.”154 On the defenders’ accounts of unconscionability, there is no exception for one who deliberately chooses to do what the court thinks she ought not to do; from the perspective of human welfare, the one who deliberately chooses what is contrary to her true interests needs protection as much as the one who blindly stumbles into error. These theorists would thus enforce a moral law whose concern for human welfare pays no respect to the individual’s deliberate choice and so denies the individual her status as a separate agent with a life and mind of her own.

All this suggests that the law must not only show support and concern for the realized autonomy of its citizens; it must also find a way to embody the particle of truth that lies at the heart of Isabel’s early conception of freedom. That truth is that human beings are separate centers of self-determining activity, capable of independent thought and responsible action. If the doctrine of unconscionability is to reflect this understanding of human reality, it must be interpreted, not as a license for judges to refuse to enforce all contracts that turn out to be contrary to one party’s well-being, but as an exception within a general scheme of freedom of contract for those who, due to ignorance or extreme need, non-

151. JAMES, supra note 8, at 379.
152. Kennedy, supra note 2, at 634.
153. Kronman, supra note 2, at 773.
154. Shiffrin, supra note 7, at 209.
deliberatively enter a contract wherein they alienate the material conditions of living an autonomous life.

A consequence of this interpretation of the unconscionability doctrine is that while Williams v. Walker-Thomas was rightly decided, Henningsen v. Bloomfield Motors was not. This is so for two reasons. First, whereas the goods at stake in Walker-Thomas were basic household necessities required for living for personal goals beyond survival, what Henningsen agreed to by accepting the standard term was to bear the burden if the car turned out to be a lemon. But since it seems unreasonable to think that owning an automobile with a robust warranty is a necessary condition of living a life whose overall shape reflects one's values and purposes, we cannot say that in signing the contract, Henningsen alienated a condition of his realized autonomy.

Second, much has been made of the fact that in Henningsen, the disclaimer of warranty was presented on a take-it-or-leave-it basis so that no bargaining was possible. Many have written as though Henningsen had no choice but to accept the disclaimer of warranty because it was a standard term in the automobile industry. But this of course is not true; Henningsen could have chosen to forgo the purchase. The industry-wide standard terms meant that the car company was in a position of superior bargaining power once Henningsen had decided to buy a car, but as long as the party in the weaker bargaining position can walk away, superiority of bargaining power is not, by itself, enough to establish that the terms were not deliberatively agreed upon. Moreover, it is important to notice that the decision in Henningsen did not depend on the court’s finding that the disclaimers were hidden in the contract’s fine print or that their significance was unintelligible to the ordinary consumer. The decision rested on the court’s conclusion that a car manufacturer’s disclaimers of the warranty of merchantability and of liability for consequential damages were “so inimical to the public good” that they could not be enforced. In other words, no consumer could choose to accept the limited warranty and limitation of liability in exchange for a cheaper vehicle—not even a consumer who understood the full implications of this bargain and wanted it anyway. In its concern for human welfare, the court in Henningsen forgets that the welfare we care about is the welfare of individual human beings, separate persons capable of choice and responsibility.

But where unconscionability is interpreted to require, not merely an improvident bargain, but an improvident bargain made in circumstances of ignorance or extreme need and without independent advice, the individual who acts with full knowledge and understanding may still choose to do

155. Murray writes: “as to a certain material provision in the contract, he had no choice at all since he could either procure the deal with no other party, or even if he could, the identical or similar provision would have again confronted him. . . . [T]his smacks of duress; it is something like duress.” Murray, supra note 150, at 4.
with her own life what the morally authoritative conception of her well-being thinks she ought not to do. And where unconscionability applies only to those cases where (as in Walker-Thomas) the individual alienates the universal conditions of living autonomously and not to cases where (as in Henningsen) the individual has simply made a bad bargain from the perspective of her personal interests or goals, the law shows concern for freedom’s vulnerability without denying the individual’s responsibility for her choices. When the doctrine of unconscionability is interpreted in this way, it embodies the complex set of truths that Portrait of a Lady teaches us. The freedom of human beings is meaningful only if it is freedom realized in a life reflective of self-authored ends. Because, however, freedom in that sense is vulnerable to circumstance and manipulation, it depends upon the positive support and concern of a moral community independent of our wills—one that the court represents. Still, such a community would destroy the freedom it is supposed to fulfill if it did not also treat human beings as separate, responsible agents with independent minds and lives of their own, as much entitled to the court’s respect for their deliberate choices as to its concern for their objective well-being.