In Defense of Unconscionability

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In Defense of Unconscionability

M. P. Ellinghaus*

“You just don’t see much good legislation any more.”

Lester Maddox†

Introduction

Section 2-302 of the Uniform Commercial Code, which might be considered at first sight to be the very quintessence of progress in matters of sales law, has in fact received something less than universal approbation. Even its presumed chief draftsman seems in the end to have had only half a fondness for it. Its most substantial and trenchant critic concludes that the section amounts to no more than “an emotionally satisfying incantation,” abstracted to the point of meaningless, and that it provides for draftsmen the valuable lesson that “it is easy to say nothing with words.” As these remarks suggest, the criticism most generally levelled against Section 2-302 is that the test of “unconscionability” which it prescribes is without certain or meaningful content, and that its application is, therefore, likely to result in harm rather than good.

This article makes no attempt to deal with all of the substantial body of literature concerned, in general as well as in more specific ways, with the problems of unconscionability. Out of the conviction that provi-

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† N.Y. Times Magazine, Nov. 24, 1968, at 141. 
1. Section 2-302. Unconscionable Contract or Clause. 
1(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. 
1(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. 
3. The drafting of the Sales Article, as of other portions of the Code, is attributed to many hands. Leff 488 n.11. It is not unreasonable, however, to see the hand of Llewellyn writ large over Section 2-302 (except for subsection 2, which can be traced with certainty to Professor Braucher). 
4. Leff 558-59. 
5. Among the many materials which I have, by and large, omitted from careful consideration is the Uniform Consumer Credit Code, which, apart from many other provisions of relevance to the present topic, has its own unconscionability provisions, e.g.,
sions like Section 2-302 are vastly useful, and indeed essential if the common law of contracts is to survive in modern times, I have attempted to show, by means more analytical than agglomerative, that criticism directed against the Section's draftsmen in terms of "abstraction" and "meaninglessness" is misconceived ab initio, and that the standard of "conscionability" is in fact proving to be a workable one.\(^7\)

I should, however, make it clear from the outset that I make no attempt to offer a "theory" or "definition" of "unconscionability." Indeed, the first section of the article is specifically concerned with establishing the proposition that the nature of Section 2-302 makes it inappropriate to ask for such a theory or definition.\(^8\) This is not to say, of course, that all discussion of the "meaning" of unconscionability is beside the point. The major portion of this article seeks to bring to light such concreteness as may be elicited from the words of the statute, the cases, and other relevant sources. It will be contended that in most areas some minimal clarity is achievable without straying too far into the realm of unmitigated speculation.

For the sake of structural clarity I set out at this point the major headings under which the remainder of my discussion is organized:

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6. The Sales Article of the Code (if not others) must, of course, be understood as one stage in the organic development of the law of sales. Its many innovative provisions are hardly conceivable without due tender of obeisance to "the undying succession of the Great Commercial Judges whose work across the centuries has given living body, toughness and inspiration to the Grand Tradition of the Common Law," K. Llewellyn,*The Common Law Tradition* at \(v\) (1960).

7. No systematic examination of Section 2-302 has yet been made from such a point of view. Some attempt to deal with its critics in the light of decided cases is made in Shulkin,*Unconscionability—The Code, The Court and the Consumer*, 9 B.C. IND. & COMM. L. REV. 367 (1966), but the approach there is more chronological than analytic. Davenport,*Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967) contains much valuable matter, although it is handicapped by its avowed determination "to demonstrate that Section 2-302 introduces nothing really new and is substantially a restatement of common law," id. 123, as well as by its adherence to a dichotomous categorization of unconscionability in terms of "oppression" and "unfair surprise."

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I. Preliminary Considerations

The legal consequences which Section 2-302 prescribes attach or do not attach, as the case may be, according to a finding in terms of "unconscionability." It will at once be apparent that we are confronted here with something Pound would have termed a "standard" (in contrast to a "rule," "principle," or "conception"). The function of "standards" in the law is closely (though not perhaps exclusively) tied to the maintenance of "residual categories":

Every system, including both its theoretical propositions and its main relevant empirical insights, may be visualized as an illuminated spot enveloped by darkness. The logical name for the darkness is, in general, "residual categories." . . .

If, as is almost always the case, not all of the actually observable facts of the field, or those which have been observed, fit into the sharply, positively defined categories, they tend to be given one or more blanket names which refer to categories negatively defined . . . .10

The maintenance of such residual categories—"reasonableness," "due care," and "good faith"11 are obvious if maximally dissimilar examples—is essential to the well-being of any system, and serves to counteract its inherent tendency to become logically closed.12 The very essence of those standards here under discussion is to be found in their residual

12. T. Parsons, supra note 10, at 17.
quality. It is true, of course, that the task of scientific inquiry is to carve out from the outer darkness such solid substance as has been made accessible by the progress of empirical insight. But that task must proceed in the knowledge—must, in fact, take as its fundamental premise—that the terrain to be explored is illimitable in extent.

In the sense, then, that "unconscionability" by its very nature encompassed a world both shadowy and without bounds, its "content" is illusory. But that is not the reproach it might seem. As Professor Stone, who has devoted considerable attention to the problem of illusoriness in this connection has said:

What needs bringing home, especially as the illusory categories themselves are increasingly recognized, is how endemic or chronic (or we should perhaps say, how "normal") a part of the appellate judicial process they really are.\(^{13}\)

The role played by such categories is, as Stone says elsewhere, by no means wholly negative:

They may serve, even while imaginative judicial innovation is proceeding, to give to the legal craftsman a certain assurance arising from the belief that innovations are but a rediscovery of or an inference from existing legal norms. We cannot, accordingly, dismiss the illusory categories as mere irrelevancies to what really goes on in judicial development of the law. We may have to see their use as an organic part of the traditional techniques. . . . In short, the illusory categories may be resorted to, not because they are believed to determine creative decision-making, but because they are felt, often instinctively, to enable the content of legal norms to change while ensuring that the legal order continues as an unbroken unity.\(^{14}\)

I do not for a moment suggest that the commentator's job is done when he has made the points so far made. But a strict distinction must be drawn between the nature of his task and that of the draftsman. The latter's vulnerability lies in this: he may be accused of having chosen to fling into the fray a "residual category" at a time when (or in a place where) it has not yet become clear that the disparate phenomena intended to be embraced by that category are in fact usefully subsumable in such a way.\(^{15}\) But he is not to be attacked because he chose to insist on the essential qualities of the tool which he was wield-

14. Id. 25.
15. Whether the draftsman's timing came off in the present instance is a question now adjudicable at least to some degree by reference to recent cases which have utilized Section 2-302—an advantage not, of course, available to Professor Left and others who have gone before.
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ing—which in this case go by adjectival labels such as “residual” and “illusory.”16 Whether the draftsmen of Section 2-302 were the victims or (as this article contends) the promoters of the illusion is ultimately of no consequence. Their language is, in any case, suffused by a wholly admirable spirit of tautology, and splendidly productive of that “certain assurance” referred to by Professor Stone.17 Thus to say, as Professor Leff does, that ever since 1952 unconscionability has been “defined in terms of itself”18 is, from the present perspective, a less telling point than might at first appear.

Let it be clear that the difference between an attitude such as that of Professor Leff and the view here expounded is, at bottom, one merely of approach. It is a difference, nevertheless, which seems to me important. To criticize the draftsman for failing to accomplish that which he did not set out to accomplish is, in the first place, unfair to him. More important, too much emphasis on the illusory nature of the “content” of unconscionability means that those matters which are not beyond the range of discovery are left underinvestigated. Most important of all, such an overemphasis is calculated to discourage the courts from discharging the function of reasoned and creative exegesis and implementation which Section 2-302 so obviously (because necessarily) entrusts to them.

II. The “Meaning” of Unconscionability

The assertion that Section 2-302 supplies a “standard” and thereby constitutes an invitation to judicial creativity is not, of course, proof that such a tactic was necessarily well-chosen. We have now, however, a sufficient body of case-law making explicit reference to the section to make possible some estimate, however tentative, of the practical working of “unconscionability.” By and large it may be asserted that the direction and the pace of territorial expansion have been judiciously fixed upon; it must be conceded, however, that the means of occupation have on occasion been unnecessarily haphazard. Although the results of the cases have more often than not a ring of conviction about them, the reasoning in support has frequently shown a want of analytical rigor.19

16. Cf. Professor Leff’s complaint that the abstractness of the final form of Section 2-302 renders the provision meaningless and lacking in “reality referents.” Leff 558.
17. P. 760 supra.
18. Leff 499.
19. Most of the opinions involved have been trial court products, which may be much of the story. It is not clear, however, why appeals have been so infrequent. Pragmatism suggests that litigants may often have been impecunious—but that is typically true
The discussion which follows, while it focuses primarily on those cases which have so far utilized Section 2-302, seeks to incorporate as well both the cases provided as points of compass by Comment I of the Section itself, and a variety of other relevant authorities. Since the typical case is concerned with an amalgam of matters which are, for the sake of analysis, segregated below, the usual warning must be given that to this extent schematization is artificial. Nor can it be maintained, of course, that the distinctions between the various categories adopted below are ultimately so clear-cut as to allow of no overlap.

A. Matters Touching Freedom of Assent

The circumstances which militate against free assent and which may, therefore, call into question the procedural20 conscionability of an agreement can be dichotomously arranged with the help of the approximate labels "misleading bargaining conduct" and "inequality of bargaining position."21

1. Professor Leff's Argument

It is Professor Leff's view that in attempting to deal with "procedural" unconscionability the draftsman had a duty to define, as clearly as possible, the bargaining elements which will make a contract "open to judicial rewriting," or, alternatively, which "will permit scrutiny for unconscionability."22 In reverse form, the question is simply that of "insulation": may the parties, by a sufficient compliance with the proprieties of bargaining, insulate the contract from judicial intervention on the ground of "substantive" unconscionability? If so, what degree of bargaining unfairness must be shown before that insulation melts away?

The proper place for a discussion of this very legitimate problem is elsewhere; it is a part of the topic of "substantive" unconscionability of only one party, generally the winning one. I should like to think that the lack of appeals is in itself a vindication, of a sort, of the draftsman's design; but a less sanguine temperament might, of course, be inclined to single out the generally moderate amounts at stake, as well as a degree of nervousness on the part of counsel which perhaps corresponds to that manifested by the commentators. (Such a nervousness is not, be it noted, necessarily unwholesome in its implications: tremors, too, may be conceived of as part of the grand design.)

20. Professor Leff distinguishes between bargaining aspects and substantive aspects of unconscionability by labelling the former "procedural"—perhaps unhappily so, but I have accepted the usage for simplicity's sake.

21. An amalgamation of the two categories will, however, intrude at a later stage, as a result of the necessary recognition of a judicial trend towards regarding as sul generis contracts involving the participation of low-income consumers, of which more is said below.

22. Leff 504 (emphasis added).
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itself, of the question: How far does the power of the court to find such unconscionability extend? What is important here is that this problem must be distinguished carefully from the one presently in issue, which is not what level of bargaining conduct permits scrutiny for unconscionability (or, conversely, insulates against such scrutiny), but rather, and very differently, what level of bargaining unfairness (if any) is sufficient to entitle a court to refuse to enforce a contract for unconscionability even where the terms of the contract are not in themselves unconscionable? Professor Leff, it seems to me, does not make this distinction clearly, and the result is confusion. The former question, it will be seen later, is admittedly incapable of being answered with precision, and this is so for what seem to the present writer good and substantial reasons. The latter question, on the other hand, required—as will be submitted below—no particular attention from the draftsmen of Section 2-302, in view of case doctrine already available in the field.

2. Misleading Bargaining Conduct

The traditional means of dealing with the problems of misleading bargaining conduct are familiar and diverse. Fraud, misrepresentation, mistake, and the like are all relevant here in ways too self-evident to justify elaboration. The adequacy of developed doctrine was perhaps called into question for a time by the advent of the form contract, but it seems hardly open to dispute that this challenge had been met without serious dislocations by the time the Uniform Commercial Code began to be enacted in the various states. The courts had shown themselves quite capable of dealing with matters of unread, fine, or otherwise inaccessible print and so on, entirely in terms of the competing categories of the traditional doctrines of assent and interpretation.

According to these doctrines, moreover, a sufficiency of deception may in itself, without more, be enough to absolve the promisor from all (or any particular) obligation.

"Unconscionability," therefore, while it clearly embraces this field, serves, with respect to it, at least on one level primarily by way of dec-

23. I discuss the problem of insulation, and give the "good and substantial reasons" referred to, under the heading "The Question of Insulation," pp. 773-75 infra.

oration. The simplest answer to charges that the section fails to make clear what kinds of bargaining conduct are unconscionable, and that the official comment cases fail\textsuperscript{25} to do more than "illustrate what kind of bargaining procedure will not serve to insulate a contract from gutting pursuant to Section 2-302,"\textsuperscript{26} is, therefore, that the major thrust of Section 2-302 is simply in another direction (that of "substantive" unconscionability),\textsuperscript{27} and that its relative inattention\textsuperscript{28} to bargaining matters was justified in the light of developed judicial doctrine.

If a demand for dramatic focus nevertheless be made, Comment 1 surely supplies it by incorporating the phrase "unfair surprise."\textsuperscript{29} Professor Leff suggests\textsuperscript{30} that the utility of the phrase is diminished or destroyed by the introduction, in 1952, of the reference to clauses "so one-sided as to be unconscionable" (this being a definition of unconscionability "in terms of itself"),\textsuperscript{31} and by the addition in the same year of the word "oppression," which by constituting another dimension of unconscionability, represents a further dilution.\textsuperscript{32} One has here, I think, a good instance of the all-or-nothing approach which characterized the major portion of Professor Leff's commentary. If there is to be a reference to "unfair surprise," then that reference must stand craggily alone, sole monarch of the realm: any attempt to supply chiaroscuro is obfuscation.

Still, if the question is asked: What does Section 2-302 add to the techniques already available for dealing with deceptive bargaining practices, then it must be answered: nothing much except a greater possibility of overtness in place of covertness.\textsuperscript{33} Most cases so far de-

\textsuperscript{25} As they clearly do: see Professor Leff's convincing argument. Leff 502-04.

\textsuperscript{26} Id. 503.

\textsuperscript{27} See Section B infra.

\textsuperscript{28} It ought to be remembered that where matters of fine print and the like are of special relevance, the Code usually lays down explicit standards. See, e.g., UCC § 2-316(2).

\textsuperscript{29} "The principle is one of the prevention of oppression and unfair surprise . . . ." UCC § 2-302, Comment 1. I suggest below that "surprise" was intended by the draftsman to have the primary function of delimiting a species of substantive unconscionability, but there is no reason why it should not be utilized in the present context. That it should be equally useful in both areas perhaps indicates the artificiality of distinguishing between them.

\textsuperscript{30} Leff 498-99.

\textsuperscript{31} Id. 499.

\textsuperscript{32} Id. 499-500. The introduction of "oppression" is troublesome apparently because its content cannot be specifically assigned to either the procedural or substantive aspects of unconscionability; with respect to the former, it raises further doubts, according to Professor Leff, about the "insulation" issue to be discussed below.

\textsuperscript{33} Compare Professor Leff's conclusion, invoking Llewellyn's famous dictum, that the total effect of Section 2-302 is just the opposite. Leff 559; cf. note 270 infra. My point is simply that the court may find it congenial squarely to label as "unconscionable" that
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cided under Section 2-302 have involved "form" contracts, but the fact is as often ignored as commented upon. 34

On another level, the section is also perhaps encouraging the courts to use language, which, though it constitutes in the first place a response to bargaining matters, has nevertheless profounder implications: language which reflects the broad trend of our times toward a far-reaching socialization of the law of contracts. It is not difficult to see that, quite apart from factors such as lack of education 35 which may in given situations diminish the understanding of one of the bargaining parties, even the man of solid bourgeois accomplishments (who is presumably the anthropomorphic norm here) may often in these times be overwhelmed by incomprehension, or at least unconquerable ennui, in the face of lengthy columns of finely-honed lawyers' language. It may be that we are at the point of adopting the principle that under certain circumstances it is simply "unconscionable," within the meaning of Section 2-302, to rely on print as a means of communication (and therefore as a means of defining the ambit of assent); more may be necessary by way of detailed and comprehensive disclosure. 36

3. Inequality of Bargaining Position

As in the case of misleading bargaining conduct, the nature of this problem, too, has been familiar for a considerable time, and questions which would formerly have been neutrally referred to as preventing "agreement" or "consensus ad idem."

34. In American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964), for instance, the court might conceivably have made something of the apparent complexities of the printed forms involved, but concentrated on excessiveness of price instead. In those cases in which the standard form aspect is singled out for attention, the decision might well have been supported by arguments making no reference, as to this point, to Section 2-302. See, e.g., David v. Manufacturers Hanover Trust Co., 4 U.C.C. Rep. Serv. 1145 (N.Y. Civ. Ct. 1968) (clause waiving right to a civil jury, printed in fine print on a "signature card" apparently non-contractual in nature); Zabriskie Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 240 A.2d 195 (1968), where the court, in holding a warranty disclaimer a la Henningsen unconscionable by invocation of that case and of Section 2-302, puts the issue of "fine print" in terms of Section 2-316(2); and the dissent of Gibson, P.J., in State Bank of Albany v. Hickey, 29 App. Div. 2d 993, 288 N.Y.S.2d 980 (1968), which insists on the unenforceability of a guarantee contained in a finely-printed document of "circuitous structure," couched in "laboured and redundant language," on the basis of "ambiguity" (presumably according to the maxim of interpretation contra proferentem), although the majority opinion discusses the issue in terms of Section 2-302.

35. See p. 770 infra.

36. Coming to meet us here from the opposite direction is, of course, the expanding notion of strict tort liability, which in one important respect has already absorbed into its territory an area no doubt originally conceived of as comprised within the sphere of operation of Section 2-302: the area of manufacturers' liability for defective products. I take it that extensive citation is superfluous. See, e.g., Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966).
of "adhesion," in particular, have been extensively canvassed in the literature.\textsuperscript{37} The relevance of the respective bargaining positions of the parties to the issue of unconscionability is beyond dispute,\textsuperscript{38} although to ask the draftsman for a comprehensive statement of the precise nature and scope of this relevance is, as we have argued above, misguided. One might, however, fairly demand of him that he should give some indication of the \textit{degree of emphasis} which is to be placed on the factor of bargaining power. And Section 2-302 provides a very real clue here: the principle is, says Comment 1, one of prevention of oppression and unfair surprise, "and \textit{not} of disturbance of allocation of risks because of superior bargaining power."\textsuperscript{39} These words are no doubt not as ideally clear as might be wished for by some commentators, but they do, it is submitted, almost certainly mean that \textit{mere} disparity of bargaining strength, \textit{without more}, is not enough to make out a case of unconscionability. Just because the contract I signed was proffered to me by Almighty Monopoly Incorporated does not mean that I may

\textsuperscript{37} I think the ritual of listing the usual array of pieces by Dawson, Ehrenzweig, Kessler, et al., may be dispensed with nowadays. For a compendium of thinking on the matter, see Patterson, \textit{The Interpretation and Construction of Contracts}, 64 \textit{Columbia L. Rev.} 833, 855-62 (1964). This invaluable article touches on many points of general relevance to the present essay. Cf. Eisenberg, \textit{Let the Seller Beware: A New Concept under the UCC}, 72 Com. L.J. 349 (1967), which I cite only, however, for the suggestiveness of its title.

\textsuperscript{38} So far as the case law is concerned, it should be noted that Professor Leff goes some lengths to establish the inapplicability of equity decisions both to this area and to matters of bargaining conduct. I deal with his argument here because the equity cases seem on the whole to be worried predominantly about certain classes of persons whose most egregious common attribute—if real or presumptive idiocy is put to one side—seems to be weakness of bargaining strength. Professor Leff concedes that the equity cases offer a "whole universe of kinds of bargaining which . . . will support a refusal specifically to enforce it." Leff 531; but for two reasons no comfort may, in his view, be derived from them \textit{guand même}; first, they are prototypically concerned with property transactions (essentially dissimilar, he argues, from the sale of goods), and second, their "dramatic situations" offer, as already intimated, quintessentially the spectacle of a large variety of "presumptive sillies"—sailors, heirs, farmers, women, illiterates, drunkards, etc., etc.—situations which are "exceedingly unlikely to be reproduced in the Sales context." \textit{Id.} 532-33. To utilize Professor Leff's splendid aphorism: "Equity dealt with the pathology of bargaining. The Code deals with the pathology of nonbargaining." \textit{Id.} 537.

It is difficult not to feel that this position is somewhat overstated; by hypothesis, the use of analogy does not, after all, depend on the very closest degree of affinity between subject and analogue. For instance, to the extent to which Section 2-302 has induced recognition of the underprivileged consumer, there is a clear analogy to equitable recognition of the "presumptive silly" (impolitic as that point may seem). A thorough investigation of the equity cases would be a major task of scholarship, and is beyond the scope of this article.

\textsuperscript{39} Some ingenious footwork in connection with the phrase "unfair surprise" enables the writer of Comment, \textit{Bargaining Power and Unconscionability: A Suggested Approach to UCC Section 2-302}, 114 \textit{U. Pa. L. Rev.} 998 (1966), to conclude that the application of the section is to be "\textit{limited} to those contracts whose unfairness arises from unequal bargaining power between the parties." \textit{Id.} 999 (emphasis added). In view of the cases this position, even if it is conceived of in "threshold" terms, is hardly worth quarrelling with.

\textsuperscript{39} Emphasis added.
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subsequently argue exemption from any or all obligation: at the very least, some element of deception or substantive unfairness must presumably be shown. If this interpretation is correct, therefore, it is clear that inequality of bargaining position (unlike deceptive bargaining conduct) is not, even potentially, enough per se to justify judicial intervention under Section 2-302. The cases seem to support this view.40

If, in the further pursuit of precision, we now ask ourselves: What precisely is “inequality of bargaining position”? it must be answered that a comprehensive and detailed description is as impossible as it is undesirable. It may, however, be said that traditional usage embodies the notion of a disparity of status as opposed to a disparity which is the product of a particular contingency. The bargain is the occasion on which Wotan and Alberich—merchant and consumer, corporation and individual, and so on—meet and draw apart, each conceived of as a representative of a statically different order.41 But it should not be lost sight of that there are also bargains struck between seeming equals which, on closer investigation, turn out to be lopsided because of particular circumstances of the case. Even Alberich may possess the Ring, if only for a time. A recurring situation of this kind is that of the near-insolvent business forced to look for last-minute financial relief to those who, well aware of the opportunity for gain thus provided, are willing to lend only on terms extravagantly advantageous to themselves. Financing agreements are, of course, prima facie beyond the scope of the Code’s Sales Article, but an attempt to apply Section 2-302 to such an agreement was nevertheless made in In re Matter of Elkins-Dell Manufacturing Co.42 There a referee in bankruptcy held that a contract under the terms of which the lender had no real obligation to advance

40. See, e.g., the Paragon Homes litigation, discussed pp. 803-04 infra, where the court, although it took note of the fact that the cases did not involve “parties situated on an equal basis” (home owner v. construction company), stressed also that the clause in question had been inserted into the contract “for the purpose of harassing and embarrassing the defendants”; David v. Manufacturers Hanover Trust Co., 4 UCC REP. Serv. 1145 (N.Y. Civ. Ct. 1968) where, although some emphasis is placed on quasi-adhesive elements (bank v. private customer), more is made of matters involving deceptive bargaining conduct. See also Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co. 51 Misc. 2d 446, 448, 273 N.Y.S.2d 364, 366 (1966): Section 2-302 is not directed “against the consequences of uneven bargaining positions.” (For criticism of this otherwise very badly argued judgment, see note 256 infra.)

It will be seen that my discussion of each “component” of unconscionability seeks to suggest an answer to the question whether that component is per se at least potentially capable of sustaining a finding of unconscionability.

41. The dangers of a rigid adherence to this approach are spectacularly demonstrated by Sinkoff v. Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (1966). See note 254 infra.

funds, while the borrower submitted to almost total economic enslavement, was unconscionable, and confined the lender's recovery to the legal rate of interest although the borrower, as a corporation, was deprived by statute of the defense of usury. On petition for review, the federal district court declined to express its view as to whether Section 2-302 might be extended to financing agreements of the kind before it, but held that, in any case, analogous principles of equity demanded that a hearing of the kind contemplated by Section 2-302(2) be held in order to determine the commercial context of the case and its implications.

Whether or not Section 2-302 be applied outside the law of sales, however, the pressures of financial difficulty are clearly of potential relevance within the sales context. Either seller or buyer may submit to unusually onerous terms because of the prospect of impending bankruptcy. In such circumstances the court ought, by way of analogy to Elkins-Dell, to look beyond any nominal parity of status of the parties to the reality of the situation. And the considerations relevant to insolvency situations ought to be applicable, mutatis mutandis, to other situations in which unusual pressures are being brought to bear on one of the parties not by a divergence of status but by the contingencies of the moment.43

4. Exploitation of the Underprivileged44

That a significant stratum of American society is composed of those whose income is sufficiently negligible or sporadic to warrant their being labelled "poor" is a fact to which nowadays no particular attention need be drawn. That one of the incidents of poverty is a tendency to fall victim (usually by way of the installment contract) to purchase commitments entered into over-optimistically is also sufficiently obvious. That those commitments are often made under pressure of unscrupulous salesmanship, and that their terms are usually heavily weighted in favor of the merchant-supplier, is presumably no news to anybody, either. In this area insufficiency of understanding and inequality of bargaining power play an intertwined role and are jointly traceable to features of the context (that is to say, the disadvantages of the purchaser's station) which on that account deserve to be institutionalized.

43. The contractor-subcontractor or general bidder-subbidder situations come to mind as other examples of situations involving particular pressure on one party if deadlines or outstanding commitments have to be met.
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The most immediately relevant questions here seem to be: (1) According to whose susceptibilities must the degree of communicational clarity required by the law (especially of the standard form contract) be adjusted—those of the "reasonable" or "average" man (who, as we have said elsewhere, is presumably a staunch bourgeois)—or must some lower common denominator be kept in view? (2) How significant is the seller's knowledge that the consumer cannot afford the purchases contracted for by him?

The problem of the particularly susceptible consumer is, of course, an old one, not only in the law of contracts, and we have no doubt come a long way from the views once prevalent with respect to it. The sensible answer is, surely, that the particular character of the consumer in question, or, at the very least, the class of consumers with which dealing was or should have been contemplated, cannot be left out of account. In Williams v. Walker-Thomas Furniture Co. the court put the test in this way: "Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract . . . ?" Under this formula, the seller acts at his peril, at least in the sphere of ordinary consumer transactions, unless he uses "language that the least educated person can understand."

That he do so was demanded by the court in the ITM case, in which the Attorney-General of New York sought an injunction against a so-called "referral" or "endless chain" sales plan, misrepresented to customers as a money-making scheme from which they could make thousands of dollars. Concomitant with enrollment the customer was required to enter into an installment contract for the purchase of a household appliance at an exorbitant price. A "literal cascade of misleading statements and misrepresentations" issued from the promoters of the plan. The court held, not surprisingly, that the Attorney-General "not only had the right, but the most imperative duty, to bring this action," and issued the injunction prayed for. Beyond this, how-

45. 350 F.2d 445 (D.C. Cir. 1965). See Wright, supra note 44, at 102-04. (Judge Wright wrote the opinion for the court in this case.)
46. 350 F.2d at 449 (emphasis added). It is true that the court was applying common law doctrine, since the UCC had not, at the time of the making of the contracts in question here, been enacted in the District of Columbia; but the court referred to the Code, and to Section 2-302, as "explicitly derived" from the "rationale of the cases" upon which it relied. 350 F.2d at 449.
48. This is a very abbreviated account of the case, the detailed facts of which take up the greater part of a very lengthy opinion. A point which deserves mention here is that part of the promoters' grand design was the immediate assignment of the contracts to finance institutions.
ever, the court went on expressly to hold the installment contracts obtained under the scheme "unconscionable" within the meaning of Section 2-302.\textsuperscript{49} For present purposes the important feature of the case is that recruitments to the "referral plan" were apparently sought predominantly from low-income and low-literacy strata of society. This factor, along with others, "placed the respondents in a position requiring a much fairer and more honest course of dealing than would be countenanced in the ordinary course of a commercial transaction."\textsuperscript{60}

In \textit{Frostifresh Corp. v. Reynoso},\textsuperscript{51} the buyers' native language was Spanish, and although oral negotiations were conducted in that language, the "form" contract eventually entered into was entirely in English and was "neither translated nor explained"\textsuperscript{52} to the buyers. The court, in holding that Section 2-302 barred the seller's action for the price, emphasized that the buyers "were handicapped by a lack of knowledge, both as to the commercial situation and the nature and terms of the contract which was submitted in a language foreign to them."\textsuperscript{53} It would appear, therefore, that the "more honest course of dealing" required in the context presently under discussion includes translation (or, at the very least, "explanation") of the terms of the contract where the consumer is known to have a defective knowledge of English.\textsuperscript{54}

The seller's knowledge of the buyer's impecuniousness was a factor present, and noted by the court, in all three of the cases discussed above. In \textit{Williams}, the plaintiff company was aware that the buyer was on welfare; the amount of her allowance and the name of her social worker were listed on the reverse side of the contract. In the \textit{ITM} case, "in most cases it was immediately and outstandingly apparent that these expensive products were far beyond the consumers' limited means,"\textsuperscript{55} and the fact that immediate assignment was an integral part

\textsuperscript{49} 52 Misc. 2d at 53, 275 N.Y.S.2d at 321. Presumably so as to make quite sure that the assignees could not recover.

\textsuperscript{50} 3 UCC Rep. Serv. 793. The paragraph in which this passage appears is for unknown reasons omitted from the reports of the case in 52 Misc. 2d and 275 N.Y.S.2d.


\textsuperscript{52} 52 Misc. 2d at 27, 274 N.Y.S.2d at 758.

\textsuperscript{53} 52 Misc. 2d at 27, 274 N.Y.S.2d at 759.

\textsuperscript{54} In Hernandez v. SIC Finance Co., 5 UCC Rep. Serv. 1151 (N.M. 1968), plaintiffs' reliance on Section 2-302 failed when the court held the section inapplicable to the secured transaction in issue. The court nevertheless referred to the plaintiffs' argument that they "had no education in English . . . and had not had the agreement explained to them in Spanish." It held that this contention was not established by the evidence, thus recognizing, by implication, the relevance of the point in theory. 5 UCC Rep. Serv. at 1154.

\textsuperscript{55} 3 UCC Rep. Serv. at 793; see note 50 supra.
of the selling scheme made this a matter of special culpability. In *Reynoso*, too,

the defendant husband told the salesman that he had but one week left on his job and he could not afford to buy the appliance. The salesman distracted and deluded the defendants by advising them that the appliance would cost them nothing because they would be paid bonuses... on the numerous sales that would be made to their neighbors and friends.56

The latter tactic is, of course, much the same as that used by the promoters of the ITM affair.

It is only fair to point out that although in each of these cases the court draws attention to the buyer’s manifestly inadequate means, nevertheless that factor is not made an independent reason for decision in any of them. In view of the presence of various other factors touching on unconscionability such a course of action would perhaps have been a needlessly bumptious one. And yet it is difficult to see why a finding that the seller knowingly induced a buyer to enter into a contract beyond his apparent means should not in itself be regarded as potentially sufficient in point of unconscionability to justify judicial intervention in one form or another, at least where the seller from the beginning proposes to assign his rights, or to invoke repossession or security rights and to profit by attendant fees.

Whatever thevalidity of this suggestion,57 it is fair to say that the case of the underprivileged consumer has become recognized as sui generis to a sufficient degree to warrant its institutionalization by way of a quasi-presumptive pursuit of “unconscionability” whenever he appears on the scene.58 The implications of such an approach may, of course, be far-reaching, especially where the ubiquitous installment contract is concerned.59

Professor Leff is apparently not inclined to fall in with the strategies here suggested: “the court,” he writes, “ought not to be allowed to

56. 52 Misc. 2d at 27, 274 N.Y.S.2d at 758.
57. The Uniform Consumer Credit Code explicitly adopts this attitude: see § 6.111(3)(a) (Final Draft). The question is, of course, of much greater complexity than is suggested by the scope and length of this discussion; a discriminating use of Section 2-302 may, however, supply stop-gap answers to problems which clearly require a thorough and comprehensive investigation.
58. See also Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (1967); Unico v. Owens, 50 N.J. 161, 232 A.2d 405 (1967); David v. Manufacturers Hanover Trust Co., 4 UCC REP. SERV. 1145 (1968). The majority opinion in the Walker-Thomas case, runs through these cases, by way of citation and quotation, like the proverbial scarlet thread. See also *Leff* 555 n.288.
subsume its social decisions under a high-level abstraction like 'unconscionability.'

One may suggest that first (and less important) it tends to make the true bases of decisions more hidden to those trying to use them as the basis of future planning. But more important, it tends to permit a court to be nondisclosive above the basis of its decision even to itself; the class determination is so easy and so tempting (and often so heart-warming) . . . . [N]o legislature in America could be persuaded openly to pass such a statute, nor should any be permitted to do so sneakily. . . . [I]f one wants to protect a class, improvident by definition, from the depredations of another class, it is at least arguable that one should just up and do so—but clearly.

Professor Leff's argument that the "true bases of decision" remain hidden, even to the courts themselves, appears to rest in the main on his view that the recognition of "class" distinctions is a process which "immensely simplifies decision by limiting the required inquiry to the person's membership in the class," and that "Once that determination is made, a certain legal result will flow." He cites, by way of illustration, the law relating to the capacity of minors to make contracts. But nothing could be more misconceived than such an analogy. There is no suggestion that the institutionalization of the "class" factor proceed along the rigid and abstract lines of the majority-minority dichotomy; it is, on the contrary, meant to be based firmly on very concrete and particular references to lack of education, vulnerability of bargaining position, and so forth. There is nothing to prevent the court from taking account of idiosyncratic aspects of the situation before it. If the consumer in question has particular knowledge or experience, and therefore an adequate understanding of the language and situation which confronts him, it is an elementary proposition that the court may, indeed must, give this matter due consideration.

A word must also be said about Professor Leff's second point. That no American legislature would "openly pass such a statute" is surely a very curious argument indeed. If the precise results of legislation

60. Leff 557. At the time when Professor Leff wrote, the only case available on the point under discussion here was Walker-Thomas.
61. Id. 558.
62. Id. 556.
63. In State Bank of Albany v. Hickey, 29 App. Div. 2d 993, 288 N.Y.S.2d 980 (1968), the majority held that the defendant, a car dealer who had made an assignment of a conditional sales contract to the plaintiff bank, was bound by the guarantee contained in the assignment contract, because he had read it, had been in the car business for many years, had been a credit manager for a prominent lending institution, and had obligingly described himself as an "expert" on the witness stand.
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could always be foreseen, life might well be less of a burden to us all; but the unavailability of such foresight has not prevented the vast majority of American legislatures from enacting a provision so blatantly open-ended as Section 2-302; and that is surely the point which deserves emphasis if speculations about the gutsiness and/or wooden-headedness of our legislatures are at all relevant to the subject.

B. Substantive Unconscionability

It seems clear that the major focus of Section 2-302 is in fact on issues subsumable under the general heading of "substantive" unconscionability. Comment 1 goes to some lengths to establish a climate in which courts will feel emboldened to strike directly at contracts or contractual terms which appear too heavily weighted in favor of one of the parties; that is to act, in some measure at least, as a tribunal of constitutional review applying "bill-of-rights" prescriptions to the parties' private legislation.

Before turning to an investigation of the nature of substantive unconscionability itself (which, as will be seen, proceeds by way of distinguishing "overall imbalance" from "component unconscionability"), a preliminary question must be considered: Is the power of "constitutional" review referred to above absolute, in the sense that the courts are entitled to find unconscionability even where the party alleging it assented freely and fully to the terms of the bargain? Or is it possible, by a sufficient specificity of bargaining, to "insulate" a contract from judicial intervention under Section 2-302?

1. The Question of Insulation

Suppose we take as an example a seller's disclaimer of warranties which in the abstract is conceded, for the sake of the argument, to be unconscionable. Can the seller, by explicitly drawing attention to the clause, and by obtaining the buyer's clear and specific assent, prevent the subsequent invocation of Section 2-302 by the reviewing tribunal?

64. This is Professor Left's term, which he uses to distinguish questions of unfair "content" from those relating to bargaining misconduct ("procedural" unconscionability). The terminology has its shortcomings, but I must confess to being unable to improve upon it.

65. The question may also be asked in its reverse form: Is it possible to find a contract, or a given term, unconscionable merely because the process of bargaining was such as to make "free" assent impossible, even though the content arrived at is, in itself, objectively conscionable? Analogous questions may be asked with respect to any isolatable component of unconscionability: Can a sufficient inequality of bargaining position be in itself decisive? Are certain terms unconscionable ipso facto, no matter what the contractual context? and so forth. These matters are taken up below.
(To make matters even more clear-cut, let parity of bargaining position be presumed.\textsuperscript{66})

Professor Leff has shown, by a careful analysis of the drafting history of Section 2-302, that the earliest predecessors of the present version were specifically concerned with the question of insulation, that the possibility of insulation was at first conceived of as virtually axiomatic, but that the draftsmen eventually abandoned this view and opted, in 1948, for a doctrine of outright "per se unconscionability."\textsuperscript{67} This—in Professor Leff's view—laudable clarity of position was, however, subsequently abandoned in favor of the obfuscation of the later drafts. Professor Leff does not make it entirely clear whether he believes that the final form of the section and comments renders the bargaining process altogether irrelevant, or whether their obfuscating effect relates merely to the "insulation" question. The former suggestion, although seemingly entertained in passing,\textsuperscript{68} is certainly untenable: the proposition that in deciding whether a contract or one of its terms is unconscionable one may not inquire into the bargaining process is surely somewhat bizarre (and it will be seen that the courts which have so far applied Section 2-302 have not thought themselves thus restricted). It is, however, undeniable that the 1948 version clearly provided\textsuperscript{69} that in some circumstances unconscionability might be found no matter what the bargaining process had been, and that this version was replaced by words which are less unequivocal.

It may be true, as Professor Leff suggests, that this metamorphosis is to be explained historically by the opposition of "important backers of the Code"\textsuperscript{70} to the explicitness of the 1948 version. Nonetheless the change is both comprehensible and defensible in terms of policy. The shibboleth "freedom of contract" may be pretty debased coinage nowadays, but—to mix metaphors—it surely still plays at least the role of

\textsuperscript{66}. Professor Leff does not seem to want to go as far as this: he consistently assumes that the question here is simply whether \textit{inequality of bargaining position} can in itself justify intervention. Thus the 1948 version is said to mean: "The policy determination was made, in effect, that one could use his superior bargaining power only so far," Leff 496. But there is no reason why the question of insulation should not be raised in its purest form: suppose that there was no bargaining advantage, suppose the victim merely made a mistake in "judgment" or didn't really exercise his mind on the point in question. That is apparently how the draftsmen saw the issue: \textit{See Comment 4 of the 1948 version, quoted infra note 69}.

\textsuperscript{67}. Leff 494-5.

\textsuperscript{68}. One of a series of questions asked by Professor Leff vis-à-vis the amended comments is: "Briefly put, is the manner in which a provision gets into a contract relevant or not?" Leff 497.

\textsuperscript{69}. Comment 4 of the 1948 version refers explicitly to "cases where one party has deliberately entered into a lop-sided bargain with full knowledge and awareness and has actually assented to clauses which are unconscionable in effect against him."

\textsuperscript{70}. \textit{See} Leff 501 n.50.
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a constitutional monarch. Occasions on which a bargain ought to be struck down even though it was arrived at by full and free assent (giving these words a meaning as far as possible removed from the rhetorical) must of necessity be rare, if they be conceded at all; and that such a power be as explicitly conferred on the courts as it was by the 1948 version is arguably overbold. The important fact about the present version of Section 2-302 is that there is nothing in it which denies such a power to the court, should it be moved to exercise it by the extremity of the situation before it. And that very extremity, which is a necessary presupposition if we are to consider the possibility that a court may on occasion be disposed to ignore free assent, is also the guarantee that the equivocality of Section 2-302 on this point will be used positively and not negatively—that is, the absence of interdiction will be taken to imply authorization. By the same token, the level of extremity required for judicial intervention under these circumstances is best left also to be fixed (if it can be “fixed”) under the stress of actual situation-work.

Here we have then an instance of draftsman’s hiatus which implies, I submit, a perfectly orderly sequence of analysis and a very deliberate decision not to preclude, by premature dogmatism, further organic development in the context of actual litigation. With respect to a “residual category” embodied in a “standard,” such a tactic is eminently proper, and the vulnerability of Professor Leff’s criticism here is ultimately a reflection of his failure to bear in mind the distinction between “standards” and the other legal prescriptions mentioned at the beginning of this article. In the light of such a distinction it is possible to recognize a high degree of calculation where Professor Leff sees only “fudging.”

2. “Overall Imbalance”

Professor Leff rightly points out that the earliest versions of Section 2-302 “contemplated as the field of operation of Section 2-302 the entire contract”; that is to say, substantive unconscionability in fact meant “something like ‘gross overall imbalance’ of an entire contract.” In this respect too, however, the 1948 version marks a moment of departure; this draft imported for the first time explicit mention of the concept of “an unconscionable clause.”

Professor Leff conceives of this moment as one of “progression . . .

71. “Thus faced with a dilemma . . . the draftsmen . . . fudged.” Leff 501.
72. I have borrowed this phrase, like so many others, from Professor Leff.
73. Leff 511-12.
74. Id. 513.
from overall imbalance to one-clause naughtiness,” and regards this “progression” as “the most important single transformation disclosed by a study of the drafting history.”\textsuperscript{75} He writes:

[I]f one decides to police contracts on a clause-by-clause basis, he finds that he has merely substituted the highly abstract word “unconscionable” for the possibility of more concrete and particularized thinking . . . . Should warranty disclaimers be permitted? . . . Should parties be allowed to agree about what law will govern their contract? To what extent, if any, should a party be permitted to limit his liability under a contract? All these questions need decision. But not one of them is helped toward solution by being subsumed in a section as a species of “unconscionability.”\textsuperscript{76}

It might first of all be observed that, while it may be true that “more concrete and particularized thinking” is not made inevitable by the subsumption referred to, the “possibility” of such thinking can hardly be taken to have been removed. But more important, it is difficult to understand why the addition of the single-clause provision must be taken in any sense as a substitution of one kind (clause-by-clause) for another kind (overall imbalance) of policing; surely the process should be understood rather as one of supplementation of one method by another.\textsuperscript{77} Section 2-302 continues to speak, after all, of unconscionability of “the contract,” apart from and beside its references to single clauses. If one takes into account as well the express citation, in Comment 1, of Campbell Soup Co. v. Wentz\textsuperscript{78} (a classic case of overall imposition), it becomes obvious that the concern with overall balance manifested in the earliest drafts of the section cannot realistically be assumed to have been abandoned altogether.

\textsuperscript{75} Id.
\textsuperscript{76} Id. 515-16 (emphasis added).
\textsuperscript{77} Even if “substitution” is, for the sake of argument, conceded, Professor Leff’s critique is founded on the notion that the difficulty inherent in deciding whether a single clause is unconscionable is significantly greater than that involved in the weighing of overall balance. It is not made entirely clear why one task should be so very much more complicated than the other; in the end, the reason seems to be that If one asks the overall-imbalance question it is at least easy to identify the “cake sliced 99-1,” to use Llewellyn’s language. Leff 514 n.113. But it is surely just as easy to identify the extreme limits of unconscionability with reference to a single clause considered, as it must always be, in the context of the whole bargain, even though when the metaphors of “weight” and “balance” have been abandoned no handy quantitative formula suggests itself. (A possible example of such self-evident unconscionability in the matter of single terms is the kind of submission-to-a-foreign-forum clause used in the Paragon Homes cases, there being no discernible reason for the inclusion of such a clause in the contracts there involved except harassment. See pp. 803-05 infra.) And it may be asked, in any case: what help is it to the court to be able to recognize the outer edges of extremity when the great majority of the cases before it inevitably fall uncomfortably close to the inner borderline?

\textsuperscript{78} 172 F.2d 80 (3d Cir. 1948).
To assert that, as a matter of interpretive logic, the concept of "overall imbalance" has not been jettisoned is clearly not enough; it is necessary also to supply an answer to the question: Precisely what function is allotted to the concept as a criterion, or species, of unconscionability? My attempt to provide this answer falls into two parts. First, I contend that a court may refuse to enforce an agreement on the ground of overall imbalance independent of any showing of component unconscionability; second, I propose an additional or auxiliary role for the concept: namely that of helping the court to decide whether it ought simply to strike the contract down or "rewrite" it according to the dictates of conscionability. To elaborate:

a. Overall Imbalance as a Form of Unconscionability

The crux of the issue here may be simply exposed by asking: May a court apply Section 2-302 so as to characterize the whole of an agreement as unconscionable even though no single component can be found to deserve this epithet? The answer, it is submitted, is clearly yes. That the draftsmen intended it so is evident from the citation of the Wentz case. There the court, although it agreed with plaintiff's argument that "the provisions of the contract are separable [sic],"80 and rejected defendant's contention that an individual clause was unconscionable in itself,81 nevertheless examined the contract as a whole and found that "the sum total of its provisions drives too hard a bargain for a court of conscience to assist."82 It is true that the action was one in equity for specific performance,83 but the draftsmen's incorporation of the decision must be regarded as establishing that a court applying Section 2-302 is to consider itself as much a "court of conscience" as did the court in Wentz, and that the principle espoused there is to be utilized mutatis mutandum when necessary.

It is also true that the peculiar aspect of the doctrine so imported is, as Professor Leff notes, that "the one-sidedness complained of [is]
irrelevant to the harshness complained of." What the defendants in Wentz were suffering from was a fixed-price term in the context of an enormously risen market, and there was no suggestion that the term was in itself unfair. Unlike Professor Leff, I find this less than hair-raising. There seems to be nothing inherently objectionable in a procedure whereby the courts may, in effect, make clear their view of the proprieties of overall fairness of contractual content even though in the particular case at bar that matter is not strictly "relevant" to the calamity which has prompted one of the parties to invoke Section 2-302. The moral of the Wentz case is simply that he who has exacted "too hard a bargain" in the totality risks coming to grief in the courtroom (should the matter get there) even though individual terms, considered by themselves, do not transgress the bounds of conscionability. Put this way it surely has something to recommend it.

Situations in which a vitiating degree of overall imbalance exists even though no individual components of the contract can be unequivocally singled out as in themselves unconscionable are not, of course, likely to arise very often. It is therefore not surprising that cases utilizing Section 2-302 in the Wentz fashion have not so far arisen (although there have been—as is argued below—certain decisions from which one can at least derive a "picture" of sorts of overall imbalance). The degree of emphasis placed on the overall structure of the contract at issue in the Elkins-Dell and Dorset Steel Equipment decisions perhaps entitles one to consider them as giving implicit support to the argument put forward above, although they clearly involved identifiable component unconscionability as well, especially with regard to price.

b. Overall Imbalance and the Scope of Remedial Action Under Section 2-302

It is clear that any given controversy is most likely to be centrally concerned with only one, or a very few, of the total number of terms embodied in the contract in question. Consequently the complaining party very often objects justifiably to such a single term (or group of terms), without necessarily asking at the same time that the whole con-

84. Id. 538.
87. See discussion at TAN 99-111 infra.
88. Cf. Leff 518.
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tract be thrown out. The continuation of the contractual relationship, modified in accordance with the dictates of conscionability, may be of great importance to him: in fact, his position may well be that if he were put to the choice between the continued operation of the contract in its actual form, on the one hand, and its wholesale abandonment on the other, he would opt for the former, unconscionability notwithstanding. In these circumstances it would seem the merest common sense to provide, as does Section 2-302, that the court, if it finds unconscionability, may

refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.\(^8^9\)

The court is thus no longer limited, as it seems on the whole to be limited at law and in equity, to a simple choice between enforcement or non-enforcement of the contract. It also has available to it a third possible course of action: it may eliminate or "limit the application of" the offending component so as to leave the parties with a "rewritten" contract. It will be noted that Section 2-302(1) is in this respect permissive and not restrictive:\(^9^0\) that is to say, the court may decline to enforce the contract as a whole even though only a single component is found to be unconscionable in itself, although in such cases it is surely reasonable to assume that elimination or limitation is prima facie the more appropriate remedy. The question therefore arises: under what circumstances should the court strike down the contract as a whole rather than "rewrite" it? The following answer suggests itself: either if it finds the contract as a whole (rather than any single component) unconscionable, or if, even though a single component might be characterized as unconscionable in itself, nevertheless the whole contract is also so characterizable—that is to say, is afflicted by "overall imbalance." There is a dual reason for thus allotting to the concept of overall imbalance the role of identifying those situations in which a court may legitimately absolve the promisor from all contractual obligation instead of exercising its option, under Section 2-302, to redefine his obligations for him in accordance with the dictates of

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\(^8^9\). UCC § 2-302(1).

\(^9^0\). I suppose it is possible, on the basis of syntax, to argue against this view, but such an argument seems to me both excessively literal and against the general spirit of Section 2-302 (which I take to be in favor of maximum flexibility of remedial action). Cf. UCC § 1-106, which stipulates that the "remedies provided by this Act shall be liberally administered"; and, more particularly, UCC § 1-108 (presumption of severability).
conscionability. First, the matter of convenience: the more contractual provisions there are which give rise to offense, the more difficult the task of judicial remolding. Second, the traditional and deeprooted, if sometimes residual, respect for "freedom of contract"; the greater the amount of rewriting needed, the more likelihood there is of a departure from even the broadest "sense" of the transaction as originally conceived by the parties themselves.

Nevertheless, a court should probably begin with a bias in favor of "rewriting." Where modification of the contract, by way of appropriate treatment of the unconscionable component, seems to be capable of working a measure of justice, it would seem unnecessarily and arbitrarily zealous on the part of the court to go further. The court should, in particular, be on guard against an inherited bias tending in the opposite direction, that is, against modification of the contract: Section 2-302 clearly calls for a break with tradition in this respect, and it is more in accordance with its mood and tenor to err here on the side of boldness than on that of caution.\footnote{Cf. UCC § 1-106.}

It would seem, by and large, that only the wishes of the litigants themselves should be allowed to override the basic predisposition which I advocate. In this connection it is necessary to consider not only the attitude of the promisor (i.e., the party invoking Section 2-302) but also that of the promisee. Of course the promisee in the first place presumably objects to all judicial intervention based on unconscionability; given the fact of such intervention, however, he may well have a preference as to the form it will take. A seller, for example, may well prefer not having to deliver at all to having to deliver at a judicially determined "conscionable" profit. The relevant permutations of attitude here seem to be as follows, a showing of unconscionability and the consequent intervention of the tribunal being in each case presumed:

1. Both parties want "rewriting."
2. The promisor wants "rewriting" while the promisee prefers wholesale dissolution.
3. Vice versa.
4. Both parties want dissolution.

From our present perspective case (1) seems to be the simplest of all. Where the parties' own wishes correspond with the fundamental bias already referred to, it is difficult indeed to envisage circumstances in which a court might justifiably strike down the contract as a whole.
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It is, however, possible to imagine three potential reasons for such a course of action. First, and perhaps most plausibly, there is the possibility that in a given situation the data on the basis of which any "rewriting" must proceed are unavailable or ambiguous. For instance, it may be too difficult to arrive at a conscionable price, in place of the unconscionable one set aside by the court, because of prevailing market contingencies. Second, the transaction in question may be one of a continuing nature, so as to bring into play considerations akin to those which prompt courts of equity to withhold specific performance of contracts for "personal services" and the like. This factor increases in importance, of course, the further one moves towards the view that Section 2-302 ought to be regarded (as it certainly threatens to be regarded) as part of the general jurisprudence of contracts, rather than as narrowly applicable to sales. But even certain "transactions in goods" may involve analogous elements. Third (and this is more tenuous), it is just possible that the court may, in cases of sufficient "overall imbalance," decide that it knows better than the parties. The contract may, for example, be so one-sided that the prospects of further controversy seem certain to the court. When in addition one of the parties persisting in what the court regards as a misjudgment as to the viable nature of the contractual relationship happens to be disadvantaged in some way (e.g., to be a member of one of the "underprivileged minorities" to which I have already devoted some attention), the court might perhaps be justified in giving effect to its own view of the affair.

The further one moves away from a joint preference of the parties for "rewriting," however, the more plausible becomes the prospect of wholesale dissolution. The scale of plausibility ascends according to the sequence of permutations set out above. Clearly the promisee's wishes in this respect are less important than the promisor's, since by hypothesis the former stands convicted on "unconscionability." But the bias against dissolution which I have advocated works in favor even of the culpable promisee. That is to say, even where the aggrieved promisor

92. The problems which might arise in this connection seem to be somewhat akin to those involved in the application of the principle that damages, in order to be recoverable, must be "certain." 93. See note 259 infra. 94. UCC § 2-102 provides that Article 2 "applies to transactions in goods" "unless the context otherwise requires." 95. E.g., American Home Improvement Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (installation as well as supply of materials). But "transactions in goods" is a problematical term. See pp. 808-11 infra. 96. See pp. 768-71 supra.
requests dissolution the court ought, in the interests of the principle of security of transactions, to go very carefully into the question whether justice might not best be done by rewriting rather than dissolving the contract. Where both parties request dissolution, however, somewhat the same considerations which were discussed a moment ago with respect to the opposite situation (where both parties prefer rewriting) apply in reverse.

In making its decision whether to strike down or to rewrite a contract, however, the court has need of a framework of inquiry which takes into account something more than the preferences of the parties. It might first of all be suggested that the possibility of dissolution depends to a large extent on the degree to which the contract remains executory, or, to put the larger principle, on the ease with which the pre-contractual status quo may be restored. Where the goods have been delivered and have been consumed or used, the appropriateness of dissolution is reduced accordingly. Beyond such self-evident practical considerations, however, it is at this point that the notion of "overall imbalance" comes into its own. The principle suggested here is this: the greater the degree of "overall imbalance," the more willing the court should be to entertain the possibility of total dissolution, even though the possibility of rewriting is also open. The bias, it must be said once again, should be against dissolution, but in cases where that bias begins to be eroded by the preferences of the parties (or even in those very marginal situations in which, although the bias is reinforced by the parties' preferences, the court feels obliged to disregard their judgment), the test of "overall imbalance" assumes real relevance.

What then is overall imbalance? A "definition" which is not largely tautologous seems hardly possible here; description by way of example appears preferable. Unfortunately the yield of cases using Section 2-302 which can usefully be discussed in this context has so far been small indeed. Two early and related decisions, In re Elkins-Dell Manufacturing Co. and In re Dorset Steel Equipment Co., although analyzable also—as was said earlier—in terms of component unconsion—

97. I realize that this principle can be invoked, in the context of a discussion of Section 2-302, only with a certain irony. But it is arguably paying a residual deference to it to take the view that it is preferable for the parties to be stuck with some precipitates of the transaction than to absolve them utterly.


100. 2 UCC REP. SERV. 1016 (E.D. Pa. 1965), consolidated on appeal with Elkins-Dell, supra note 99.
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ability, nevertheless present a good example of an agreement which, at least on its face, displayed a clearly discernible overall tilt. Both were cases of involuntary bankruptcy. In each case the bankrupt had entered into an agreement with Fidelity America Financial Corporation under which Fidelity advanced money to the bankrupt against the assignment of accounts receivable. In each case the question was whether payments collected under these agreements after the filing of the bankruptcy petitions should be turned over to the trustee on the ground that the agreements were unconscionable. It is clear, of course, that security agreements are not "transactions in goods" within the meaning of Section 2-102, and the United States District Court, on petitions for review, expressly declined to rule whether Section 2-302 might be extended to the present cases.\(^1\) It purported, however, to apply those general principles of equity which are taken to be prototypical, so far as Section 2-302 is concerned, and in doing so made free use of the word "unconscionable."\(^2\)

Under the two agreements in question, the bankrupts were prohibited from assigning accounts or disposing of other assets to anyone other than Fidelity; on the other hand Fidelity had no obligation to buy any accounts—i.e., to finance the bankrupts. There were numerous "additional and enslaving"\(^3\) obligations. The bankrupt could not borrow from anyone other than Fidelity without the latter's consent. Fidelity had an almost unqualified right to change the terms of the agreement unilaterally.\(^4\) The bankrupt might not suspend business without Fidelity's consent: Fidelity, in other words, "could force the borrower to continue to buy goods and services on credit, knowing that these would not be paid for and knowing that the benefits of such non-payment would accrue to Fidelity," a circumstance which "not only created a state of economic serfdom, but a way to cheat creditors."\(^5\) Moreover, Fidelity exacted a minimum charge of $6,000 per annum, bearing "no relationship either to the actual flow of accounts receivable between the parties or to any fixed obligation of Fidelity to supply money...."\(^6\) In sum:

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102.  Whether the cases ought nevertheless to be considered no more closely connected with Section 2-302 than the general run of equity cases does not, in any case, matter according to the view which I take of the relevance of the latter. See pp. 785-86 infra.
103.  2 UCC REP. SERV. at 1024.
104.  The bankrupt had a right of "dissent" within five days, but, as the referee noted, the exercise of this right would presumably result in the cessation of financing.
105.  2 UCC REP. SERV. at 1025.
106.  Id.
The agreement gave all meaningful rights and remedies to Fidelity. The bankrupt's rights . . . are de minimis and trivial. The agreement imposed onerous burdens and one-sided duties and obligations on the bankrupt but committed Fidelity to no mutual duties and obligations.\textsuperscript{107}

The referee accordingly held the agreements to be unconscionable and unenforceable.\textsuperscript{108} In reviewing his decision the District Court pointed out that the case was not one where, owing to the deceptive bargaining conduct or lack of understanding of one of the parties, assent might be regarded as fictional, but rather one of "genuine assent by businessmen to terms which (it is asserted) ought not to be countenanced."\textsuperscript{109}

\textit{To prove unconscionability there must be a showing, not only that the terms of the contracts are onerous [sic], oppressive, or one-sided, but also that the terms bear no reasonable relation to the business risks. This is a showing that depends on the commercial environment and cannot be made from the face of a contract alone.}\textsuperscript{110}

The court then remanded the cases for "prompt and thorough factual hearings" to ascertain "whether these contracts were, in the light of all the circumstances, reasonable commercial devices."\textsuperscript{111}

That overall balance is not profitably discussed in vacuo is, of course, a point well taken, particularly with reference to an agreement which, on its face, could scarcely be more one-sided. Although the court asserted that it was applying general principles of equity, it is difficult to resist the conclusion that Section 2-302(2)—the hearing provision—was overwhelmingly influential here. The court in \textit{Campbell Soup Co. v. Wentz},\textsuperscript{112} working in what must realistically be conceived of as a pre-Code era despite the existence of early drafts, and applying a presumably pristine view of equity law, showed no disinclination to work on

\textsuperscript{107} \textit{Id.} at 1025.

\textsuperscript{108} It is true that he nevertheless awarded the lender the "legal" rate of interest. But this is hardly to be seen as an instance of "rewriting" the contract; rather it must be regarded as being in the nature of restitutional compensation for an \textit{executed} consideration.

\textsuperscript{109} 253 F. Supp. at 871. In view of the court's awareness of the "economic duress" aspects of the situation, its use of the phrase "genuine assent" seems somewhat paradoxical.

\textsuperscript{110} \textit{Id.} at 873.

\textsuperscript{111} \textit{Id.} at 874. The Court elaborated to some degree on the issues to be explored at the hearings. \textit{See TAN 267 infra}. A very obvious, and at least potentially sufficient, explanation for the onerous nature of the contracts in these cases is the fact that the bankrupts were hardly, at the time of the agreements, sound financial risks. Cf. Consumers Time Credit Inc. v. Remark Corp., 259 F. Supp. 155, 157 (E.D. Pa. 1966)

\textsuperscript{112} 172 F.2d 80 (3d Cir. 1948).
the basis of the face of the contract there involved.\textsuperscript{113} The Code's hearing provision, on the other hand, explicitly preserves reference to the contractual context. And to give the parties, in cases of claimed or apparent unconscionability, an opportunity to "present evidence as to . . . commercial setting, purpose and effect"\textsuperscript{114} of the contract is to concede that the issue of "overall balance," or any other aspect of unconscionability, cannot easily be resolved in the abstract,\textsuperscript{115} and to warn that generalizations in terms of the "content" of contracts as such were not intended by the draftsmen.

Only two other cases using Section 2-302 may usefully be referred to here; in neither was the hearing provision invoked. In the \textit{ITM} case\textsuperscript{116} the court declared the installment contracts in question wholly unenforceable; although overt fraud was probably an important factor in the decision, the case certainly presents a striking picture of overall imbalance. \textit{American Home Improvement, Inc. v. MacIver,}\textsuperscript{117} on the other hand, is from the present point of view a troublesome decision. The court there concerned itself exclusively with matters of price: nowhere is there any suggestion that the contract was one-sided in other respects. The court's decision to strike down the whole contract, rather than merely to award a "reasonable profit,"\textsuperscript{118} is perhaps most politely explained in terms of the peculiarity of the transaction before it. The plaintiff had agreed not only to supply the materials but to install them as well, and to have told him to do that work for a "reasonable" profit would no doubt have been inviting the sort of trouble which equity courts avoid by refusing specific relief in cases involving personal service contracts.\textsuperscript{119}

The scantiness of authority utilizing Section 2-302 in this area is not a matter for undue concern, since there is a substantial body of equity case-law available to be drawn upon. "That equity does not

\textsuperscript{113} Whether a similar cavalierness applies in the case of the common law unconscionability doctrine (if there is one: \textit{see note 123 infra}) is not clear. \textit{Cf.} Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), where the court remanded the case for trial on the issue of unconscionability (conceived of in "procedural" terms, however).

\textsuperscript{114} UCC § 12-302(2).


\textsuperscript{116} 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966).

\textsuperscript{117} 105 N.H. 435, 201 A.2d 886 (1964).

\textsuperscript{118} As was done, for instance, in Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), \textit{rev'd with respect to damages}, 54 Misc. 2d 119, 281 N.Y.S.2d 954 (1967). \textit{See TAN 140-144 infra.}

\textsuperscript{119} Reference may also be made to the fact that the court in \textit{MacIver} was playing, with respect to Section 2-302, a pioneering role, and that it had the aid of counsel on one side only. Plaintiff, as noted by Professor Leff, presented no appellate brief. \textit{See} 105 N.H. at 437, 201 A.2d at 887.
enforce unconscionable bargains is too well established to require elaborate citation," said the court in *Campbell Soup Co. v. Wentz*,

citing Pomeroy\(^{121}\) and Williston,\(^{122}\) and the explicit reference to this case in Comment 1 of Section 2-302 must be taken to draw equity doctrine into the ambit of statutory unconscionability. A close scrutiny of the equity cases is beyond the scope of this article. If the commentators\(^{123}\) may be believed, however, and if *Campbell Soup* may be taken to be representative, then "overall imbalance" is certainly a recognized species (perhaps the major species) of unconscionability in the equity context.\(^{124}\)

3. *Component Unconscionability*

In some ways, the assessment of single contractual components in terms of unconscionability, although a major (if one is to go by the Comment cases, the major) concern of Section 2-302, presents the most difficult problem of all. This is so not only because the relationship of single clause to contractual and situational context is a matter of such variability and intangibility as to make the process of generalization a daunting one. But also, and above all, because with respect to

190. 172 F.2d at 83.
121. 4 J. POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941).
122. 5 S. WILLISTON, CONTRACTS § 1425 (rev. ed. 1937).
123. See, e.g., 3 J. POMEROY, EQUITY JURISPRUDENCE 926-28 (5th ed. 1941). Professor Left goes so far as to suggest that, in point of "substantive" unconscionability, all equity cases "really depend upon a finding of inadequate overall consideration." (Professor Left therefore considers equity principles to be irrelevant in the present context, since he disputes the relevance of "overall imbalance" altogether, as we have seen). See Left 538.

The common law is said to have had no unconscionability doctrine as such. See, e.g., 1 A. CORBIN, CONTRACTS § 128, at 551 (1963). Direct invocations of "unconscionability" by way of dictum have not, however, been entirely lacking. See, e.g., Mr. Justice Frankfurter's famous dissent in United States v. Bethlehem Steel Corporation, 315 U.S. 289, 326 (1942), and cases noted in Annot., 18 A.L.R.3d 1305, 1310-12. And Williams v. Walker-Thomas Furniture Co. must presumably be regarded as innovative in this area. See, also Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967). That mistake, duress and fraud—especially the extraordinary doctrine of "constructive fraud"—served, in any case, as functional equivalents of "unconscionability" on many occasions is hardly open to debate. These "law" cases do not, however, move in terms of "overall imbalance," but concern themselves with specific contractual terms. See also Comment, Unconscionable Contracts: The Uniform Commercial Code, 45 Iowa L. Rev. 843, 850-54 (1960); Davenport, *supra* note 8.

124. It is also noteworthy that the court in *Wentz* drew particular attention to paragraph 9 of the agreement, under which Campbell Soup was "excused from accepting carrots under certain circumstances. But even under such circumstances the grower is not permitted to sell them elsewhere unless Campbell agrees. This is the kind of provision which the late Francis H. Bohlen would call "carrying a good joke too far."") 172 F.2d at 83. Clauses of this kind, as well as analogous terms, have often been considered by courts of law in connection with the so-called doctrine of mutuality. It may be that decisions which have declared contracts unenforceable on the ground of "lack of mutuality" are often to be explained by a covert recognition of unconscionable features of the transaction before the court; if so, there is here a further body of case-law worth investigating for those who would be made happy by such a task.
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Each "kind" of clause the question of per se unconscionability heaves itself into view in clear and inescapable outline. It is no longer possible to produce, as I did with respect to questions of bargaining conduct, a formula in terms of "sufficient degree." There are (at least for present purposes) no "degrees" to a clause waiving trial by jury: either it does or it doesn't. Nor is the minimal comfort of a general negative proposition available here: it obviously cannot be asserted that such-and-such a clause can never, no matter what the context, be found to be unconscionable.

The converse proposition, however—an assertion that all clauses of type X, wherever found, are always unconscionable—is at least potentially feasible (just as the Code might, as Professor Leff notes, have simply declared all warranty disclaimers illegal). But to deal in such generalities is to pitch the level of inquiry at too uncomfortable an altitude. It is more useful, if less satisfying, to preserve in all cases some degree of contextual reference, such as the Code provides by way of the hearing provision of Section 2-302(2).

This does not, however, dispose of inquiry in terms of per se unconscionability at the more modest level kept to throughout this paper. In the present context that inquiry may be put in this form: May (not must) clause X be found unconscionable per se, without reference to the other component factors of unconscionability such as bargaining procedure and position and overall imbalance? Examination of the various individual clauses discussed below proceeds in these terms.

a. Excessive Price

The law, we are told, will not inquire into the adequacy of consideration; the promisee does not forfeit his right to the promisor's performance because he has paid too small a price. Which is, of course,

125. It will be remembered that I argued, with respect to such conduct, that "a sufficiency of deception may in itself, without more, be enough to absolve the promisor from all (or any particular) obligation." See p. 763 supra.
126. Such as I put forward with respect to "bargaining position." See pp. 766-67 supra.
127. Leff 516.
128. I have examined only those clauses which have so far received attention by courts applying or invoking Section 2-302. Obviously this list is not intended to be exhaustive for the future, or even the present: the Code itself, it will be remembered, provides, for instance, that liquidated damages provisions are subject to the test of reasonableness. UCC § 2-718, Comment. Cf. Denkin v. Sterner, 10 Pa. D. & C2d 203, 70 York Leg. Rec. 105 (1956); Henry v. W.S. Reichenbach & Son, Inc., 45 Pa. D. & C2d 171, 5 UCC REP. SERV. 985, 986 (1968).
I make no apology for fragmenting inquiry by factual categorization of the kind adopted below. The task of pinning down the "meaning" of unconscionability must necessarily (and should ideally) proceed by way of recognition and classification of "type" situations. Cf. K. Llewellyn, The Bramble Bush 159 (1965).
merely another way of saying that the promisor may not go back on his undertaking merely because its value is grossly in excess of the counterperformance rendered or promised by the other party.\footnote{120}

It is nonetheless true that the law has not wholly refused to pay heed to inequalities of exchange. As long ago as 1909 Roscoe Pound wrote: "From the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors."\footnote{120} In 1947, Professor Dawson concluded that the prevention of unjust enrichment was "the main function of duress doctrines":\footnote{131} and the 1964 edition of Fuller and Braucher's Basic Contract Law lists "at least" nine established "exceptions" to the general principle, noting that others (including unconscionability under the Code) may be in the process of development.\footnote{132} Altogether there has been no dearth of comment on the discovery and demonstration of judicial\footnote{133} price justice, and it would be surprising if it were otherwise.\footnote{134}

The Code, it will be noticed, makes no attempt to supply a mathematical formula, and preserves, via Section 2-302(2), the possibility of justifying (at least theoretically) any price by reference to "commercial setting, purpose and effect."\footnote{135} But the idea of price as an independently operative factor in matters of unconscionability seems to have been adopted enthusiastically by the courts. No other single factor has so far received as much attention.

The earliest case on point, American Home Improvement, Inc. v. Maclver,\footnote{136} is perhaps still the most unequivocal. Plaintiff sued for damages, alleging breach of a contract under which defendant had agreed to pay a total of $2,568.60 for various improvements to his home.

\footnote{129} Documentation would be redundant. The pleasure of citing Thomas Hobbes has in this country been thoroughly spoilt by the compilers of case-books, who seem to regard the flinging of the Leviathan into the fray as an obligatory piece of virtuosity. See, e.g., L. Fuller & R. Braucher, Basic Contract Law 177 (1964); F. Kessler & M. Sharp, Contracts 249 (1953).


\footnote{132} L. Fuller & R. Braucher, Basic Contract Law, 180-81 (1964). And this list omits the "functional equivalents." See note 123 supra.

\footnote{133} I leave out of account, for obvious reasons, the vast amount of relevant legislation, e.g., usury laws.

\footnote{134} Nevertheless Professor Left thinks it questionable "whether the legislatures which have flocked to embrace the Code would have been willing to adopt a provision which frankly and openly declared that overcharges of large but unspecified degree could be invalidated by courts on an ad hoc basis, at least as part of a commercial code." Left 549 (emphasis in original). See pp. 772-73 supra for my observations in rebuttal.

\footnote{135} UCC § 2-302(2).

\footnote{136} 105 N.H. 435, 201 A.2d 886 (1964).
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to be supplied and installed by the plaintiff. The total sum referred
to included a "cash price" of $1,759.00, the rest representing various
charges under a long-term financing agreement arranged for by the
plaintiff. The Supreme Court of New Hampshire held that the re-
quirements of a lending statute requiring full disclosure in lending
transactions\(^3\) had not been complied with, and that recovery might
be denied on that ground. It went on, however, to hold that the
transaction was unenforceable on "another and independent ground"
— that of unconscionability under Section 2-302.

Inasmuch as the defendants have received little or nothing of
value and under the transaction they entered into they were pay-
ing $1,609 for goods and services valued at far less, the contract
should not be enforced because of its unconscionable features.\(^1\)

Since the court makes no reference to elements of bargaining procedure
or position, or to other factors, MacIver must be taken as strong au-
thority for a per se unconscionability principle as delineated in our
earlier discussion.\(^2\)

Support for such a principle may be drawn from subsequent cases.
Although matters of bargaining conduct and position played some part
in Reynoso,\(^4\) the court formulated the issue in terms of price:

The question presented in this case is simply this: Does the
court have the power under Section 2-302 of the Uniform Code to
refuse to enforce the price and credit provisions of the contract in
order to prevent an unconscionable result.\(^5\)

The court went on to hold that the contract, under which an appliance
which had cost the seller $348 was being passed on to the pur-
chaser for a total (including "credit charges") of $1,145.88, was (quot-
ing the Wentz decision, itself seen as concerned with "oppression with
respect to price")\(^6\) "too hard a bargain"\(^7\) and unenforceable.

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\(^{188}\) 105 N.H. at 439, 201 A.2d at 889.
\(^{189}\) Accord, Annot., 18 A.L.R. 3d 1305, 1308 (1968); see pp. 787-88 supra. The argument
has been made that the word "features," in the passage extracted above, indicates a
plurality of factors contributing to the finding of unconscionability. See Shulkin, Un-
conscionability—The Code, the Court, and the Consumer, 9 B.C. IND. & COM. L. REV.
367, 370 (1968). This strikes me as excessively literalistic. Besides, the only other "feature"
of relevance in the case appears to be the fact of non-disclosure of interest rate, which
the court mentions only in connection with the statutory provision already referred to.
Non-disclosure is, of course, easily conceived of as a matter of bargaining unconscionabil-
ity, but the court did not refer to it when discussing Section 2-302.

\(^{140}\) 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1965), rev'd with respect to damages, 54 Misc.

\(^{141}\) 52 Misc. 2d at 27, 274 N.Y.S.2d at 759.

\(^{142}\) 52 Misc. 2d at 28, 274 N.Y.S.2d at 759.

\(^{143}\) Id.
New York Supreme Court upheld the finding of unconscionability as clearly warranted by the evidence, although it reversed on the question of damages.144

In the ITM case,146 where prices charged for household appliances varied from two to six times the cost of the units to the respondents and were usually more than twice the retail market value, the same court suggested that such prices were "unconscionable per se."146 And a plain statement that "[E]xcessively high prices may constitute contractual provisions within the meaning of Section 2-302" issued from the court in Central Budget Corp. v. Sanchez.147 This dictum was quoted with approval in Toker v. Perl,148 a New Jersey case involving an installment sales contract for a refrigerator-freezer, the price of which, according to expert testimony accepted by the court, "was in excess of two and one half times the maximum value."149 The issue before the court was again somewhat muddied by allegations of fraud, but the court, in holding the contract to be unenforceable, relied in the alternative on square invocation of Section 2-302.

It is submitted that these authorities make clear that a sufficient disparity between "value" and price may, by itself, be a species of unconscionability.150 There is certainly no particular cause for alarm at such a conclusion. The civil law has worked happily with the notion of *laesio enormis* for a long time.151 That the precise degree of disparity required for a finding of unconscionability has not been defined is a matter for rejoicing rather than for sorrow.152

146. 52 Misc. 2d at 33, 275 N.Y.S.2d at 321.
149. 5 UCC REP. SERV. at 1174.
150. But see Shanker & Abel, Consumer Protection Under Article 2 of the Uniform Commercial Code, 29 Ohio St. L.J. 689, 706 (1968). I do not mean to suggest, of course, that an "excessive" price is necessarily unconscionable. If the parties have by honest-to-God dickering arrived at an objectively excessive price, the court need not feel compelled to intervene. Cf. Vitex Manufacturing Corp. Ltd. v. Caribtex Corp., 377 F.2d 795 (1967). "But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation." UCC § 2-313, comment 4.
151. The restricted scope of the doctrine of *laesio enormis* does not seem to detract from the point. For those who feel the need for guidance from the past sufficiently strongly, it might be comforting to look not only into the question of lesion, but into the civil law treatment of "unconscionability" generally. See, e.g., Cellini & Wertz, Unconscionable Contract Provisions, A History of Unenforceability from Roman Law to the UCC, 42 Tul. L. Rev. 193 (1967).
152. It is interesting to note that the Uniform Consumer Credit Code does not attempt to go beyond "gross disparity" either. See UCC § 6.111(5)(c). Shanker & Abel, supra note 150, suggest, incidentally, that "most American cases seem to require at least" a price-
The Maclver case raises, as indicated earlier, a serious question as to whether dissolution is in these cases an appropriate remedy. Except in those rare circumstances in which the factor of "overall imbalance" assumes an overriding importance, it would seem that the more rational solution is to "rewrite" the price term. In cases involving excessive interest charges, reference might be had to the "lawful rate." Where there is simply an inflation of the cash price, the court might allow the seller a "reasonable profit," as was done in Reynoso. There the trial court awarded the seller his cost price, plus interest, refusing explicitly to reimburse him for salesmen's commissions, legal fees, or any other items of overhead. On this point the New York Supreme Court reversed, being "of the opinion that plaintiff should recover its net cost for the refrigerator-freezer, plus a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges," and ordered a new trial on the issue of damages.

Professor Leff's view of the problem under discussion is worthy of comment here. Although he is not, it would seem, unalterably opposed to the notion of excessive price itself, Professor Leff finds it questionable whether that notion ought to be introduced by way of subsumption "under a high level abstraction like 'unconscionability,'" and proceeds to argue that the "decision in the Maclver case exposes the weaknesses of abstraction so deliciously that it justifies esurient consideration." "Esurience" is duly given free rein, resulting in a concedely telling exposure of the "breathtaking economics" of the Maclver decision. There is no need to go into the mathematics

value differential of one-half as a measure of unconscionability": 29 Ohio St. L.J. at 706. The exhilarating sanguineness of this statement ("most American cases"—how many are there?) is matched only by its splendid vagueness ("seem to require," "at least," "price-value differential," "as a measure").

153. See pp. 777-86 supra.

154. See, e.g., In re Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966). In Pennsylvania the defense of usury is not available to a corporation. Id. at 865. For a fuller discussion of this case see pp. 782-84 supra.

155. 54 Misc. 2d at 120, 281 N.Y.S.2d at 965. Cf. Hume v. United States, 132 U.S. 406 (1889) (action for price; recovery limited to market value where clerical mistake made by buyer).

156. The issue did not arise in Toker, apparently because the contract there was still wholly executory. I do not mean to suggest, incidentally, that there may not be occasions on which a court might legitimately limit the seller's recovery to his cost price as a "punitive" measure. Presumably the trial court's zeal in Reynoso was motivated by the tactics of the plaintiff's salesman, which savored of fraud; the court's reference to the fact that the pleadings set forth no defence of fraud carries a touching suggestion of regret.

157. Leff 549.

158. Id.

159. Id. 550.
suffice it to say that in assessing the “true value” of goods and services to be supplied under the contract the court excluded altogether the sizable—$800!—commission paid by the plaintiff to his salesmen, and, in further excluding “interest and carrying charges,” made “absolutely no attempt to work out what the true effective yearly rate of interest is for [the] five-year payout.”

Now it might seem at first sight that this recital of the court’s peccadillos in matters of accounting, though interesting in itself, has little bearing on the wider issue of price justice under Section 2-302; not so, however, according to Professor Leff; for the responsibility for judicial error is not, in this instance, to be attributed to the much-invoked fallibility of mankind but rather to the section itself:

[T]he court in this case went on nothing but guesswork to reach its decision, examined none of the relevant considerations and was encouraged by 2-302 to behave in just that way. Had the section been in less abstract terms, perhaps an examination of the relevant factors would have taken place. . . . When the key evaluative word, however, is a description of the judge’s own state of mind rather than of the situation which might be justified in producing such a state, the likelihood that the court will even examine the relevant questions is severely lessened.

Professor Leff’s suggestion is that a provision which infuses into the law of sales the after all revolutionary notion of an overall requirement of conscionability, and explicitly provides for a hearing of evidence on the issue, actually encourages the courts to perpetrate laxities and superficialities of potentially horrendous proportions. Professor Leff may, of course, have known more capricious courts than I. My impression of (at least appellate) courts is, on the whole, that the more expansive standard applied, the sourer the mien, the greater the particularism, and the more pronounced the anxiety to confine the decision “to the facts.” That the New Hampshire Court was, in those salad days, taken in by defendant’s counsel (in the absence of an appellate brief from the plaintiff) hardly amounts to a conclusive demonstration of the contrary.

160. Id.
161. Leff 550-51 (emphasis in original). I pass with some regret over the suggestion, delicious in its implications, that it was actually the judge’s own state of mind which was “unconscionable” in the Maclver case.
162. Professor Leff, it should be noted, thinks very little of the hearing provision. See pp. 812-14 infra.
163. It should be noted, moreover, that the computations to which Professor Leff takes justifiable exception were not directly related by the Court to the question of “unconscionability” under Section 2-302, but were used instead to bolster the argument
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Lower courts have, it is true, generally proved so far only somewhat more sophisticated than the *MacIver* court in this respect. Talk of the "true value" of the subject-matter of the transaction has, however, been replaced with less metaphysical references to seller's cost or other tangible standards. In *Reynoso*, as we have seen, the point of departure was the $348 which the seller conceded to be what he had paid for the refrigerator-freezer in question. In *ITAI*, price-talk was in terms of "the cost of the units to the respondents" and "retail value." In neither case, however, was there any real attempt to work out the interest rate along the lines suggested by Professor Leff with respect to *MacIver*. This matter still awaits authoritative treatment by a major appellate tribunal.

A greater readiness to invoke the hearing provision of Section 2-302(2) may to some extent take care of the problem. A hearing will of itself surely generate concern with the facts and mathematics of the situation before the court. It is to be noted that the court in *Reynoso* held such a hearing before it came to a decision; in *Sanchez*, the court denied plaintiff's motion for summary judgment in order, *inter alia*, to allow for a hearing on the question of unconscionability.

b. Warranty Disclaimers and Remedy Limitations

Neither warranty disclaimers nor remedy limitations are, of course, unconscionable in themselves under the Code: Sections 2-316 and 2-719 respectively legitimize both explicitly. Professor Leff's attitude that the "purpose" of the New Hampshire lending statute, on which the Court relied in the first part of its opinion, might in the circumstances disclosed by such arithmetic best be implemented by denying recovery to the plaintiff; the statute itself forbids the extension of credit without requisite disclosure without making explicit the precise way in which problems arising out of an accomplished contravention of this prohibition should be resolved. As to Section 2-302, the passage quoted in the text at note 162 embodies, it will be noted, a distinctly non-arithmetic reference to goods and services "valued at far less" than the total amount payable.

164. In *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701, 5 UCC REP. SERV. 171 (1965), the defendant buyers produced an "expert witness" who testified in terms of "maximum value." See *103 N.J. Super.* at 503, 247 A.2d at 702, 5 UCC REP. SERV. at 172. One is hardly entitled to object to the court's acceptance of this seemingly imprecise terminology, since the seller did not, apparently, offer any evidence in rebuttal.

165. 52 Misc. 2d at 53, 275 N.Y.S.2d at 320-21.


167. 53 Misc. 2d at 27, 274 N.Y.S.2d at 759. I have been unable to obtain a transcript of this hearing.


169. I discuss these two "components" together not only because they are analogous in function and effect, both being "exculpatory" clauses (or what in Anglo-Saxon circles have been called "exception clauses"), but also because, as a result of this similarity, unconscionability works in the same way with respect to both.
is that, in view of the presence of these sections, the relevance of Section 2-302 to contractual terms of this nature is highly questionable. With respect to remedy limitations, the comments to Section 2-719 specify that the exclusion of remedies is—except as to "consequential damages"—not permissible; that any limitation must be "reasonable" and not "unconscionable"; that there must be "at least minimum adequate remedies" and/or "a fair quantum of remedy."

Professor Leff argues that in view of these very explicit requirements Section 2-302 is, in this connection, substantially redundant: "As benchmarks for determining the permissibility of a remedy limitation, 2-302's 'oppression and unfair surprise' can't hold a candle to 2-719's 'fail of its essential purpose,' 'minimum adequate remedy,' and 'fair quantum of remedy.'"

With respect to warranty disclaimers, Professor Leff's attitude is naturally even less equivocal. Section 2-316 provides for the disclaimability of warranties, makes—unlike Section 2-719—no reference to "unconscionability", and moreover provides—again unlike Section 2-719—detailed "procedural" standards whereby compliance with the norms of bargaining conscionability may be judged. It is, therefore, impossible to argue here, as one might perhaps argue with respect to remedy limitations, that there is scope for resort to Section 2-302 at least with respect to bargaining conduct. Professor Leff writes:

It appears to be a matter of common assumption that section 2-302 is applicable to warranty disclaimers. I find this, frankly, incredible. Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section . . . . It contains no reference of any kind to section 2-302, although nine other sections of Article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of

170. Although both limitation and exclusion of consequential damages are permissible under Section 2-719(3), and limitation or exclusion must not be "unconscionable," the section goes on to provide that "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Despite this explicitness, old and undesirable habits do not die easily. In Henry v. W.S. Reichenbach & Son, Inc., 45 Pa. D. & C.2d 171, 5 UCC Rep. Serv. 985 (1968), a case not, it should be noted, dealing with consumer goods, the court declared a clause excluding liability "for any damage for injury to any person or property on or off the premises, resulting from the work by Contractor from any cause whatsoever," inapplicable to the facts before it, and chose to do so by means of interpretation contra proferentum, thus inviting the draftsman back to the attack in time-honored fashion.

171. One might be excused for thinking that "minimum adequacy" and "fair quantum" are two different things, but Comment 1 seems to treat these phrases as synonymous or at least cumulative in effect.

172. Leff 519.
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2-316 might still be strikable as “unconscionable” under 2-302 seems explainable, if at all, an oversight, wishful thinking or (in a rare case) attempted sneakiness.\textsuperscript{173}

And yet, and yet . . . . The ten cases cited in Comment 1 of Section 2-302 as illustrative of the “underlying basis” of that section are all concerned, as Professor Leff himself points out, with remedy limitations or warranty disclaimers. “Oversight” seems hardly possible in such circumstances; and if a recognition of this aspect of the Section is “attempted sneakiness,” then may heaven preserve us from artlessness. The lesson of these cases (and it is fully in accord with the general tenor of Section 2-302 as an ultimate bill-of-rights provision in the field of sales) must surely be that a remedy limitation may be such as to leave a “fair quantum” of remedy under Section 2-719 and nevertheless be unconscionable under Section 2-302;\textsuperscript{174} and, similarly, that a warranty disclaimer may be procedurally unimpeachable under Section 2-316 and nevertheless be unconscionable under Section 2-302.\textsuperscript{175}

Ah, but how? One might, of course, take refuge here in the general proposition, put at the outset of this essay, that unconscionability is a “standard” which awaits, and is designed to encourage, organic development by the courts; that, if we assume the eventual existence of a meaningful quantum of such situation-work, the relevance of Section 2-302 in the present context is properly that of a referent making available to the tribunal faced with a remedy limitation or warranty disclaimer the sum total of experience gathered by way of judicial exposition of that section. I must confess to a temperament quite capable of viewing such wooliness without particular discomfort.\textsuperscript{176} It so happens, however, that it is possible to be a good deal more explicit here, especially if due attention is paid to the archhierophant himself. I refer of course (and without intending disrespect) to Professor Llewellyn, whose influence on the section remains, in spite of apparent dilution by other hands, perfectly unmistakable.

\textsuperscript{173} Id. 523 (footnotes omitted).

\textsuperscript{174} So far as Section 2-719 is concerned, it ought to be remembered, too, that its Comment 1—as has already been noted—uses the word “unconscionable.” And for a particular remedy limitation (not subject to disclaimer) expressly made answerable directly to the requirements of Section 2-302. See Section 2-718, Comment 1 (unreasonably small liquidated damages).


\textsuperscript{176} It is evident that the Code’s draftsmen foresaw from the beginning a creative and flexible role for the Courts. See, e.g., UCC § 1-102, Comment 1.
Llewellyn's famous discussion of the "boilerplate" agreement\textsuperscript{177} revolves around two central insights or hypotheses, inter-connected to be sure, but distinguishable as operating on different levels of abstraction. The first is that of "transaction-types"—the view that transactions are characterizable, and therefore segregable, by reference to the "iron essence" of each type. "The picture is one of this or that transaction-type as having . . . an essence which contains a minimum of balance, a core without which the type fails of being . . . ."\textsuperscript{178} Llewellyn intends more here than a metaphysical construct, of course: the functional basis of the notion of transactional essence is rooted in the expectations legitimately raised in the parties;\textsuperscript{179} just as is the second point—the distinction between "dickered terms," which "constitute the dominant and only real expression of agreement,"\textsuperscript{180} and the "supplementary boilerplate," containing terms which are acceptable so long as they "do not alter or eviscerate the reasonable meaning of the dickered terms."\textsuperscript{181} If we apply these ideas—as Llewellyn surely proposed that they be applied\textsuperscript{182}—to Section 2-302, and to the particular problem at hand, there emerges a principle something like this: A warranty disclaimer or remedy limitation which complies with the requirements of Section 2-316 or Section 2-719 respectively is nevertheless unconscionable if it is either (a) at odds with the "iron essence" of that transaction-type known as the sale of goods, or (b) an alteration or evisceration of "the reasonable meaning of the dickered terms" of any given such transaction. According to this principle, the ten Comment cases must be seen as instances of such conflict.

\textsuperscript{177} K. \\textit{Llewellyn}, \textit{The Common Law Tradition} 362-71 (1960). Llewellyn's discussion, though prototypically applicable to form contracts, has always struck me as perfectly applicable, \textit{mutatis mutandis}, to any kind of contract involving a sufficient complex of terms to make a distinction between dickered essentials and ancillary residue practicable.

\textsuperscript{178} \textit{Id.} 368.

\textsuperscript{179} Cf. Kessler, \textit{Contracts of Adhesion—Some Thoughts About Freedom of Contract}, 43 \textit{COLUM. L. Rev.} 629, 637 (1943): "In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling,' and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." The "enterpriser's calling" is perhaps too narrow a referent: the "nature of the transaction" and its whole situational context must be taken account of. \textit{See also} Patterson, \textit{supra} note 37, at 858.

\textsuperscript{180} K. \textit{Llewellyn}, \textit{supra} note 177, at 370.

\textsuperscript{181} \textit{Id.} 370. The twin notions of transactional essence and dickered terms are explicitly made a part of UCC § 2-313, comment 1, which distinguishes between "implied" and "express" warranties as being related to the former and latter respectively.

\textsuperscript{182} It is true that the distinction between dickered deal and boilerplate is developed in terms of the scope of assent, but it is clear that Llewellyn regarded a solution in terms of assent as an opportunity missed and gone, and Section 2-302 as an objectified substitute therefor, albeit a less satisfying one. \textit{See} K. \textit{Llewellyn}, \textit{supra} note 177, at 369.
with essence, or evisceration of the dickered deal—which is, I submit, precisely what, on examination, they turn out to be.\textsuperscript{183}

\textit{Transactional essence.} To those who are familiar with English niceties in matters of contract law, it will at once be apparent that Llewellyn's notion of "iron essence" has more than a passing resemblance to the late lamented doctrine of "fundamental breach" or "fundamental terms" as developed by British courts chiefly in the post-war era. The complexities and inscrutabilities of that doctrine are beyond the scope of this paper:\textsuperscript{184} suffice it to give a simple statement of the thing:

Every contract contains a "core" or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him.\textsuperscript{185}

For instructions on conducting the quest for this unexcludable core, one might quote Lord Denning, \textit{bête noir} and general scapegoat of English academe though he be:

The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.\textsuperscript{183}

\textsuperscript{183} It is not to the point to say that these cases involve transgressions of the standards of merchantability and/or fitness for a particular purpose. The point is that they do so \textit{to a degree} which justifies analysis in terms of "fundamental breach."

Of course, if a transaction is conducted explicitly and unequivocally on the footing that the seller assumes absolutely no liability whatsoever, we have moved from the area of the sale of "goods" to that of the sale of "risks"—that is, from sale to gamble: the parties, if they consciously desire, \textit{can} make their own bargain if they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

\textsuperscript{184} For Anglo-Saxons they have, in any case, been considerately taken care of by the House of Lords (\textit{Suisse Atlantique Société D'Armement Maritime S.A.} v. \textit{N.V. Totterdamse Kolen Centrale}, [1967] I A.C. 361, is generally taken to have abrogated this doctrine, although the opinions in the case are sufficiently verbose to allow of some doubt in the matter), a fate which, for those who must breathe the air of stultificaton which afflicts English contract law generally, was perhaps from the beginning only a matter of time.


\textsuperscript{186} Karsales Harron Ltd. v. Wallis, [1956] 1 W.L.R. 936, 940.

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In the field of sales much ingenuity was devoted to outlining the precise nature of this "fundamental obligation." Some support developed for the view that the seller's obligation to convey good title was such a fundamental term of the contract; more relevant for our purposes, however, and more generally assented to, was the proposition that the seller must, as a matter of fundamental obligation, deliver goods of the "kind" contracted for—and a sufficient degree of definitiveness tended to be regarded as establishing a difference in kind.

A term was fundamental "if its breach substantially deprive[d] the victim of what he bargained for": a disclaimer of warranties, therefore, would not excuse the seller if he supplied goods which deviated drastically from the contract description.

If we turn now to the Comment cases of Section 2-302, the relevance of the foregoing immediately strikes the eye. In *Andrews Bros. Bournemouth, Ltd. v. Singer & Co.*, for instance (cited frequently in the literature as an early "fundamental breach" decision), the thing contracted for was a new car; the thing delivered was a used one. Similarly in *Meyer v. Packard Cleveland Motor Co.* what was contracted for was a "dump truck"; what was delivered was unfit for use as such. At least three of the remaining cases are analyzable in similar terms.

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187. See Coote, *supra* note 185, at 61, and citations therein at 62 et seq.

188. The difficulties associated with this concept are of course as obvious as they are ultimately insurmountable (as are those generated by other like distinctions, e.g., that between "substance" and "quality"). See, e.g., Williams, *Language and the Law III*, 61 L.Q. Rev. 299, 303 (1945); Williams, *Mistake as to the Party in the Law of Contract*, 25 Canadian B. Rev. 271 (1945). For discussion and annotation see Coote, *supra* note 186, at 45 et seq.

189. G. Treitel, *The Law of Contract* 161 (2d ed. 1966). Cf. Smeaton Hanscomb & Co. v. Sassoon I. Setty, Son & Co., [1953] 1 W.L.R. 1468, 1470 (Devlin, J): I do not think what is a fundamental term has ever been closely defined . . . . It is, I think, something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. If, for example, instead of delivering mahogany logs the sellers delivered pine logs, and the buyers inadvertently omitted to have them examined for 14 days, it might well be that the sellers could not rely on the time clause.

190. [1934] 1 K.B. 17.


192. 106 Ohio St. 328, 140 N.E. 118 (1922). Note the language of the court: What was Meyer to get in return for his money? A toy truck, or a transportation truck; a 5-ton dump truck merely in size or style, or was it to be a 5-ton dump truck for the usual and ordinary service to which dump trucks are put? . . . When a man buys a horse he hardly needs a warranty that it is a horse, or that it is not a mule or camel, though they belong to the same general family of burden bearers . . . .

193. Austin Co. v. J.H. Tillman Co., 104 Or. 541, 209 P. 131 (1922) (new asphalt mixing machine versus used machine defective in numerous respects and incapable of
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The concept of "difference in kind" between the thing contracted for and that delivered is, therefore well represented. A warranty disclaimer or remedy limitation is of no avail in such cases because it aspires—to the extent to which it seeks to justify fundamental deviations of the sort referred to—to be more than itself, to modify the "iron essence" of the sales contract of which it is a part and which is, in fact, its raison d'être. And to the extent to which it thus seeks to transcend itself, the court is entitled, under Section 2-302 to strike it down or to limit its application.¹⁹⁴

May support for this proposition be drawn from the cases which have so far utilized Section 2-302? Authority is admittedly scanty as yet, but as far as it goes it is indeed confirmatory. In Zabriskie Chevrolet, Inc v. Smith,¹⁹⁵ the court had before it warranty disclaimers substantially identical with those in issue in Henningsen v. Bloomfield Motors.¹⁹⁶ The automobile in question had become inoperable because of a defective transmission within a short time after leaving the dealer's premises. The buyer refused to accept a substitute transmission, and the dealer sued for the price. The court held for the defendant, both because, with respect to the exempting provisions, the requirements of Section 2-316(3) had not been complied with, and because of the Henningsen doctrine:

Although Henningsen was decided prior to the effective date of the Code, its basic concept that a technique such as the one described herein is against public policy now finds statutory support not only in 2-316(3), but also in . . . 2-302 (unconscionable contract or clause).¹⁹⁷

producing agreed-upon quality and quantity: "the machine delivered failed in substantial and vital particulars to correspond with the description in the contract." 104 Or. at 555, 209 P. at 139; Robert A. Munroe & Co. v. Meyer, [1930] 2 K.B. 312 (adulterated meat not corresponding with the contract description); Green v. Arcos, Ltd. (1931) 47 T.L.R. 336 (quantity of timber of varying classes in given proportions versus a quantity of varying classes in entirely different proportions). It should be added that the famous decision in Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1959), insofar as it rests on public policy, must surely also be understood as something of an affirmation of the notion of transactional essence.

¹⁹⁴ The Code sets out from the beginning with the notion that the parties' powers of "private legislation" do not extend to the modification of "the obligations of good faith, diligence, reasonableness and care prescribed by this Act." UCC § 1-102(3).


¹⁹⁶ 32 N.J. 358, 161 A.2d 69 (1959). Henningsen itself, of course, cites Section 2-302, although the Code was not then in effect in New Jersey. The fact the major automobile companies (Chrysler in Henningsen, General Motors in Zabriskie) remained unmoved is perhaps a warning that this decision is ultimately not as unambiguous as it has often been taken to be, and that the "fall of the citadel" cannot, perhaps, be dated with total precision after all. See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev 791 (1966). Cf. Hall v. Everett Motors, Inc., 340 Mass. 490, 163 N.E.2d 107, 109 (1960), another pre-Code case concerned with the automobile manufacturers' limitation-of-liability clause.

That we are here concerned with “transactional essence” should be obvious. Tender of the vehicle with a substitute transmission “not from the factory and of unknown lineage” would, said the court, involve “a chattel not within the agreement or contemplation of the parties . . . .”198 A similar situation arose in *Vlases v. Montgomery Ward & Co.*199 a Third Circuit decision involving an action brought by the buyer of one-day old chickens which some nine months after the date of purchase had to be destroyed because of infection with avian leukosis. The buyer based his action on the implied warranties of merchantability and of fitness for a particular purpose provided for in the Code. The seller asserted several defenses based on the nature of the disease involved and the circumstances in general. The court held that liability under the implied warranty sections was strict and avoidable only by modification or exclusion in accordance with the provisions of Section 2-316. In the course of his opinion, McLaughlin, J., added:

> Even a provision specifically disclaiming any warrant against avian leukosis would not necessarily call for the defendant's freedom from liability. Section 1-102(3) of the Code's General Provisions states that standards which are manifestly unreasonable may not be disclaimed [sic] and prevents the enforcement of unconscionable sales where, as in this instance, the goods exchanged are found to be totally worthless.200

It is true that Section 1-102 does not itself contain the word “unconscionable,” but it makes reference to “the obligations of good faith, diligence, reasonableness and care prescribed by this Act,” and thus to Section 2-302 itself.201

*Evisceration.* The distinction between “evisceration” of the “dickered deal” and deviation from transactional essence is, as has already been intimated, a somewhat arbitrary one; with respect to both con-

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198. 99 N.J. Super. at 450, 240 A.2d at 205.
199. 377 F.2d 846 (3d Cir. 1967).
200. 377 F.2d at 350.
201. Two other cases (involving lease agreements, be it noted) citing Section 2-302 in connection with warranty disclaimers are *Fairfield Lease Corp. v. Colonial Aluminum Sales Inc.*, 3 UCC REP. SERV. 858 (N.Y. Sup. Ct. 1966), and *Electronics Corp. of America v. Lear Jet Corp.*, 286 N.Y.S.2d 711 (1967); the issue in both cases, however, was whether a motion for summary judgment should be granted (on both occasions it was not), and there was no discussion of the merits. *See also William v. American Motor Sales Co.*, 44 Erie Co. L.J. 51 (Pa. C.P. 1961), in which the court held a disclaimer clause ineffective to exclude the warranty of merchantability. Although relying on non-compliance with Section 2-316(2) and (3)(a), the court adverted to the possibility that Section 2-302 might be of overriding effect: *Id.* 57 n.3.
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cepts the legitimate expectations of the parties are the heart of the matter. With respect to sales, "difference in kind" is an institutionalization of such expectations. Beyond the central core of transactional essence, however, lies a shadowier area in which arguments based on the particularities of the deal in question may be given some play. There can be little doubt that the term "surprise" in Comment 1 of Section 2-302 was meant to supply the dramatic focus here. The question to be asked is roughly this: is the contended-for application of clause X to the situation before the court so much at odds with the overall tenor of the particular deal as to be unfairly surprising?

Such a question will often arise in cases where the seller "has reason to know [the] particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods." In such circumstances—absent a disclaimer—Section 2-315 of the Code implies an appropriate warranty. To rely, in circumstances where the seller has behaved in such a way as to reinforce the presumption of such a warranty, on a clause excluding it, may be unconscionable even if that clause was, in accordance with Section 2-316(2), "in writing and conspicuous"—because the dominant "meaning" of the transaction is to be derived from the manifest intention of the parties and not from the paraphernalia (at least where there is a conflict between them). That, one supposes, is the lesson to be extracted from Bekkevold v. Potts, cited by the draftsmen.

But the circumstances in which the buyer may plead legitimate surprise are, after all, infinite. In Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, for instance, the ten-day time limitation for claims in respect of the catsup there in question might have struck the buyer as perfectly reasonable—so long as it applied to defects discoverable by ordinary means such as sight, taste, and smell. He might, however, legitimately have claimed that its application to...

202. Professor Left, it should be noted, concedes the utility of "surprise" as a dramatic device, albeit in another context. Left 498. "Surprise" as a catchword also occurs in UCC § 2-612, Comment 4.
203. UCC § 2-315.
204. Cf. UCC § 2-313, comment 4. Nowadays, of course, the buyer's impression of what he is getting may well have been created by means of modern advertising techniques. See the references to the modern "marketing milieu" in Hennington, 32 N.J. at 338, 161 A.2d at 83-84; cf. Patterson, supra note 37, at 860.
205. 173 Minn. 87, 216 N.W. 790 (1927).
206. 93 Utah 414, 73 P.2d 1272 (1937). Cf. Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928), also cited in Comment 1, where the question was again one of latent defects.

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latent defects discoverable only "by a careful microscopic examination" was a surprise indeed. And a buyer's use of a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction to postpone indefinitely the date of measuring damages for his own breach is, of course, a somewhat unexpected ploy, too. Although no case using Section 2-302 has yet invoked the "evisceration" theory, such decisions should not be long in coming.

Postscript. It may be objected that the foregoing analysis runs counter to the express requirement of Section 2-302 that unconscionability, in order to be "actionable," must exist "at the time [the contract] was made." If, after all, the alleged unconscionability lies not in the fact of a clause's existence, but in the claim to extend its application in such a way as to eviscerate the "fundamental" or "dickered"
meaning of the transaction, the claim must of necessity be made in response to a situation which did not exist at the time of contracting. But this is to mistake the argument somewhat. What precisely does the party invoking the warranty disclaimer or remedy limitation assert about its scope and meaning? He asserts, necessarily, that it was always and manifestly intended to cover (inter alia, it may be) contingencies such as the one before the court. Thus the question may be seen as arising conceptually at the time of contracting. And the court, in denying the applicability of the clause to the contingency before it, is in effect saying that, insofar as the clause was intended to cover that contingency, it was unconscionable from its inception and must be limited, or struck down, accordingly.210

c. Other Specific Clauses

The principles of “transactional essence” and “evisceration” have without doubt implications going beyond the context of exculpatory clauses, and there is no reason why they should not be invoked with respect to other contractual provisions, including some of those discussed below.211 With respect to these, however, it will be seen that the principles drawn upon for decision in the cases are most commonly extra-contractual in coloring. I have therefore thought it best, at this stage of scanty authority, to refrain from procrustean chopping and lopping and to adhere to the terms of the discussion as set by the courts themselves.

Submission to Foreign Jurisdiction. On three occasions the New York courts have dealt with a clause in a contract for home improvements by which the buyer agreed to submit to a foreign jurisdiction as the forum of legal redress.212 In each case the forum selected was New York, although the corporate plaintiff and the defendant were both resident elsewhere. In Paragon Homes of New England, Inc. v. Langlois,213 both the corporation and the defendants were residents of Massachusetts, where the contract had been executed and breached. In Paragon Homes of Midwest, Inc. v. Crace,214 plaintiff was an Indi-

211. It seems to me, in fact, very desirable that they should be so invoked, not only for the sake of doctrinal elegance, but so firmly to anchor future decisions as to particular contractual terms in the root notions underlying Section 2-302.
212. The clause read: “This agreement shall be deemed to have been made in Nassau County, New York, and the parties . . . hereby submit to the jurisdiction of the Supreme Court, Nassau County, New York, for the purpose of adjudication of all their respective rights and liabilities hereunder.”
ana corporation authorized to do business in Wisconsin, and defendants were residents of Wisconsin, where the contract had been executed and breached. In both cases the court held that the doctrine of forum non conveniens overrode any consensual arrangement of the parties, since the forum selected was "haphazardly agreed upon" and "actually unsuitable," and there was no "discernible reason" for the parties' choice. The court went on, however, to add that the clause... was inserted by the plaintiff in its printed form of contract for the purpose of harassing and embarrassing the defendants in the prosecution or defense of any action arising thereunder. This is not a case involving parties situated on an equal basis. The plaintiff is engaged in a commercial enterprise for profit, whereas the materials purchased by defendants was not bought for use in a business or for resale. The procurement of defendants' consent to New York as the forum for legal redress is, under the peculiar circumstances disclosed, without justification, grossly unfair and unconscionable. Such clause would be stricken as a matter of law (UCC § 2-302) were not the action dismissed on other grounds.

In Paragon Homes, Inc. v. Carter, Paragon Homes of New England, Inc. had, after dismissal of its action for breach on grounds of the forum non conveniens principle, assigned its rights under the contract with Carter to the present plaintiff, a New York corporation. The issue being thus squarely put to the court, Brennan, J., after quoting the passage from the Langlois and Grace cases extracted above, held that Section 2-302 alone was an adequate ground for decision.

What may heretofore have been dictum is now made the decision of the court. Without the imposition of the grossly unfair and unconscionable jurisdictional clause this court lacks jurisdiction over the defendants and the complaint is dismissed.

As the quotation from Langlois and Crace indicated, these earlier opinions somewhat scatter their shot in their manner of invoking Section 2-302. Matters of bargaining conduct (printed form), bargaining position (commercial enterprise versus home-owner), and bad

215. 4 UCC Rep. Serv. at 18, 21. The opinions in the two cases are substantially identical.
216. 4 UCC Rep. Serv. at 18, 20.
217. 4 UCC Rep. Serv. at 19, 21.
219. 4 UCC Rep. Serv. at 1149.
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faith (harassment and embarrassment) are rather indiscriminately thrown together. It is difficult not to feel, however, that the last-named factor is predominant, and that the prefunctoriness of the court with respect to the others savors of ritual incantation rather than close factual scrutiny. Suppose the parties here had “dickered” over the forum clause: would the decision have been different? Given the “motive” of harassment and embarrassment, I should say (albeit somewhat nervously): no. The principle seems to boil down to something like this: a clause of the kind here under discussion is unconscionable unless a bona fide reason can be advanced for its presence. Whether bona fide reasons exist is, of course, a matter of external evidence; the fact that the hearing provision of Section 2-302(2) was given no play in the Paragon Homes cases is presumably an indication of the fact that everybody knew no such reasons existed.

Repossession Under Installment Contracts. The contract clause in issue in Williams v. Walker-Thomas Furniture Co.220 provided that payments made by the purchaser “shall be credited pro rata on all outstanding leases, bills and accounts due” at the time of payment; the effect being “to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated.”221 Although the majority opinion is replete with phrases like “commercially unreasonable contract”222 and “terms which are unreasonably favorable to one party,”223 the tenor of the whole is very much “procedural” in emphasis, and it would be oversanguine to perceive in the case any real leaning towards the—after all not inherently implausible—view that add-on clauses of the kind at stake here are substantively unconscionable per se.

The New York Supreme Court was somewhat less tactful224 with respect to a related issue in Robinson v. Jefferson Credit Corp.225 In that case the defendant corporation (the seller’s assignee) had repossessed a car as to which plaintiff-purchaser was at the time concededly in arrears. Although plaintiff paid over the arrears plus late charges and a repossession fee very shortly afterwards, defendant nevertheless declined to return the car, apparently because it anticipated

220. 350 F.2d 445 (D.C. Cir. 1965).
221. Id. at 447.
222. Id. at 449.
223. Id.
224. So perhaps instancing the difference between higher and lower judicial hierarchies to which I referred earlier. See p. 792 supra.
future defaults. Not unnaturally the plaintiff refused to make further payments, and the defendant relied on these newly-incurred arrears at the trial. The court granted plaintiff’s motion for return of the car (on condition that all arrears be extinguished), saying:

Unconscionable conduct is proscribed by the Uniform Commercial Code, and defendant’s conduct herein, even if allowed under the contract between the parties, cannot withstand comparison to the requisite standard of commercially reasonable conduct required under the code.226

Presumably this somewhat problematical statement means, inter alia, that had the contract contained a clause explicitly authorizing the defendant’s refusal to return the automobile,227 that fact would have been unavailing. If this view is correct, Robinson suggests the proposition that a clause entitling the repossession to retain possession even after arrears and attendant fees228 have been discharged may be held to be unconscionable independent of matters of bargaining or overall imbalance.229

It might well be expedient to extend this view to the Walker-Thomas type of clause as well, the hedging of the court in that case notwithstanding.230 Repossession is a potent weapon; the frequency of assignment in the field of consumer installment contracts has meant that it is often wielded inequitably and indiscriminately. The policing of contractual provisions in this area by way of Section 2-302 may provide a valuable counterthrust.

Waiver of Defence Against Assignee. The frequency of assignment in the field of installment contracts raises its own peculiar problems. If the contract assigned is unconscionable either in whole or in part, the assignee’s rights are, of course, extinguished or diminished accordingly.231 Suppose, however, that the buyer waives, as against

226. 4 UCC Rep. Serv. at 16.
227. It is not clear whether in fact there was such a clause.
228. Of course the nature and amount of such fees may in themselves raise the issue of unconscionability. Cf. Consumers Time Credit, Inc. v. Remark Corp., 229 F.Supp. 185 (E.D. Pa. 1966), where an attorney’s collection fee of 15 per cent, provided for by a clause of the financing agreement there in question, was held unconscionable as a matter of equity law and the rate of 5 per cent substituted.
229. Cf. Autocar Sales v. Sansone, 20 Erie Co. L.J. 210, 86 Pittsb. Leg. J. 570, 18 A.L.R.3d 1311 n. (Pa. C.P. 1938), a pre-Code case in which a contract provision that on repossession the lessor might sell the automobile in question without notice to the lessee and proceed against the latter for any balance was held unenforceable as being unconscionable.
230. Professor Leff would not, one gathers, agree; he draws attention to the fact that as of 1965, of the “twenty-seven jurisdictions which have statutes regulating retail installment sales, only one has a provision making add-on clauses impermissible.” Leff 554. Perhaps that is one of the reasons why a provision like Section 2-302 was urgently needed.
the assignee, those defences which he might have invoked against the seller. Such a clause was in issue in *Unico v. Owen.*\(^{232}\) There the buyer had, as part of an installment purchase transaction, executed a note of which the plaintiff, a financing company closely associated with the vendor, claimed to be holder in due course under the Uniform Negotiable Instruments Law.\(^{233}\) The Supreme Court of New Jersey held, for reasons not relevant here, that the plaintiff could not be regarded as such a holder. The plaintiff argued that he was nevertheless entitled to payment *qua* assignee of the contract of sale, and that he was so entitled even though the vendor had failed to make delivery, on the basis of the following clause contained in that contract:

> Buyer hereby acknowledges notice that this contract may be assigned and . . . agrees that the liability of the Buyer to any assignee shall be immediate and absolute and not affected by any default whatsoever of the Seller . . . . [I]n order to induce assignees to purchase this contract, the Buyer further agrees not to set up any claim against such Seller as a defense, counterclaim or offset to any action by any assignee . . . .

The court held this clause to be unenforceable as contrary to public policy. It went on, however, to consider the applicability of the relevant Code provisions. After pointing out that Section 9-206(1),\(^{234}\) which seems at first sight to assume the validity of waiver clauses, is by its own terms subject "to any statute or decision which establishes a different rule for the buyer of consumer goods," the court continued:

> In this section of the Code, the Legislature recognized the possibility of need for special treatment of waiver clauses in consumer contracts . . . . And section 9-206 in the area of consumer goods sales must as a matter of policy be deemed closely linked with section 2-302 . . . . We see in the enactment of these two sections of the Code an intention to leave in the hands of the courts the continued application of common law principles in

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233. The UCC had not yet taken effect in New Jersey at the time of the execution of the note in question.
234. That section reads:
Subject to any statute or decision which establishes a different rule for buyers or lessors of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper [Article 3]. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.
deciding in consumer goods cases whether such waiver clauses as the one imposed on Owen in this case are so one-sided as to be contrary to public policy.235

Although the court referred to certain bargaining aspects of the transaction, its objections to the clause on grounds of "public policy" were expressly stated to be "regardless" of them; and Section 2-302 was thought to be applicable in the same way.236 We have here, therefore, authority for the view that waivers of this kind may be unconscionable per se; indeed, the court's language may to some observers suggest an even less equivocal approach.237

III. Going Beyond Sales

The precise scope of the Sales Article of the Code is a matter to which relatively little attention seems to have been paid; I do not propose here to enter into the difficulties which may be conjured up by a consideration of the phrase "transaction in goods" as it is used in Section 2-102.238 If the Code follows the pattern of earlier codifying statements and enactments in American legal history (and it bids fair to do so), it will in time become part of the general jurisprudence of the nation. In the case of Section 2-302 in particular, it may be confidently predicted that the range of its application will be a constantly expanding one.239 It has already—as we have seen—been ap-

235. 50 N.J. at 125, 232 A.2d at 418. Cf. Fairfield Lease Corp. v. Colonial Aluminum Sales Inc., 3 UCC Rep. Serv. 858 (N.Y. Sup. Ct. 1966), where "consumer unconscionability" reasoning was held inapplicable to a clause waiving defenses against the assignee of a lease.

236. 50 N.J. at 123, 232 A.2d at 417.

237. The issues raised by Unico have, of course, a long and extensive pre-Code history, with which I have not concerned myself. For references to the cases and to the literature, see R. Steffen, Cases on Commercial and Investment Paper, 812-31 (2d ed. 1954).

238. Another type of clause which could raise the issue of substantive unconscionability is the provision for waiver of jury trial. A clause waiving the right to trial by jury in the event of litigation, subscribed to by the plaintiff when opening a checking account with the defendant bank, was held unenforceable in David v. Manufacturers Hanover Trust Co., 4 UCC Rep. Serv. 1145 (N.Y. Civ. Ct. 1968). There is, however, no doubt that as a matter of law such waivers by contract are permissible, although the courts have traditionally applied strict interpretative standards in this area. See the cases cited by the court at id. 1149-50. That an open invocation of unconscionability may, under some circumstances, be the preferable tactic goes without saying, but the decision in David was based squarely (and legitimately) on matters of bargaining conduct, and thus raises no issue of substantive (much less per se) unconscionability.

239. For a comprehensive summary of case-law to date, see Annot., 17 A.L.R.3d 1010, 1047 (1968).

239. Cf. 5A A. Corbin, Contracts § 1164, at 223 (1964); "Wherever this section is made applicable to contracts for the sale of goods, no court should fail to make it applicable to all other contracts; for the policy that it adopts is applicable to all alike." Cf. Comment, Unconscionable Sales Contracts and the Uniform Commercial Code, Section 2-302, 45 Va. L. Rev. 589, 590-91 (1959). Comment, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 Colum. L.R. 880, 892 (1965).
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plied or half-applied to financing transactions,240 leases (both of real
estate241 and of chattels242), and guarantee agreements.243 A further
example of such expansion, which, in view of its importance, deserves
to be discussed at some length, is supplied by Sinkoff v. Schlitz Brew-
ing Co.,244 a recent case applying Section 2-302 to a distributorship
or franchise agreement.

Problems associated with the duration and termination of fran-
chise agreements (especially in the automobile dealers field) have been
extensively canvassed in the literature.245 Where such agreements
contain clauses allowing termination at will and without notice, such
clauses have, in general, been accepted by the courts at face value.
It is, however, perfectly feasible to argue that termination of a rela-
tionship such as that between manufacturer and distributor—a rela-
tionship which, to the knowledge of both parties at its inception, will
necessarily involve a substantial investment of time and money, espe-
pecially on the distributor’s part, and the sudden termination of which
may therefore do more than the usual amount of harm—should not,
as a matter of public policy, be effected arbitrarily and without no-
tice even where an express clause of the contract seeks to authorize
such a termination.246

In Bushwick-Decatur Motors v. Ford Motor Co.,247 perhaps the best-
known decision in the field, the Second Circuit refused to accept this
line of reasoning with respect to a dealer’s claim that termination
ought to be allowed only in “good faith.” In the course of his opinion
Judge Clark wrote:

Whitestone Credit Corp. v. Barbory Realty Corp., 5 UCC REP. SERV. 176 (N.Y. Sup. Ct. 1968);
F.2d 952 (3d Cir. 1967); Hernandez v. S.I.C. Finance Co., 5 UCC REP. SERV. 1151, 1154
(N.M. 1968). It should be noted that the National Bankruptcy Conference has proposed
that Chapter XIII of the Bankruptcy Act be amended so as to include an unconsci-
onsability provision, under which an overreaching creditor’s daim would be
subordinated to the claims of other creditors. See Countryman, Proposed New Amendments to Chapter
241. Fairfield Lease Corp. v. Colonial Aluminium Sales, Inc., 5 UCC REP. SERV. 858
242. Electronics Corp. of America v. Lear Jet Corp., 55 Misc. 2d 1066, 286 N.Y.S.2d
(1964).
244. 51 Misc. 2d 446, 273 N.Y.S.2d 364 (1966).
245. Extensive citation is unnecessary here. For a recent compendium, as well as some
interesting speculations, see Hewitt, Termination of Dealer Franchises and the Code—
Mixing Classified and Coordinated Uncertainty with Conflict, 22 Bus. LAW. 1075 (1967).
246. For a collection of more recent cases “indicating that some courts are more willing
to look behind franchise terms and to consider economic and equitable considerations,”
see id. 1080-82.
247. 116 F.2d 675 (2d Cir. 1940).
With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take. . . . To attempt to redress this balance [between the strong bargaining position of the manufacturers and the weak one of the dealers] by judicial action without legislative authority appears to us a doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains. 248

It seems reasonable to argue that the requisite legislative utterance has now been made in the shape of the Code’s unconscionability section, 249 and that the hearing provision of that section now makes possible the “showing of the supposed needs” in the absence of which Judge Clark thought it improper to intervene.

In Sinkoff v. Schlitz Brewing Co., 250 the court had before it a motion for a preliminary injunction to enjoin the defendant corporation from terminating a distributorship agreement with the plaintiff. The agreement contained a clause providing that either party might terminate without cause or notice. When Schlitz terminated the agreement accordingly, 251 plaintiff sought an injunction, arguing that he was entitled, despite the termination clause, to “reasonable notice.” 252 In support, the plaintiff alleged expansion of his business in reliance on the continuation of the distributorship, as well as the threat of bankruptcy if it were suddenly discontinued. He relied specifically on UCC § 2-309(3), which, in the absence of termination

248. 116 F.2d at 677. The court referred to the Wisconsin dealer’s-day-in-court act, Wis. St. § 218-01(3)(a)(17) (1957), as suggesting “the proper source of remedy, if one is needed.” 116 F.2d at 677.
249. Other sections of relevance are Sections 1-102(3) (obligation of good faith and reasonableness not disclaimable) and 2-306 (duty of good faith in requirements contracts), as well as the termination provisions of Section 2-309 referred to below.
250. In the case of automobile dealers’ franchises, it might be argued that the Automobile Dealer Franchise Act of 1956, 70 Stat. 1125 (1956), 15 U.S.C. §§ 1221-25 (1964), has already preempted the field. But that Act shields the dealer only against manufacturers’ coercion and not against arbitrary termination. This has prompted doubts as to whether the Act has changed the position of the dealer at all. See, e.g., Conteent, The Automobile Dealer Franchise Act of 1956—An Evaluation, 48 Cornell L.Q. 711, 741 (1963). But I am conscious of paying only perfunctory attention to a problem which has occasioned a large volume of specialized literature. My intention here is only to suggest that UCC § 2-302 should be mined for all it is worth in the franchise field.
251. Actually, Schlitz gave 10 days’ notice, and alleged prior complaints.
252. Plaintiff suggested that in this case a "reasonable" period would be one year.

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on an "agreed event," requires reasonable notice, and provides that "an agreement dispensing with notification is invalid if its operation would be unconscionable."

Stanislaw, J., without considering whether a distributorship agreement like the one before him might be categorized as a "transaction in goods" (or whether, if it might not, the Code might legitimately be extended to cover it), took as his point of reference not Section 2-309(3), but Section 2-302 (an unexceptionable tactic insofar as the former section utilizes "unconscionability" as a criterion of validity). He went on to hold that, in view of Section 2-302's requirement that unconscionability, to be operative, must exist at the time the contract was made, the plaintiff's business activities after the making of the agreement were irrelevant. In the absence of "data relevant to conditions existing when the contract was executed," it was possible that "the mere creation of any relationship between Sinkoff and Schlitz was, at that first point in time, of great benefit to both and perhaps even particularly favorable (and thus especially inoppressive) to Sinkoff." Plaintiff's motion was accordingly denied without prejudice.

Although this opinion is analytically highly vulnerable, its value for present purposes lies in its underlying premises: (a) that Section 2-302 is applicable to distributorship agreements (and, presumably, to others like them), and (b) that, had the requisite "data" been available, the termination clause might have been found unconscionable under the Section. Now, from the view that conscionability may require, in the case of distributorship agreements, termination clauses incorporating a provision for "reasonable notice," it is a decidedly un-

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253. 51 Misc. 2d at 449, 273 N.Y.S.2d at 366.
254. The errors in reasoning seem to me to be: (a) If the termination clause is asserted to be applicable to the contingency before the court, then the assertion must be that it was always intended to embrace that contingency, even "at the time when the contract was made." Cf. my argument with respect to fundamental breach and warranty disclaimers, p. 803 supra. (b) In any case, Section 2-309(5), primarily relied on by the plaintiff, clearly looks to circumstances not only at the time of making the contract, but afterwards. See Comment 8 (an agreement dispensing with notice is valid "unless the results of putting it into operation would be the creation of an unconscionable state of affairs" (emphasis added)). (c) Moreover, so far as Section 2-302 is concerned, the question is not whether the "relationship" created by the contract was or was not of benefit to the complainant. The question is whether the clause in question—here the termination clause—was unconscionable under the circumstances at that time. Here, reliance on the distributorship, etc., might well have been argued to have been foreseeable at the time of making the contract.
gigantic step—or so it seems to me—to the position that there must also be further provision for reasonable criteria by which the validity of the act of termination itself may be judged. That a long-standing franchise agreement should be terminable, as it was held terminable in *Bushwick-Decatur*, quite irrespective of motive or even good faith, seems to me wholly at odds with the moving spirit of Section 2-302 (or, for that matter, of Section 2-309). Termination clauses which permit such unilateral oppression should, I submit, be regarded as prima facie unconscionable—subject always of course, to vindication by explanatory and exculpatory evidence as to “commercial setting, purpose and effect.”

IV. The Hearing Provision

I have had frequent occasion, in the preceding pages, to refer to the hearing provision contained in Section 2-302(2) as a means of tempering first inclinations derived from the face of a contract.

It might be supposed that the usefulness of such a provision would be self-evident, even if one is not inclined to make extravagant claims in the matter. Professor Leff, however, is strongly critical of it. His central objection seems to be this: Suppose that, when called to the witness stand, the seller explains a given term of the contract (price, add-on repossession clause, warranty disclaimer, to take examples chosen by Professor Leff himself) as being simply designed to increase profits, as an “edge” in his favor in that respect.

256. In formulating those criteria, the draftsman should pay due attention to—perhaps unfortunate—line of decisions suggesting that phrases like “for good cause” are too imprecise to be given effect by the courts. See citations given in the *Bushwick-Decatur* case, 116 F.2d at 677-78.

257. UCC § 2-302(2) reads:

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.


258. It is difficult to separate the various strands of Professor Leff’s argument here. He complains also that Section 2-302(2) is of little help in identifying unconscionability “because a warranty disclaimer is not ‘like’ a remedy limitation, and both of them are not ‘like,’ say, a choice-of-law provision. Any of these clauses might well be regulated, but one cannot decide any of the questions relevant to the form of that regulation so long as one is trying not to decide a question of social policy but to flesh out an incantation.” Leff 546. It seems to me perfectly possible to “flesh out” even “incantations” by way of deciding issues of social policy.
[H]ow does a court decide if taking that particular edge is not to be permitted if in its “commercial setting” its “purpose and effect” is to increase a party’s profits? Profesor Leff himself suggests as possible aids to such a decision testimony as to the “profit picture” of the industry or of the particular party involved, or as to the party’s “competitive position vis-à-vis his competitors,” only to reject them as unsuitable.

Since Professor Leff fails to give reasons for rejecting such testimony, it is difficult to do more than indicate one’s dissent from his view. Why shouldn’t a court seek to inquire into prevailing price levels with respect to a given appliance, or into the kind of clientele, the particular local environment, or the relative economic strengths and weaknesses of the business in issue? Walker-Thomas, after all, might conceivably have established, by suitable evidence, that if they did not take repossession measures of the stringent kind to which Mrs. Williams was subjected, they would, given their average clientele, go out of business within a short time, and that the result would be that no poor old ladies on welfare would ever be able to bask in the barbaric splendor of television or of stereo sound. Or the automobile industry might actually convince us that a serious modification of warranty disclaimer practices would do what all their PR men have been threatening us with for years: cut profits to such a degree that average Americans would have to start walking again.

It seems to me, however, that a more fundamental objection may be raised with respect to Professor Leff’s point of view. It is, I submit, plainly unrealistic to envisage a party accused of “unconscionability,” and given an opportunity to justify himself, as simply relying, by way of such justification, on his overwhelming desire to make more money. Max Greed is a character of purely operatic dimensions, and Professor Leff’s dramatic dialogues, invented to illustrate his argument, sound like nothing so much as secco recitative. It may, I think, be safely left to the “accused” (and his presumably sane counsel) to work out whatever factual assertions are best made on his behalf; and factual issues being thus raised, they will doubtless be joined, the resultant

259. Leff 546 (emphasis in original).
260. Id.
261. Especially or perhaps exclusively insofar as such matters are apparent to the “victim” in the case.
262. I do not, incidentally, wish to suggest that such evidence would absolutely conclude the matter.
263. Professor Leff’s prototypical businessman. Leff 544-45.
264. Id. 544-45.
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process being on the whole likely to engender, besides heat, a little light as well. It is hardly beyond the capacity of normal intelligence to develop a set of relevant questions. A good instance (indeed, the only one available\textsuperscript{265}) is provided by the Elkins-Dell cases\textsuperscript{266} in which the court, in remanding the cases for hearings on the issue of unconscionability, outlined some of the issues to be explored:

\[\ldots\] the financial positions of the bankrupts at the time the agreements were entered into; the extent to which agreements of this kind are customary among lenders like Fidelity; the extent to which Fidelity's contracts vary with and reflect anticipated risks; the availability of other credit to the bankrupts \ldots; the extent to which the various provisions were enforced by Fidelity or influenced the bankrupts' business conduct, particularly their ability to secure other funds; whether the terms of these contracts facilitated commerce by making funds available where they otherwise would not be or impeded commerce by precluding access to other sources of funds; and the effects of holding these contracts unenforceable in bankruptcy on the future financing of similar businesses in need of funds.\textsuperscript{267}

It is difficult to see why similar questions might not be formulated in the sales context, whatever the particular inequity complained of may be.

V. Conclusion

I have tried to show that Section 2-302 is more than mere incantation; that it has a number of "reality referents,"\textsuperscript{268} and that it is not too difficult, given an appropriate initial disposition and a little concentration, to flush those referents out of their thickets. To go to great lengths to prove the opposite amounts in the end merely to a demonstration of the self-evident: that "unconscionability" is a residual category of shifting content and expansible nature. The thesis of this

\textsuperscript{265}. In Frostifresh Corp. \textit{v.} Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966), \textit{rev'd with respect to damages}, 54 Misc. 2d 119, 281 N.Y.S.2d (1967), a hearing was apparently held during the course of trial, and before the opinion was rendered; I have been unable to obtain a transcript. Fairfield Lease Corp. \textit{v.} Colonial Aluminium Sales Inc.; 3 UCC REP. SERV. 858 (N.Y. Sup. Ct. 1966), and Central Budget Corp. \textit{v.} Sanchez, 58 Misc. 2d 620, 279 N.Y.S.2d 391 (1967), were cases in which motions for summary judgments were denied so that hearings might be held. I understand from privately supplied information that the cases were settled before such hearings could take place. Settlement was also, it should be noted, the eventual outcome of the Elkins-Dell litigation.


\textsuperscript{267}. 253 F.Supp. at 874.

\textsuperscript{268}. One of Professor Left's complaints is that it has none: Left 558.
essay has been, of course, that we cannot do without such regrettably vague standards.

Professor Leff finishes with a trumpet-blast from Llewellyn. It is an old and facile game to match quotations, but I shall indulge myself nevertheless:

[I]n any intellectual enterprise . . . there must always be a certain difference between theory and practice or experience. A theory must certainly be simpler than the factual complexity or chaos that faces us when we lack the guidance which a general chart of the field affords us. A chart or map would be altogether useless if it did not simplify the actual contours and topography which it describes. . . . No science offers us an absolutely complete account of its subject matter. It is sufficient if it indicates some general pattern to which the phenomena approximate more or less. For practical purposes any degree of approximation will do if it will lead to a greater control over nature than we should have without our ideal pattern. But for theoretic purposes we need the postulate that all divergences between the ideal and the actual will be progressively minimized by the discovery of subsidiary principles deduced from, or at least consistent with, the principles of our science.

269. Llewellyn's famous tag: "Covert tools are never reliable tools." It is, of course, quite clear that Llewellyn intended Section 2-502 to be a substitution of overtness for covertness. Professor Leff's irony is, of course, intentional.