

Fall 1987

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Recommended Citation

Robert Kratovil, Unconscionability - Real Property Lawyers Confront a New Problem, 21 J. Marshall L. Rev. 1 (1987)

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ARTICLES

UNCONSCIONABILITY—REAL PROPERTY LAWYERS CONFRONT A NEW PROBLEM

ROBERT KRATOVIL*

IN GENERAL

Those who read this article are certain to ask whether it is really necessary to add one more article to the existing store of legal literature on unconscionability. The sheer volume of commentary is awesome. Nevertheless, there is a need to probe further. Much that needs explaining has been ignored. The effort here will be to look at the areas that clearly have slipped through the doctrinal cracks. Commentators have apparently ignored significant areas in the field of equity and real property law. There is, as well, a need to see what the courts are actually doing as distinguished from what the commentators are preaching.

MERGER OF LAW AND EQUITY

Neither the unconscionability section of the Uniform Commercial Code (U.C.C.), nor the *Restatement (Second) of Contracts*, have made any effort to distinguish between law and equity cases. In equity, of course, the doctrine of unconscionability goes back to the year 1600 and a vast body of unconscionability law exists. To illustrate, under current civil practice, one court (theoretically) handles all civil litigation, including chattel security litigation (usually sounding at law) and mortgage foreclosures (sounding in equity). In both types of cases, security documents in litigation are sure to contain acceleration clauses. In the standard treatise on the U.C.C., this clause is given one line stating that acceleration clauses are enforced.¹

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1. J. WHITE & R. SUMMERS, *LAW UNDER THE UNIFORM COMMERCIAL CODE* 1087 (2d ed. 1980).

A great number of decisions exist in mortgage foreclosure law which spell out the hurdles a lender must leap before he may accelerate a home mortgage and deprive the borrower of his home by foreclosure. Outside of equity the authorities seem unaware of the fact that enforcement of acceleration presents a typical unconscionability problem. Again one feels the shock and surprise of the obvious fact that the bench and bar that operate outside of chancery are oblivious to the enormous changes that equity is still making in our substantive law. It is perfectly clear that the judges who are assigned to the chancery bench will continue to set aside accelerations and control the home foreclosure process to prevent an unconscionable result. Will this kind of thinking percolate across the aisle into the law bench, with the courts involved in trying chattel security litigation? This is discussed hereafter.²

UNCONSCIONABILITY UNCONFINED

The answers to some questions are coming in dribs and drabs. Early on, the courts confronted with chattel lease situations decided that although the U.C.C. technically was limited to *sales* of chattels, the philosophy clearly was also applicable to leases.³ This was a small step for mankind, but it was big enough. The genie had escaped from the bottle. Unconscionability cannot be confined.

When, in a statute, the legislature declares that unconscionability will not be tolerated in sales of chattels, how is it possible to confine this expression of policy to sales of chattels? Is unconscionability acceptable in chattel leases?⁴

To paraphrase Karl Llewelyn, the "dickered" word was "unconscionable." If parties to transactions must behave conscionably, the courts must follow them, wherever they go, and see that unconscionability is not permitted to raise its head. In the chattel lease situation, how could a court hold that it had no choice but to enforce an unconscionable chattel lease? What choice does the court have when confronted with an unconscionable lease of real property?

RESTATEMENT (SECOND) OF CONTRACTS

The *Restatement (Second) of Contracts* attempts to answer some questions. It makes *all* contracts subject to the requirement of conscionability. As the foregoing questions make abundantly clear,

2. See *infra* text accompanying notes 9-16.

3. *Pacific Am. Leasing Corp. v. S.P.E. Bldg. Sys., Inc.*, 152 Ariz. 96, 100, 730 P.2d 273, 277 (1986) (by analogy, article 2 of the U.C.C. applies to leases).

4. *Id.* at 96, 730 P.2d at 273 (rule incorporated in proposed final draft of amended U.C.C. § 2A-108, April 6, 1987).

the draftsmen had no choice. More importantly, the *Restatement* was really in large part merely restating existing law on unconscionability. As Harlan Fiske Stone once pointed out, statutes are precedential.⁵ When a statute contains a clear expression of policy, that policy is automatically applicable to cognate situations not falling within the letter of the statute.⁶

In light of the above, it is amazing that an enormous amount of current litigation goes on in ignorance of the fact that the local precedents cited are now without vitality. All of us are aware of the devotion of many law firms to mechanical research. It may be difficult to teach the machines to perceive statutory analogies present in legislation unrelated to the issue under research. For example, when the courts first began to impose an implied warranty of habitability on builders of new homes, they used the analogy of the U.C.C. warranties section, on the eminently practical theory that if the law imposes a warranty in the sale of a dish mop, it ought to impose a warranty in the sale of a new home.⁷ All this was obvious even to the untrained eye, but until Colorado spoke, many reviewing courts failed to make the analogy. Then, like dominoes, the old *caveat emptor* decisions on sales of new homes fell all across the country. A *judicial* precedent was available! The machines could find it!⁸

Now one can put a finger on one of the problems unconscionability faces. Many cases will continue to follow old precedent, even rejecting the *Restatement (Second) of Contracts*, and *Restatement (Second) of Property*, in total unawareness of the fact that their legislatures have spoken, giving a home to the doctrine of unconscionability in the local statutes, namely the U.C.C.

CONTRACT LAW TODAY

It is difficult to believe that the judges of today, practically all of them "chancellors" as well as "judges," can fail to be influenced by equitable doctrines in the granting of any of the unconscionability remedies that are available.⁹ After all, the law should be based on current concepts of what is right and just, and the judiciary should be alert to the never-ending need for keeping its common law

5. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

6. See *infra* text accompanying notes 40-46 for discussion of statutes as precedent.

7. See *Carpenter v. Donohoe*, 154 Colo. 78, 82-83, 388 P.2d 399, 402 (1964) (establishing an implied warranty of workmanship and habitability in the sale of a new home by a builder-seller).

8. Actually, a concept search is possible but very difficult. See *infra* text accompanying note 83 for an example of how courts will read the implied term despite lack of judicial precedent.

9. 1 A. CORBIN, CORBIN ON CONTRACTS § 128, at 551 (1963).

principles abreast of the times.¹⁰ The judiciary's power to enforce the terms of any contract is at all times exercised subject to the restrictions and limitations of public policy as manifested in constitutions, statutes and applicable legal precedents.¹¹ The problem, of course, is one that affects all human conduct. We all tend to take the easiest way out. It is much easier to search for the case in point than it is to search for later statutes that express a differing philosophy, though not directly related to the subject matter at issue. Given this fact, it is almost a miracle that the lawyers who persuaded the courts to find a covenant of warranty of good construction in a sale by a builder-seller were able to cite, in support, a U.C.C. provision that dealt only with sales of chattels.

UNCONSCIONABILITY—THE U.C.C. DEFINITION—EQUITY INFLUENCE

U.C.C. Section 2-302 assigns to the judge alone the issue of determining unconscionability, and if he finds it present, he alone determines the appropriate remedy. A leading commentator states that the operation of Section 2-302 is clearly equitable in nature.¹² Not only does the judge alone decide the question, but the remedy is typically equitable in that the court has the power to custom tailor the relief by refusing to enforce the entire contract, any portion thereof, or, in effect, to *remake* the contract to avoid the unconscionable result.¹³

Others have also concluded that the definition leans heavily upon equitable doctrines. Thus, we are reminded that "half of our private law—the part that prevailed when any conflict arose—was ascribed by the Chancellors who created it to standards no more precise than 'equity and good conscience.'"¹⁴ Professor Hillman agrees that equity is indeed the source of unconscionability doctrine.¹⁵ Courts of law and equity now review bargains for unconscionability.¹⁶ The net result is to leave without support many of the positions taken by Professor Leff.¹⁷

10. *Schipper v. Leavitt & Sons*, 44 N.J. 70, 297 A.2d 314, 325 (1965).

11. *Town of Stratford v. Local 134*, 201 Conn. 577, 519 A.2d 1 (1986).

12. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 39 (1969).

13. *Id.* (emphasis added).

14. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1043 (1976).

15. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for the UCC Section 2-203*, 67 CORNELL L. REV. 1 (1981).

16. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 750 (1982).

17. Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). Professor Leff argues that the meaning of § 302 of the U.C.C. will progressively become abstract, and will eventually be destroyed. Modern law squarely contradicts this assumption.

The U.C.C. was first enacted in Pennsylvania in 1953. New York referred the U.C.C. to its Law Revision Commission, where extensive changes were made. This revised version is the original U.C.C. as it was enacted by the states.¹⁸ Next came the amendments of 1972,¹⁹ and now, there is the proposed redraft of leases.²⁰ Throughout its history, the U.C.C. has been an example of wretched draftsmanship. Many commentators have pointed out that particularly the unconscionability definition is a pure horror.²¹ Thus, Professor Murray has observed that the definition simultaneously requires the disturbance and non-disturbance of risks.²² The actual phrasing of the U.C.C. unconscionability definition must often be disregarded in order to discover its true intent, as the canons of construction advise. The same is true of the *Restatement (Second) of Contracts*, which repeats the U.C.C.'s errors.²³

UNCONSCIONABILITY AS A CONTINUING PROCESS

The U.C.C. permits a court when asked to pass on unconscionability, to go into a contracts commercial setting. Evidence is admissible under Section 2-302 as to the setting.²⁴ The aggrieved party's ignorance of the terms of the contract, disparity in bargaining power, disproportionate levels of education, deceptive sales techniques, failure to really bargain over the risks, lack of reasonable opportunity to negotiate risk-shifting clauses, and many other factors present in the bargaining process, have been adverted to as elements that enter into the judgment of unconscionability.²⁵ This has all become hornbook law. It is evident then, that unconscionability is part of a bargaining process. Courts cannot intelligently decide unconscionability by looking at the contract alone.

Section 2-302 of the U.C.C. imposes the obligation of determin-

18. HENSON, SECURED TRANSACTIONS UNDER THE UCC 3, 4 (2nd ed. 1980).

19. *Id.* at 5.

20. Proposed Final Draft, April 6, 1987.

21. See generally Hillman, *supra* note 15, at 2 & n.10.

22. Murray, *supra* note 12, at 40.

23. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

24. U.C.C. § 2-302 (1972). Section 2-302 of the Uniform Commercial Code provides:

(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.

(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.

Id.

25. *Bekins Bar v. Ranch v. Huck*, 664 P.2d 455, 462 (Utah 1983).

ing conscionability *at the time the contract is made*.²⁶ Section 1-203 imposes the duty of good faith.²⁷ Section 2-103 adds the obligation of reasonable commercial fair dealing.²⁸ The *Restatement (Second) of Contracts* Section 205 requires of each party a duty of good faith and *fair dealing*.²⁹ Adding *fair dealing* makes the expression more descriptive of *performance* of the contract.³⁰ At first blush, one would think that there are two concepts divided by time, one relating to the situation up to the date of the contract and the other relating to events occurring thereafter. This is an impossible construction for several reasons. For example, all the relevant Code sections, like those adverted to, create new standards of morality in the contract process.³¹ It is totally unthinkable to suggest that one standard governs the bargaining process up to the date of the contract, and another and different standard governs the contract thereafter.

THE REQUIREMENT OF GOOD FAITH BARS BAD FAITH

Bad faith in the performance or enforcement of a contract is barred because it violates community standards of decency, *fairness* or reasonableness.³² Obviously *unfair dealing* in the *performance* of the contract violates the same standards.³³

Likewise, because the U.C.C. bows to existing equitable principles, it necessarily approves the time-honored equity practice of applying unconscionability rules *after* the contract is executed. Moreover, because neither the U.C.C. nor the *Restatement* distinguish between law and equity, it is certainly arguable that the judges sitting on the law side should, as Corbin argues, recognize that they are also chancellors.³⁴ Let us test this last statement. We know for a certainty that if a mortgage default results from the illness of a

26. U.C.C. § 2-302 (1) (1972). There is no suggestion here that subsequent unconscionable conduct is condoned. Basically it means that the conscionability of the lease or contract terms is determined as of the time the lease or contract was made. See *Casey v. Lupkes*, 286 N.W.2d 204 (Iowa 1979).

27. *Id.* § 1-203. Section 1-203 of the Uniform Commercial Code provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *Id.*

28. U.C.C. § 2-103(b) (1972). Section 2-103 of the Uniform Commercial Code provides in relevant part: "(b) 'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

29. RESTATEMENT (SECOND) CONTRACTS § 205 (1979) which provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*

30. E. FARNSWORTH, CONTRACTS, 526-27 n.3 (1982). (emphasis added).

31. See *supra* notes 24-29 and accompanying text discussing unconscionability and fair dealing in the U.C.C. and the Restatement (Second) of Contracts.

32. RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979).

33. *Id.* (emphasis added).

34. 1 A. CORBIN, CORBIN ON CONTRACTS § 128 (1963).

bookkeeper, equity will set the acceleration aside as unconscionable. If a chattel security agreement under Article Nine were involved, is it conceivable that a law court would come to a contrary conclusion? The question answers itself.

There is a further question. When the U.C.C. and the *Restatement* bar unfair dealing, what is the "dealing" that is forbidden? To deal is to have economic transactions with another. All dictionaries give the same definition. There is no such thing as unilateral "dealing" except in a poker game. Thus, when we talk about unconscionable acceleration by a lender, unconscionable forfeiture of an installment contract, or unconscionable forfeiture of a lease by a lender, we cannot be talking about *unfair dealing*. Neither the U.C.C. nor the *Restatement* treats this matter explicitly. But one who files foreclosure the day after default occurs is not guilty of bad faith or unfair dealing. He is acting unconscionably. A sensible solution would be to adopt the existing equity solution and apply it to unconscionability in enforcement.

Viewed in this light, the decisions that look at unilateral conduct in accelerating a loan and brand it as unconscionable are on solid ground. Unconscionability provides a vehicle for establishing minimum requirements of *fairness*.³⁵ The U.C.C. provision on unconscionability forbids bargaining naughtiness.³⁶ And every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.³⁷ Acts of unilateral unfairness in the enforcement of a contract belong under the same umbrella. The concepts are virtually identical. The similarity between unconscionability and unfair dealing is aptly set forth in a New Jersey case.³⁸

To repeat, for the sake of emphasis, the Code says that unconscionability must be determined as of the time the contract was made.³⁹ If oppression occurs in the way a contract is brought into being, that can be considered in determining the presence or absence of unconscionability. The court, of course, can examine every paragraph of the contract and the means by which the contract was brought about. But there, says the U.C.C., the process of testing for unconscionability ends. Thus, at least half of the contract process, that part dealing with remedies and enforcement, seems to be left out of the unconscionability area. Obviously what the Code means is

35. Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellation*, 1967 DUKE L.J. 465, 507-508.

36. Leff, *supra* note 17, at 487.

37. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979).

38. *Krigler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971). There, the court stated that "[t]he standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing." *Id.*

39. U.C.C. § 2-302(1) (1972). See *supra* note 26.

that *circumstances* occurring after the contract is entered into should not be considered in determining unconscionability. Because the Code applies to both law and equity, it must not be construed so as to terminate the common practice in equity of treating events subsequent to the contract as creating unconscionability. Moreover, the law courts should apply the same rule.

STATUTES AS PRECEDENT

All courts and lawyers are engaged in a perpetual search for the "case in point." Less well known is the principle that statutes are also precedents.⁴⁰ This is especially true of the Uniform Commercial Code, because of its wide acceptance.⁴¹ That being the case, in instances not falling within the ambit of the equitable views on unconscionability, courts should welcome the opportunity to adopt the Code's views on unconscionability. The Code should be treated like a Restatement.⁴² Indeed, the *Restatement (Second) of Property* adopts this view.⁴³ Perhaps the most interesting decision on this point is *Seabrook v. Computer Housing Co.*⁴⁴ The *Seabrook* court held that the unconscionability provisions of the U.C.C. are applicable to a real estate lease situation, and cited numerous decisions from various states in support of its position.

Of course, when the courts finally address themselves seriously to this problem, they will immediately perceive that virtually all states are committed to the position that statutes are indeed precedential. In the numerous decisions (over forty states) holding that there is an implied-in-law warranty of habitability in a sale by a builder-vendor, the courts have almost invariably invoked the analogy of the U.C.C.⁴⁵ If, in a sale of a dish mop, there is an implied warranty under the U.C.C. that it will wash dishes, the courts ask, why should there not be a warranty in the sale of a new home that it is fit to live in? But as is plainly evident, the courts are applying a statute that deals with a sale of *chattels* to a situation where it is *real estate* that is being sold. This treats the U.C.C. as precedential

40. *Pugh v. Holmes*, 486 Pa. 272, 405 A.2d 897, 904 (1979); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1970). Spanogle, *Analyzing Conscionability Problems*, 117 U. PA. L. REV. 931, 949 n.83 (1969); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936);

41. Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

42. *Fairbanks, Moore & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817, 822 n.9 (3d Cir. 1951).

43. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT Introduction (1977).

44. 72 Misc. 2d 6, 338 N.Y.S.2d 67 (1972).

45. See, e.g., *Peterson v. Hubschman Const. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

in a situation not governed by its terms. Whatever the court thought or did not think, *its holding was that the U.C.C. was precedential in a real property situation*. Thus, a great majority of American courts are officially committed to this view.⁴⁶

MORTGAGES—THE BEGINNINGS

The largest and most famous step in introducing the concept of unconscionability in the law occurred in mortgage law. The chancellors took a document that conveyed the fee simple title and the corresponding right of possession to the lender and converted it into a simple security instrument that in the great majority of American jurisdictions, conveys no title whatever and no right of possession.⁴⁷ This was done without the benefit of statute. The chancellors needed no statutes as their chore was to prevent inequitable or unconscionable results.

MORTGAGES—ACCELERATION

As Cardozo observed, a court of equity may set aside an acceleration where an acceleration would be unconscionable.⁴⁸ This is merely a modern version of the old rule that equity will set aside an inequitable acceleration.⁴⁹ There are many cases that follow Cardozo.⁵⁰

46. Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 5 REAL EST. L.J. 291 (1980) (Table I).

47. R. KRATOVIL AND R. WERNER, MODERN MORTGAGE LAW AND PRACTICE, ch. 1 (2d ed. 1981).

48. *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 171 N.E. 884 (1930) (Cardozo, C.J., dissenting and using word "unconscionable"); see also *Bisno v. Sax*, 175 Cal. App. 2d 714, 346 P.2d 814 (1959).

49. *Clark v. Lachenmeier*, 237 So. 2d 583, 585 (Fla. 1970) (equity foreclosure using word "unconscionable").

50. See, e.g., *Arizona Coffee Shops, Inc. v. Phoenix Downtown Park Ass'n*, 95 Ariz. 98, 387 P.2d 801 (1963) (mortgagor missed payment because of ill bookkeeper's error; court cites dissenting opinion in *Graf* and uses word "unconscionable"); *Federal Home Loan Mortgage Corp. v. Taylor*, 318 So. 2d 203 (Fla. Dist. Ct. App. 1975) (default due to misunderstanding and court uses word "unconscionable"); *Redding v. Gibbs*, 203 Neb. 727, 280 N.W.2d 53 (1979) where the court stated:

We believe the facts of this case afford a proper situation where equity may afford relief from a technical acceleration of a mortgage under an acceleration clause because of the harsh, oppressive, and unconscionable conduct of the mortgagee. The law is well established, and the general rule is stated in an annotation in 70 A.L.R. 993 *et. seq.* entitled "Grounds of relief from acceleration clause in mortgage." The general rule is there stated as follows: "It is held, apparently without dissent, that a court of equity has the power to relieve a mortgagor from the effort of an operative acceleration clause, when the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee." Cases from at least 15 jurisdictions are cited to that effect in that annotation

Id. at 727, 280 N.W. 2d at 53.

In the seventies, when mortgage money was hard to come by, many mortgaged properties were sold subject to the existing mortgage. Often this was done in violation of the due-on-sale clause, a type of acceleration clause that permitted acceleration where land was sold subject to a mortgage without the lender's consent. Many courts, offering a variety of explanations, but resting basically on unconscionability as understood today, refused to permit acceleration.⁵¹

All of these decisions became largely academic when Congress enacted the Garn Act.⁵² A puzzling circumstance is the constant reference in the cases to illegal restraints on alienation. As far back as 1930, Cardozo had pointed out that the issue was one of unconscionability.⁵³ There never was anything illegal about the due-on-sale clause. Rather, some courts objected to the unconscionable use of the due-on-sale clause to exact a higher interest rate. Acceleration clauses are per se valid. Courts intervene only when acceleration clauses are used oppressively. This is unconscionability.

MORTGAGES—FORECLOSURES

A mortgage foreclosure will be dismissed where there is an absence of good faith and fair dealing, as where an FHA mortgagee fails to follow HUD regulations requiring a good faith effort to recast the loan.⁵⁴ Here again, the unconscionability occurs after the

51. See, e.g., *First Fed. Sav. & Loan Ass'n of Mobile v. Britton*, 345 So. 2d 300 (Ala. Civ. App. 1977) (due-on-sale clause may not be used as an instrument to require increases in interest rates unless openly stated and bargained for); *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 578 P.2d 152 (1978) (due-on-sale clause, without a showing that a security was jeopardized, was an unlawful restraint on alienation); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n*, 12 Cal. 3d 625, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974) (without a showing of impingement of a legitimate interest, due-on-sale clause was an unreasonable restraint of alienation); *Clark v. Lachenmeier*, 237 So. 2d 583 (Fla. 1970) (a court of equity may refuse to foreclose a mortgage, when acceleration of the due date would render the acceleration unconscionable, inequitable and unjust); *Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n*, 73 Mich. App. 163, 250 N.W.2d 804 (1977) (sole basis for enforcement of due-on-sale clause was an interest in maintaining current interest rates and was thus an unreasonable restraint of alienation); *Sanders v. Hicks*, 317 So. 2d 61 (Miss. 1975) (restraint on alienation in deed of trust was invalid); *Continental Fed. Sav. & Loan Ass'n v. Felter*, 564 P.2d 1013 (Okla. 1977) (agreement restricting sale of property was unreasonable and inequitable).

52. 12 U.S.C.A. § 1701j-3 (West. Supp. 1987) (preempting due-on-sale prohibitions).

53. *Graff v. Home Building Corp.*, 254 N.Y. 1, 8-15, 171 N.E. 884, 886-90 (1930) (Cardozo, C.J., dissenting).

54. See, e.g., *United States v. American Nat'l Bank & Trust Co. of Chicago*, 443 F. Supp. 167 (N.D. Ill. 1977) (HUD has a statutory obligation to avoid foreclosure by considering a modification, recasting, extension, or refinancing of the mortgage in appropriate cases); *Federal Nat'l Mortgage Ass'n v. Bryant*, 62 Ill. App. 3d 25, 28-9, 378 N.E.2d 333, 336 (1978) (citing HUD rules as achieving equitable principles); *Associated East Mortgage Co. v. Young*, 163 N.J. Super 315, 394 A.2d 899 (1978) (HUD Directives prohibit unconscionable conduct); *Federal Nat'l Mortgage Ass'n v. Ricks*,

making of the contract. The contract itself is free from the taint of unconscionability.

LEASES—CONTRACT NATURE

Conceptually, the lease has had a curious history. It started as a contract, and thereafter became a property concept. With large concentrations of people living in urban centers, for whom a lease is a means of providing shelter, rather than income, with large commercial enterprises making complex physical and financial use of leased land and structures, and with leases becoming longer than was common in Coke's time, the law of landlord and tenant has for the past 150 years marched steadily back to contract.⁵⁵ Today the contract aspect clearly predominates.⁵⁶ Hence, the lease is governed by modern notions of fairness and equity.⁵⁷ A lease is a contract "like any other contract."⁵⁸

RESIDENTIAL TENANCIES

The residential tenancy presents an interesting aspect of American legal history. Until 1970, American courts seemed unaware of the fact that their decisional law was heavily pro-landlord. Then a pro-tenant decision came down.⁵⁹ As in the case of the implied warranty in sales of new homes, all the dominoes fell as floods of pro-tenant decisions came down. Again, a judicial precedent! The residential lease today is a contract package of services for the furnishing of heat, hot water, janitor service and the like.⁶⁰ It is in this area that the doctrine of unconscionability really blossoms.

Meanwhile, the *Restatement (Second) of Property* has been

83 Misc. 2d 814, 372 N.Y.S. 2d 485 (1975)(mortgagee's failure to follow HUD directives constitutes unconscionable conduct). See generally Note, *The Enforcement of HUD Mortgage Foreclosure Guidelines: Possible Illinois Court Interpretations*, 52 CHI-KENT L. REV. 703 (1976) for an article discussing HUD's guidelines which call for alternatives to foreclosure.

55. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT Historical Perspective, 4 (1977).

56. Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977).

57. United States v. Bedford Assoc., 657 F.2d 1300, 1312 (2d Cir. 1981); Kridel, 74 N.J. at 452, 378 A.2d at 773. Real estate leases are also governed by consumer protection law. Pennsylvania v. Monumental Prop., Inc., 459 Pa. 450, 329 A.2d 812 (1974). This subject is beyond the scope of this article.

58. Parkwood Realty Co. v. Marciano, 77 Misc. 2d 690, 353 N.Y.S.2d 623, 626 (1974). See also Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972) (discussing the clauses that frequently give rise to unconscionability problems).

59. Javins v. First Nat'l Bank, 428 F.2d 1071 (D.C. Cir. 1970).

60. Jack Spring v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1970). See also Glasoe v. Trinkle, 107 Ill. 2d 211, 479 N.E.2d 915 (1985); Comment, *Unconscionability: A New Helping Hand for Residential Tenants*, 1979 WASH. U.L.Q. 993.

making a countrywide analysis of the statutory law as well as the decisional law. Statutes widely adopted and reflecting a concern for the residential tenant are becoming part of the *Restatement's* black letter law. The post-1970 decisions are also becoming part of the *Restatement's* black letter law. All this should have happened long ago, but American courts' devotion to judicial precedent has stood like an iron curtain between the residential tenant and justice. I am not overlooking the Uniform Residential Landlord and Tenant Act. I am talking about the duty of courts to find a way to do justice when the legislature is silent.

COMMERCIAL LEASES

Leases, then, are contracts.⁶¹ Mortgages that finance shopping centers, for example, are underwritten on the basis of cash flow which leases to high credit tenants generate. These leases are contracts for the most part. The property law aspects are minor. The ordinary property law priorities rules are replaced by subordinations, non-disturbance agreements, attornment agreements and all the paraphernalia that is the stock in trade of the lawyers who deal in these matters.⁶²

LEASES—ASSIGNMENTS AND SUBLEASES

A majority of jurisdictions have long adhered to the rule that where a lease contains an assignment approval clause (a clause stating that the lease cannot be assigned without the prior consent of the lessor), the lessor may arbitrarily refuse to approve a proposed assignee no matter how suitable the assignee appears to be and no matter how unreasonable the lessor's objection. This rule has come under attack in the better modern decisions.⁶³ A landlord must act fairly in granting or withholding consent to a sublease.⁶⁴

61. *University Club v. Deakin*, 265 Ill. 257, 260, 106 N.E. 790, 791 (1914); 51 C.J.S. *Landlord & Tenant* § 202(2) (1968). How and to whom a leasehold may be assigned is also a matter for contract law. *Shadeland Dev. Corp. v. Meek*, 489 N.E.2d 1192, 1200 (Ind. App. 1986). Thus, this matter is brought under the doctrine of unconscionability. *RESTATEMENT (SECOND) OF PROPERTY* § 56 (1977). See *infra* text accompanying note 6.

62. R. KRATOVIL, *MODERN REAL ESTATE DOCUMENTATION* 313 (1975).

63. See, e.g., *Kendall v. Ernest Pestara, Inc.*, 40 Cal. 3d 488, 209 Cal. Rptr. 135 (1985). See also Note, *Kendall v. Ernest Pestana, Inc.: Landlords May Not Unreasonably Withhold Consent to Commercial Lease Assignments*, 14 PEPPERDINE L. REV. 81 (1986); Annotation, *When Lessor May Withhold Consent Under Unqualified Provision in Lease Prohibiting Assignment or Subletting of Leased Premises Without Lessor's Consent*, 21 A.L.R. 4th 188 (1983).

64. *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 638 P.2d 1084 (1982). New Mexico law has consistently required fairness, justice and right dealing in all commercial practices and transactions. *Id.* at 1086.

In every jurisdiction that regards statutes as precedential, and that includes almost all the states, it is obvious that like all other transactions, assignments and subleases, and the landlord's consent requirements, must be tested for unconscionability. Thus, the state courts that refuse to so test the transaction are inadvertently disregarding the philosophy expressed in their state statutes.

Shell Oil Co. v. Marinello involved a lease of a service station by Shell, a major oil company, to an individual operator, where there was a contemporaneous dealer or franchise agreement.⁶⁶ Both the lease and the franchise agreement contained termination clauses reserved by Shell.⁶⁶ The court of chancery held that Shell's attempt to terminate was unfair and set it aside.⁶⁷ The *Marinello* court cited the landmark decisions of *Henningsen v. Bloomfield Motors, Inc.*⁶⁸ and *Ellsworth Dobbs, Inc. v. Johnson*.⁶⁹ Thus, the principle forbidding unfair practices, in *Marinello*, cuts across lease law, franchise law, and the law of chattel sales. The decision leaves contract law stranded in some sort of limbo, because the tenant is left in possession "for an indefinite period" subsequent to the contract termination date.⁷⁰ This case, therefore, joins those that do not hesitate to remake contracts in the interest of conscionability.

It is a completely reasonable surmise that because a commanding majority of the states follow *Henningsen*, another New Jersey case, and *Ellsworth Dobbs*, a New Jersey case that is well on its way toward becoming the majority rule, *Marinello* will join this duo of leading cases. To much the same effect as *Marinello* is *Atlantic Richfield Co. v. Razumic*.⁷¹

There is an interesting comment on *Marinello*.⁷² There, it is stated that "*Marinello* signals an expansion of the *Henningsen* principle by applying it to a contract between two commercial parties."⁷³ In another interesting observation, the comment concludes that *Marinello* combines the basic doctrine that courts will not permit themselves to be instruments of inequity and injustice with the be-

65. *Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974).

66. *Id.*

67. *Id.*

68. 32 N.J. 358, 161 A.2d 69 (1960).

69. 50 N.J. 528, 236 A.2d 843 (1967).

70. *Marinello*, 63 N.J. at 407, 307 A.2d at 603.

71. 480 Pa. 366, 390 A.2d 736 (1978) (citing numerous authorities, including those dealing specifically with unconscionability, e.g., Hewitt, *Good Faith or Unconscionability-Franchise Remedies For Termination*, 29 BUS. LAW 227 (1973)). *Contra* *Kerr-McGee Corp. v. Cutter*, 564 P.2d 215 (Okla. 1977).

72. Comment, *Gasoline Dealers' Remedies Against Dealership Termination*, 28 U. MIAMI L. REV. 710 (1974).

73. *Id.* at 712.

lief that one-sided commercial contracts can harm the public.⁷⁴

LEASES—UNCONSCIONABILITY MISCELLANEOUS DECISIONS

Where a lease contains an option to renew at a rent to be determined by the landlord, and the landlord fixes an unconscionable rent, the court will set aside the rent so fixed and will fix a conscionable rent.⁷⁵ Cancellation of a lease by the landlord for a *de minimis* default by the tenant was held unconscionable in *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*⁷⁶ The decision noted that strict enforcement of leases was improper. Again, the unconscionability events occurred after the contract was made.

OPTIONS

Only one case is needed to demonstrate how far the new law has departed from property law and from the antediluvian contract law of the Industrial Revolution era. The case is one involving a lease of a service station with an option to purchase.⁷⁷ The tenant exercised the option to purchase.⁷⁸ It then developed that the payment of the option price, owing to ambiguities, might extend over a period of fifty years.⁷⁹ The reviewing court, after outlining some options open to the trial court, concluded that the trial court could refashion the option so that it would pay out over "a fair period" in installments, with appropriate security.⁸⁰ Again under modern contract law, courts can refashion the contract to speak in reasonable terms.

The law of unconscionability is more protective of options in leases than options in gross. A lessee in a commercial lease will build up good will, make improvements, and make alterations. All these are worthy of protection. In one case, a lessee who had an option to

74. *Id.* at 714. The franchise situation has been described in "David/Goliath" terms. *Wright v. U.S.*, 472 F. Supp. 1153 (D. Mont. 1979). Subsequent decisions approve *Marinello*. See, e.g., *E.S. Bills, Inc. v. Tzucanow*, 38 Cal. 3d 824, 215 Cal. Rptr. 278 (1970).

75. *Tai On Luck Corp. v. Certoa*, 35 A.D.2d 380, 316 N.Y.S.2d 428 (1970). There is a split of authority on whether an option to renew can be enforced where the renewal rent is not stipulated. Annotation, *Validity and Enforceability of Provision for Renewal of Lease at Rental to be Fixed by Subsequent Agreement of Parties*, 58 A.L.R. 3d 500 (1974). Cases refusing to enforce such an option must now be re-examined for unconscionability, as where the tenant has erected valuable improvements. *Tai On Luck* is followed. *SKD Enterprises Inc. v. L&M Offset, Inc.*, 65 Misc. 2d 612, 318 N.Y.S.2d 539, 543 (1971) (emphasizing unconscionability as applicable to leases).

76. 71 Misc. 2d 353, 335 N.Y.S.2d 872 (1972).

77. *Rego v. Decker*, 482 P.2d 834 (Alaska 1971).

78. *Id.*

79. *Id.*

80. *Id.* See also *Duncan v. G.E.W., Inc.*, 526 A.2d 1358, 1365 (D.C. App. 1987) (forfeiture of lease renewal options could be unconscionable).

renew for ten years was thirteen days delinquent in serving a notice of exercise of his option. This was due to an accountant's error. The court compelled the landlord to honor the option. Any other course would have been unconscionable.⁸¹

PRE-CODE DEVICES

Prior to the adoption of the Code, the courts had created an armory of devices calculated to temper the injustice that often resulted from strict application of the contract terms as written. These included terms implied in law (Corbin's constructive conditions), impracticability of performance, frustration, waiver, mistake, penalties, and so on. The question that arises is whether these separate "pigeon-holes" will continue to exist or will be swept under the broad umbrella of the new provisions. This question is readily answered. All the old rules remain in the *Restatement (Second) of Contracts* and in Farnsworth's treatise.⁸²

Unconscionability will be used to strike clauses rather than to insert conscionable clauses.⁸³ For this reason, the term "implied in law" (constructive condition) will continue to be of special interest to the real property lawyer.⁸⁴

To refresh the real estate practitioner's memory, let us assume a simple contract whereby A agrees to sell Blackacre to B for \$10,000. Drafted by unsophisticated lay persons, this contract is totally silent on the question of marketable title. In the interests of fairness and justice, the court will read into the contract the requirement that the vendor must furnish a marketable title.⁸⁵ This has absolutely nothing to do with intention. The requirement is there because justice is served. Because in real estate transactions this concept so efficiently serves the ends of justice, it is mentioned here from time to time.

As is obvious, the two concepts work together nicely in a push-pull fashion. Unconscionability pulls the naughty clauses out of the contract, and needed terms inadvertently omitted from the contract are pushed in as *terms implied in law*.

While many decisions talk of *terms implied in law* and Corbin talks of *constructive conditions*, the *Restatement (Second) of Contracts* strikes out in a new direction. It appears to discard the old

81. *Romasanta v. Mitton*, 189 Cal. App. 3d 1026, 234 Cal. Rptr. 729, 731 (1987).

82. See, e.g., *RESTATEMENT (SECOND) OF CONTRACTS* §§ 261-72 (impracticability of performance, frustration); §§ 151-58 (mistake); § 344-85 (remedies) (1979).

83. E. FARNSWORTH, *CONTRACTS* 309 (1982).

84. See *id.* at 579.

85. 1 G. WARVELLE, *A TREATISE ON THE AMERICAN LAW OF VENDOR AND PURCHASER OF REAL PROPERTY* 303 (1890).

terminology. Section 204 speaks of "supplying" an omitted essential term.⁸⁶ Comment d of that section states that "the court should supply a term that comports with community standards of fairness and policy" No name is furnished for this process. Section 226, comment c states that this process of "supplying" a term has often been "described as a 'constructive' (or 'implied in law') condition." Furthermore, "in most such situations," the process will fall under the obligation of "good faith and fair dealing" described in section 205.

Section 205, however, deals only with good faith and fair dealing in *performance* and *enforcement* of the contract. The duty is not imposed during other stages of the bargaining. Bridging this gap in the *Restatement (Second) of Contracts* approach is the doctrine of constructive conditions. To illustrate, the implied requirement of marketable title in a contract for the sale of land would not arise under the *Restatement* obligation of good faith and fair dealing because it is a condition implied in the formation of the contract. In the interests of justice, the courts read a constructive condition into the terms of the contract.

Somewhat similar problems exist with respect to the doctrines of frustration of purpose and impracticability of performance. Under these two doctrines, the court must determine whether the occurrence or non-occurrence of an event frustrates, or makes impracticable, the continued enforcement of the contract. The Introductory Note to Chapter Eleven of the *Restatement (Second) of Contracts* states that these doctrines are occasionally subsumed under the phrase "'implied term' of the contract." The *Restatement*, however, rejects this analysis in favor of section 2-615 of the U.C.C. Under that section, the central inquiry is whether the occurrence of some circumstance was a "basic assumption on which the contract was made."

BROKER'S LISTINGS

The leading modern case on broker's listings is *Ellsworth Dobbs, Inc. v. Johnson*.⁸⁷ Here is another case where a courageous court simply junked all the precedents that have haunted this area and refused to give the broker a commission where the seller wound up with no deal and no money. Many decisions have followed this

86. See *Bethlehem Steel Corp. v. Litton Indus., Inc.*, 321 Pa. Super. 357, 468 A.2d 748, 767 (1983) (Hester, J. dissenting). Here Judge Hester points out that under § 2-204 of the U.C.C., the parties can be bound even though certain terms are left open to be negotiated at a future time. *Id.* Thus, courts can enforce contracts that under earlier law might be considered unenforceable for lack of completeness. *Id.*

87. 50 N.J. 528, 236 A.2d 843 (1967).

case. There is no doubt that it will eventually represent the majority view. *Ellsworth-Dobbs* holds that a broker's right to a commission depends on the sellers' success.⁸⁸ Clearly, this is a *term implied in law* and the many cases that follow this rule are authority for the fact that this implied term concept is not at all inconsistent with the U.C.C.'s provisions on unconscionability and fair dealing. It has indeed survived quite nicely.

VENDOR AND PURCHASER FORFEITURE OF INSTALLMENT CONTRACTS

Another instance of unconscionability occurring long after the contract has been executed is found in the law of forfeiture of installment contracts. For example, the Utah Supreme Court has held that a forfeiture provision in a real estate contract which is not invalid at the time of its making, may become unconscionable as to a defaulting purchaser if the amount forfeited is wholly disproportionate to the rental value of property.⁸⁹

VENDOR AND PURCHASER—WARRANTIES OF THE BUILDING

It is, of course, hornbook law now that in every sale by a builder-seller there is an implied covenant warranting that the building is habitable and free from latent defects.⁹⁰ Of relevance to this discussion is the fact that over forty states have adopted this view and most have leaned upon the implied warranties provision of the U.C.C. by way of analogy.⁹¹

Thus, here again, we have a holding that statutes are precedential. Never mind that the court does not so state. We have been taught that it is the *holding* that is important, and that is what the cases hold. One cannot sufficiently stress this point. The Rubicon has been crossed. A great majority of our states now treat a statute as precedential. True, such precedents are harder to find than cases in point. The fact is there, however, and it cannot be denied. The covenant, so implied is a *term implied in law*.⁹² Here again is testimony to the fact that the old devices designed to promote fairness and justice remain very much alive.

88. *Van Winkle & Leggett v. G.B.R. Fabrics, Inc.*, 511 A.2d 124 (1986).

89. *See, e.g., Johnson v. Carman*, 572 P.2d 371 (Utah 1977); *Jacobson v. Swan*, 3 Utah 2d 59, 278 P.2d 294 (1954); *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446 (1952).

90. *Petersen v. Hubschmann Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); *Shedd, The Implied Warranty of Habitability; New Implications, New Applications*, 8 REAL EST. L.J. 291 (1980).

91. *Peterson*, 76 Ill. 2d at 42-43, 389 N.E.2d at 1159.

92. *Lloyd v. William Fannin Builders, Inc.*, 40 Ohio App. 2d 507, 320 N.E.2d 738 (1973); *Ecksel v. Orleans Constr. Co.*, 360 Pa. Super. 119, 519 A.2d 1021, 1026 (1987).

VENDOR AND PURCHASER-INSTALLMENT CONTRACTS-ASSIGNMENT CLAUSES

Contracts for the sale of land commonly contain a provision forbidding the purchaser to assign without the vendor's consent. In a recent decision involving such a situation, the vendor refused to consent to the assignment.⁹³ The court held that the refusal was in bad faith and upheld the assignment.⁹⁴ A non-assignment clause in a contract implies that the seller will act reasonably and in good faith.⁹⁵ In so holding, the court found that the analogous lease clause presented an exact analogy.⁹⁶

AFFIRMATIVE RELIEF

There is a good deal of commentary to the effect that unconscionability is merely a defense—a shield, but not a sword. This has never been true in equity. Where the transaction in “its nature and circumstances gives one party an inequitable or unconscionable advantage over the other, equity, inferring fraud, will not only decline to lend its aid to the party seeking to enforce such claim, but will often actively interfere to give relief to the other party.”⁹⁷ Obviously this remedy continues to exist under the Code. The Code explicitly recognizes the continuing vitality of equity principles.⁹⁸ And as respects unconscionability, courts of equity will not retreat one inch.

If equity will indeed affirmatively extinguish an unconscionable contract, one wonders what remains of the notion that unconscionability is merely a defense. As Williston observes, a court of equity has jurisdiction to cancel an instrument to which the obligor has a defense, but which on its face is valid, and is capable of being put to a wrongful and vexatious use by the other party to the agreement.⁹⁹ Where overreaching is present, a court of equity will cancel the contract.¹⁰⁰

CONCLUSION

This article has given little attention to the huge volume of existing periodical literature on unconscionability. That literature, by

93. *Cheney v. Jemmett*, 107 Idaho 829, 693 P.2d 1031 (1984).

94. *Id.* at 831, 693 P.2d at 1034.

95. *Id.*

96. *Id.* at 832, 693 P.2d at 1035.

97. 30 C.J.S. *Equity* § 50 (1965).

98. U.C.C. § 1-103 (1972) provides in relevant part: “[U]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provision.” *Id.*

99. 15 S. WILLISTON, *WILLISTON ON CONTRACTS* § 1880, at 716 (3d ed. 1972).

100. *Shepard v. Dick*, 203 Kan. 164, 453 P.2d 134 (1969).

and large, has not been produced by real estate or chancery lawyers. It offers these lawyers little help.

In this author's view, the introduction into the statutes on a national basis of the concept of unconscionability has created nationally a new standard of morality across the board in all contract law. It is a call for fairness and justice. This call for fairness extends to every aspect of every type of contract in the broadest sense of that word, embracing mortgages, leases, installment contracts, and every type of real estate bargain. This call for fairness extends to the negotiations, the bargaining process, to every paragraph of the contract, and to the performance and enforcement of the contract. There cannot be one standard up to the creation of the contract and another one thereafter. The unilateral actions of one party acting under the contract are governed by the rules forbidding unconscionability.

Just as there is a requirement of good faith, there is a prohibition of bad faith. Good cause to act negates bad faith.¹⁰¹

Just as there is a requirement of fair dealing, there is a prohibition of unfair dealing. Usually this will occur in the bargaining process, as where a party having superior bargaining power exerts it unfairly. And unfair conduct in the enforcement of a contract, such as unfair acceleration, is unconscionable and is prohibited.

"Unconscionability" cannot be defined.¹⁰² Like "pornography" we know it when we see it. Similarly, unconscionability cannot be confined. The word, having found a home in our statutes, now promises to spread its blanket over the entire judicial process, permitting judges to do what they have always longed for—to do justice. In the process, the shackles that were rapidly disappearing anyway, will tend to disappear more quickly. Courts will rewrite contracts when conscionability beckons. They have done so for centuries. Now real chancellors can come out of the closet.¹⁰³

101. *Dayan v. McDonald's Corp.*, 125 Ill. App. 3d 972, 993, 466 N.E.2d 958, 974 (1984).

102. RESTATEMENT (SECOND) OF PROPERTY § 5.6, Comment e (1977). "Unconscionable" means "grossly unfair." Note, *Unconscionable Contracts, the Uniform Commercial Code*, 45 IOWA L. REV. 843, 849 (1966). The definition most frequently quoted occurs in *Hume v. United States*, 132 U.S. 406, 411 (1889), which, in turn, quotes an English decision of 1750 that an unconscionable contract is one which "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Id.* (quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155). This definition smells of the Industrial Revolution, then at its height, and of the *laissez faire* thinking found in Adam Smith's *Wealth of Nations*. Contract law of that period was in a "bellicose state of nature." A court that quotes this definition is not in tune with developing legal history.

103. See *Schultze v. Chevron Oil Co.*, 579 F.2d 776, 780 (3d Cir. 1978) (Adams, J., dissenting) (traces the development of contract law from its "bellicose state of nature" phase to the present phase that rejects arbitrary or unfair conduct. The

In this author's view, we must now regard as established the rule that statutes are precedential. Hence, precedents inconsistent with the U.C.C.'s views on unconscionability are no longer viable.

However, in this area, the precise language of the U.C.C. is a faulty guide, because of its horrible ineptitude. We must therefore look to the spirit of the law, rather than its literal content. The canons of construction command this. The *Restatement (Second) of Contracts* is not much of an improvement over the U.C.C.

There is no distinction here between law and equity. All judges are now chancellors. There is no distinction between real and personal property in this regard. The older tools for introducing fairness, like the *term implied in law* will continue to exist.

The quest for justice is as difficult in law as it is in philosophy. The task is particularly disagreeable where the documentation is complex, as is true of every shopping center deal. But then, we who teach law never promised anyone a rose garden. Justice may be hard to come by. But we are all doomed. We shall have to seek it.

stress placed herein on statutes as precedents is intended to persuade bench and bar that the U.C.C. has indeed moved the entire body of state law away from its bellicose state of nature philosophy that solves no modern problems).