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The Anti-Empathic Turn

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Justice, according to a broad consensus of our greatest twentieth century judges, requires a particular kind of moral judgment, and that moral judgment requires, among much else, empathy—the ability to understand not just the situation but also the perspective of litigants on warring sides of a lawsuit. In the 1920s, for example, Justice Benjamin Cardozo extolled the virtue and necessity of a broad-ranging empathy in his classic essay on the judicial craft, along with that of fidelity, reason, and wisdom. In the 1970s, the great Ninth Circuit Judge John Noonan wrote an entire book on the topic, called *The Persons and Masks of the Law*, in which he argued with considerable passion that good judging—even appellate judging—must be grounded in an empathic bond between judge and litigant, and not solely on abstract rules that govern entities (and that Justice Cardozo lacked the capacity to develop such a bond). Judge Richard Posner has recently opined that judging can’t proceed without empathy—regardless of the pragmatic end the judge chooses to pursue. Thus, while Posner has dropped his earlier steadfast insistence on efficiency as the goal of adjudication in favor of a more pragmatic utilitarianism, he has retained his insistence that the ability to understand the goals of others is of the essence of the art of judging. Current sitting Supreme Court Justice Breyer noted at his confirmation hearings that as a judge, he needs to be able to empathize broadly with all sorts of people who might be very different from anyone in his circle of family, friends, and acquaintances, and he found narrative literature—he mentioned *Jane Eyre* in particular—an invaluable source to help him in that effort.
Recently retired Justice Stevens also has urged that the ability to decide cases wisely and humanely depends in part—only in part, but nevertheless in substantial part—on just this empathic capacity. This list could be vastly extended. It’s fair to say, in fact, that throughout most of the twentieth century, as well as much of the nineteenth it would be hard to find an idea more basic or unchallenged, either in the self-reflective writings of judges, or in legal scholarship, or in folk wisdom. One simply cannot judge another before walking in his shoes. Indeed, to suggest otherwise might be thought to be disqualifying.

It’s particularly easy to see why empathic excellence has been such a familiar judicial ideal in a common law system such as ours, or for that matter in any system in which judges reason, at least much of the time, by way of analogy. A common law judge, after all, reasoning in the way central to common law adjudication, must decide if this case, litigant, or injury is like that one, in order to reach a decision in virtually every matter that comes before him. He must decide if this litigant in this tort case today behaved in a way like that one in yesterday’s, or if this contract clause, damage, or breach is like that one, if this transaction is like that one, if this defendant and that defendant are similarly situated. Likes, after all, must be treated alike. Formal justice, *stare decisis*, the rule of precedent, and virtually any conceivable understanding of the rule of law all require as much. Is a malformed hand damaged by a botched operation which was itself induced by a promise that the hand could be made perfect, really *like* a broken machine part that comes with a warranty? Is it *enough* like a broken machine that it would be appropriate to apply a damage rule from the law of contract designed for the latter to the former, rather than a damage rule taken from tort principles governing negligence? Is the doctor's promise to make the hand whole enough like the manufacturer's promise that the machine will work, such that it makes sense to view both of these promises as *warranties*? Is the loss of an opportunity to have
an operation that might have, but more likely would not have extended a life, occasioned by a
negligently faulty diagnosis, enough like the loss of life suffered by negligent commission of
surgery, such as to justify a malpractice remedy for the loss of a slight chance at a substantially
longer life? Is this woman who has been denied a promotion, a jury of her peers, or a social
security benefit because of gender enough like a man who has suffered a legal liability because
of his race, to warrant the application of constitutional principles intended to forbid state-based
racial discrimination to discrimination based on gender? Is sex really like race in that way; is
sexism really like racism in that way? Is this couple that is not allowed to marry denied some
fundamental right? Is the right to marry really enough like the right to speech, assembly,
privacy, and so forth as to warrant an extension of principles first meant to govern the latter, to
the former? Is an unmarried individual’s decision to take birth control really like the decision of a
married couple to do so, such as to justify extending principles of familial privacy designed for
the latter, to the situation of the former? And so on. To answer any of these questions, one must
know a bit, often quite a bit, about machines, hands, the nature of promises, surgery, the art of
diagnosis, the history of racism, the institution of marriage. And one must know, of course, quite
a bit about the law of warranty, of contract, of negligence, of the Fourteenth Amendment, of
what the Court held and did not hold in Griswold, or Skinner and so on. But one must also
know something about feelings of loss: what does it feel like to lose the use of a hand, or to lose
even just a slight possibility of years of life? One must know something about pain: what might
that injury feel like? How does it feel to be denied something that was promised? One must
know something about desire, and need, and frustration: what is the basis of the need, or desire,
to marry, to have one’s intimate relations sanctified by the state as well as by religious authority?
How does it feel to be denied something important because of an “immutable characteristic?”
One must likewise know something about the subjective feel of promising, and of warranting, and of diagnosing, and of discriminating. Analogous reasoning by definition seemingly requires empathic understanding, at least where it is people’s utterly subjective situations, problems, fears, anxieties, suffering, opportunities, dreams, and foibles, from which, and to which, one is analogizing. And, adjudication does proceed largely, albeit not entirely, by analogy. For that reason alone, some level of empathic ability, one might think, is a requisite of any judging in a common law or case-method system that’s worthy of the name. Excellent judging requires empathic excellence. Empathic understanding is, in some measure, an acquired skill as well as, in part, a natural ability. Some people do it well; some, not so well. Again, this has long been understood, and has been long argued, particularly, although not exclusively, by some of our most admired judges and justices.

Somehow, however, this idea, viewed as so utterly mainstream for much of the last century’s worth of writing about judging, has, in the first decade of the twenty first century, become positively toxic, at least in the context of confirmation battles to the Supreme Court. Through the course of those battles, by both Senators and judicial nominees themselves, we citizens are now very publicly being taught that empathic judging is not only not something to strive for in judging, it is something to avoid or even abhor. Empathy itself, we’re told, is contrary to the rule of law. It is the precursor to impermissible activist judging. It runs the danger of sentimentalism. It is the very opposite of judicious behavior, or outlook. Judges should be like umpires, so said our current Chief Justice, calling balls and strikes. And umpires, obviously, need not and should not empathize with the need of a batter to improve his batting average so as to fatten his wallet or of a pitcher to save his career with a lower ERA, or of a small and overmatched child in a little league contest to improve his self esteem. Similarly, judges should
not favor or hold out hope for the poor, the disadvantaged, or the oppressed; judges should apply the rule of law. What’s good for the goose is likewise for the gander; the same law must apply to the international corporation as the impoverished individual. Empathy can’t play a part. Judges, said Justice Sotomayor, need not be any more empathic than any other citizen, and the idea that they should, she reminded us all, was the President’s notion, not hers. Judges should apply the rule of law. Judges should be open-minded, Justice Kagan said, not so as to better understand every American that comes before them, but so as to give every American a “fair shake.” Nobody’s against a “fair shake.” Empathy is not what’s required, according to Kagan, Sotomayor, and Roberts, as well as the anti-empathy senators that quizzed them all, but rather, objectivity and open-mindedness. If these confirmation battles are any guide, we have all collectively taken, we might say, an anti-empathic turn in our very crowded path of the law. What was once regarded as non-problematically central to good judging is now regarded as antithetical to it. No one challenged this claimed antipathy between empathy and judicial excellence. How did that happen?

Maybe this particular turn in our thinking about law and judging is one of those things that are over-determined. One hardly need search long and hard for explanations. Perhaps we have become a less empathic and less caring society, with less ability to perceive the situation of others. We’ve made ourselves un-empathic, so there’s no point in lauding empathy as a virtue, or a skill or capacity that grounds virtue, judicial or otherwise, if we're not very good at it any more. Maybe we have become too polarized along lines of difference to notice the common humanity among us, or maybe we have all played too many video games or answered too many emails for empathy to have any purchase, as critics of cyber-culture have long warned might happen, because we spend too many hours in front of boxes rather than human beings. There are other
possibilities. In the constitutional context, the anti-empathy turn might be—indeed, it seems to be—a rhetorical arrow in a quiver that is squarely aimed at a cluster of cases embraced by two consecutive liberal activist Courts over the course of two decades: not at judicial activism in general, but at *Roe,* *Griswold,* *Miranda,* and a handful of other cases that famously aided pregnant women, criminal defendants, sexual libertines, and other outsider groups, and did so with no clear text in the constitution mandating that outcome. That’s possible. Maybe, as a few commentators have argued, the target of the anti-empathy argument is not empathy *per se,* but selective empathy: perhaps liberal and progressive judges have over-empathized with pregnant women and under-empathized with fetal life or the moral sensibilities of pro-life citizens, or have over-empathized with tort victims injured by faulty products, and under-empathized with the consumers who will pay the higher prices, and possibly lose the benefit of the consumer surplus that might come from cheaper albeit more dangerous lawn mowers and kitchen appliances. As argued somewhat obliquely by Herbert Wechsler in a classic law review article on the topic, maybe some of those progressive justices in the Warren Court years over-empathized with those wanting to socialize with those of different races, and under-empathized with those preferring not to. The critique of empathy-in-judging stemming from this line of complaint then is really a critique of selective empathy, and the bias to which it leads. A collective sense among the empathy critics that there’s no sensible way to engage in empathic judgment and at the same time guard against this selectivity might account for some of the impetus behind this turn.

There’s one other possible explanation for the anti-empathic turn that appears prominently in the recent scholarly literature on this topic. As has been argued by a number of “emotion scholars” in law schools—and with particular force recently by Susan Bandes—the anti-empathy turn in our thinking about law might be proceeding apace on the basis of a sizeable
definitional mistake. Empathy is not sympathy, Bandes and others (including an early piece in the evolution of empathy literature by Lynne Henderson) remind us. Empathy tells us, perhaps, something about what others are feeling, or at least gives us a hint of its feel. It is a source of information. Sympathy, by contrast, is the moral sentiment that aligns our interest with that of another in pain. And if we keep the distinction firmly in mind, we can clear up a lot of the confusion, these scholars urge, which has prompted the anti-empathic turn. Empathy, just as the twentieth century jurists argued, truly is necessary to adjudication and, as modern or postmodern skeptics might add, is always already present in any event. But empathy simply gives the empathizer, including the judicial empathizer, access to a certain kind of knowledge—knowledge of the perspective of others. Empathy is not what motivates action. Sympathy is what motivates action. So, the overly sentimental judge who sympathizes with someone in pain—the tort victim, the downtrodden, the poorer of two litigants—may well be led astray by this unleashed moral emotion, if, say, he is inclined to sympathize with those in the most immediate pain, or the most readily cognizable pain, or the pain with which he is most familiar, or the pain of those whose interests he politically favors. The judge must guard against all of these possibilities of bias, and accordingly should reason, not feel, his way to the right conclusion. But empathy is not the culprit, at least according to the empathy scholars. It’s unleashed sympathy that is out of place. Empathy is what the judge needs in order to analogize sensibly. Sympathy is what he needs to keep in check, if he is to apply the rule of law.

There may be some truth to all of these accounts, and quite a bit to the last. It is indeed possible to empathize with someone’s situation and not sympathize: “I understand what you’re going through, but you get no sympathy from me.” Susan Bandes is right to insist on the distinction. In the remainder of this essay, however, I want to explore a different possible
explanation for the anti-empathic turn in jurisprudence, albeit one that is compatible with Bandes’. The anti-empathy turn currently being expressed or implicitly endorsed by very high ranking judges and justices in our understanding of judicial ideals, I will argue, is also a part of a larger shift in our paradigm of what good judging should be. That paradigm shift, I believe, is most clearly revealed, not in the Supreme Court confirmation battles that spill over on the front pages of newspapers, but in the pages of law review articles and in the law school classroom. Its consequence, I will argue, is sharply felt, not only or even primarily in the Supreme Court’s handling of the major social and constitutional issues of our time (which are better explained by political ideology), but rather, in scholarly treatment of the common law of contract and tort—areas of law that have for a couple of centuries now formed the core of our understanding of the judicial craft. The anti-empathic turn, I want to argue, is a part of a “paradigm shift”—with apologies for the cliché—in our ideals of good judging, and it's the perhaps unintended consequences of that paradigm shift that I want to explore.

The paradigm shift I’ll describe represents a culmination, or vindication, of Justice Holmes’s audacious claim, in “The Path of the Law,” at the beginning of the century just closed that the common law lawyer and common law judge of the future—that would be us, now—will be the masters of economics, statistics and the slide rule, rather than the masters of Blackstone or black letter law.26 The new paradigm of good judging, Holmes predicted, would eventually depend heavily on quantitative sociological and economic tools of prognosis and prediction, and would have much less need for either Blackstone or common law precedent. In that regard, the new paradigm—which I’ll sometimes call “scientific judging”—is forward-looking; it looks to the consequences of decisions, rather than backward-looking to the governing law drawn from the past. Economics and sound policy fill the space once filled by engagement with past cases. There
has been a transformation of that on which judges should rely in reaching their decisions, from rules laid down in the past to present understandings of future wellbeing, from precedent to social policy, from reliance on analogical reasoning based on past cases to economic or sociological reasoning based on welfare baselines. This shift is much noted, and usually, although not always, with approval (particularly by the academic left, but also by the libertarian right). Less noted, although most significant for these purposes, is this: the new paradigm has virtually no need for a judge who is capable of empathic engagement with litigants. In fact, it has little need for engagement with litigants of any sort, empathic or otherwise. Empathy is simply not a part of the paradigmatically modern judicial skill set. This, I will argue, should count as a significant cost.

I will not attempt to prove that this new paradigm has taken hold, or even that it is clearly articulated in any single source (other than in Holmes’s “Path of the Law”). Rather, in the remainder of this essay, I would like to closely explore just one piece of datum exemplifying this shift in our paradigm of good judging, by examining the evolution of the scholarly treatment of the “unconscionability” rule in contract law over the course of the last several decades. The unconscionability rule is generally understood to be, along with undue influence, constructive fraud, and requirements of good faith, one of a number of so-called “policing” doctrines (as in, “policing the contract”) that regulate the fairness of contracts. The fairly dramatic shift that has occurred in the last quarter century in our understanding of policing doctrines in contract law in general, and the unconscionability doctrine in particular, I will contend, is emblematic of the larger shift in our paradigm of judging—a shift away not only from precedent, but also from empathic regard for litigants, and toward instead a concern with the welfare-enhancing consequences of decisions for future contractors. The social welfare that ought to be the primary
concern of the judge, according to the scientific paradigm, is then defined in such a way that empathy for the class of those other persons – persons other than the litigant whose future welfare is being expanded or shrunk by the judge's decision – need not be employed. Rather, the welfare of those persons to which the judge should attend is defined by reference to observable, quantifiable behaviors that can be reckoned in fully non-empathic ways. There is no need to learn of their subjectivities through empathic understanding or otherwise. Empathy need not be in the toolkit.

In the first section below, I contrast the traditional and more contemporary approach to the unconscionability doctrine, using the iconic case Williams v. Walker-Thomas Furniture Company, and its scholarly treatment, as emblematic. In the second, I briefly explain how, in my view, this shift in the scholarly treatment of Williams v. Walker-Thomas (and related policing doctrines more generally) is reflective of and in some ways masks a larger shift in our guiding paradigm of adjudication–a shift away from a paradigm of moral judging to scientific judging. In the third and concluding section, I will offer some suggestions as to why this new paradigm has taken such a hold on our legal imaginations, and will briefly criticize it, both specifically with respect to the unconscionability doctrine, and more generally. I will urge a return to a more classical understanding–one which rested quite explicitly on the centrality not only of precedent (Blackstone, common law rules and so on) but also of moral passions and moral emotions to the work of judging, of which empathy and sympathy both are sizeable parts. Mostly, though, in this essay I just want to put in the record, so to speak, a piece of evidence for the claim that we have seemingly turned our back on a vision of moral judging that once embraced what Adam Smith dubbed the “moral sentiments” as essential to the work of judgment.
1. THE TRANSFORMATION OF THE UNCONSCIONABILITY DOCTRINE

According to what I will call the “traditional understanding” of a number of contract law doctrines familiar to virtually all first year law students, the good judging in which good judges engage, when deciding cases governed by this sizeable part of the law, requires a moral judgment about the distinctly moral quality of some sort of interaction between co-contracting litigants. These doctrines include the unconscionability doctrine itself, but also rules regarding the exercise of undue influence, bad faith, duress and constructive fraud in contracting behavior likewise – themselves derived from two hundred year old common law principles, some of which are derived from rules of equity of even older vintage. Thus, the judge in these “policing” cases, by virtue of the governing law, must render a moral judgment about the moral quality of one party’s contractual behavior vis-à-vis the other. He might have to decide, say, whether a contractor’s negotiating behavior in the course of reaching an agreement was unconscionable, or whether one contractor exercised undue influence in the bargaining process over the other contractor, or whether one contractor's conduct constituted an unacceptable form of duress, or exploited the duress of his co-contractor caused by other factors, or whether the contractor's behavior for any of these reasons or any other was an exercise of bad faith, or whether the contractor's seeming deceit constituted a form of constructive fraud – whether he failed to disclose something about the value of the subject matter of the contract that in all good conscience, given the circumstances, really should have been disclosed. The judge may have to decide whether the term or contract reached through any of these forms of morally dubious
behavior was so unconscionably one-sided as to “shock the conscience.” All of these legal “terms of art”—unconscionability, undue influence, bad faith—unlike what we are typically talking about when we invoke that phrase “terms of art,” retain, in law, their quite ordinary and explicitly moral meaning, as understood by, well, everybody who's been raised well. Did the party’s overbearing behavior in procuring a contract “shock the conscience”? Did it pass the “smell test”? Did it make you want to puke? Were the lopsided terms the parties eventually agreed to in themselves unconscionable? Did a loan contract bind the debtor to an interest rate that was obscenely usurious? Did a contract's lopsided terms—a sale of a plot of land for a hundredth or thousandth of its market value, or a loan with a 200% interest rate—violate various rules of equity, that venerated five (six?) hundred-year-old body of moral principles from which many of these “policing doctrines” are derived? Did the defendant engage in “sharp practice” with someone who was obviously suffering from depression, or from a manic mood disorder, or a mental incapacity, and who quite evidently could not protect his or her own interest, and was the stronger party’s conduct in the face of all this just a little “too clever by half”? Did the stronger party exercise good faith throughout the negotiating process? Did one contractor take unfair advantage of the other’s manifest need, or vulnerability, or age, or disability, or ignorance, lack of education, or mental infirmity? Did one contractor deliberately attempt to cloud the co-contractor's common sense, or assessment of his economic self-interest? Was the contract for any of these reasons just beyond the bounds of decency?

As has been pointed out by critics of these doctrines, the “traditional understanding” of these various principles—and they were ubiquitous throughout the nineteenth century’s common law of contract, and a prominent part of at least the initial understanding of the Uniform Commercial Code’s codification of sales law in the 1950s—requires the judge to engage in a
form of decision making that is both explicitly *moralistic*, with respect to the parties' behavior, and implicitly *paternalistic*, with respect both to the weaker party before him, and to future parties who might be similarly situated. Let me take those in order. First, to decide whether a contract is unconscionable or whether a contractor’s conduct was unduly influential in procuring it (and so forth), the judge must decide himself or must instruct the jury to resolve what are clearly questions of business ethics. “Unconscionable” and “undue influence” are, and are understood to be, moral standards, which are then made relevant to the legal issue by virtue of positive law. If the judge is to be true to the law, then he has to apply these moral standards (or instruct a jury to), and if he is to apply these moral standards, he has to resort to the teachings of his moral sense, or his moral conscience, and not only the teachings of precedent, of Blackstone, and of statutes. Whether or not a contract term is “unconscionable” depends upon what one decides of the applicability of that term of condemnation in the context of dealings between the two people, as judged by a test of conscience. Likewise, whether undue influence was brought to bear by one party upon the other, or whether a party exercised bad faith, or engaged in constructive fraud, or exploited the other party's distress, depends upon the moral quality of the relationship between the parties, as judged by somebody's conscience. If a judge decides it was, he should so hold, and according to the law, he should then strike the contract or the offensive term. The “sharp dealer,” the party “too clever by half,” will be deprived of the value of the contract (although he might have recourse to some more limited remedy, such as restitution, so as not to allow the weaker party to profit from the entire ill-fated transaction), and the weaker party will be relieved of the burden of performing an unconscionable contract, and all of this will happen for straightforwardly moral reasons: the contract, according to the judge who so held, is for some reason immoral. Thus—the “moralism” of these decisions.
Now, on the paternalism. One effect of striking the contract, in a common law system, is that some sort of rule of the case emerges—or at least might emerge—from each decision in which the judge writes an opinion and attempts to offer a holding. What that rule is might be subject to debate or interpretation, but that a written judicial decision does sometimes produce such a holding, with a range of possible meanings, really is not. The result of a decision to strike a contract or term as unconscionable, unduly influenced, procured through bad faith, or under duress, then, might be felt not only by the parties immediately affected, but by all “similarly situated persons” who might enter a similar deal after the decision is rendered, and who might therefore be properly subject to the holding that emerges from the decision. So, when a contract or a contract term is struck as unconscionable, or a tactic as unduly influential, or a clause as unenforceable because lacking in good faith, then that contract, term, or tactic is unavailable to future parties who might want to use such a term, tactic, or contract in similar circumstances.

The now iconic facts of Williams v. Walker-Thomas Furniture Company, (if not the case itself) decided in the 1960s, provides a serviceable example of both. In Williams, the cause at issue was the cross-collateral term in the installment sales contract for consumer goods between the retail store and the indigent customer in that case, by which the buyer posted as “collateral” past products purchased from the store, in exchange for a sale of new goods paid for over time in installments, such that the buyer could lose all past purchased products if she defaulted on a payment for the later-purchased goods. Judge Skelly Wright famously decided as a matter of law that the trial judge had the power to rule that “this cross-collateral term was unconscionable. Certainly if the trial court had so ruled (the case was settled instead), not only would the plaintiff in that case—Mrs. Williams herself—have been relieved of the obligation to go through with the contract (or pay damages) and the seller have been deprived of damages tied to breach of the
unconscionable clause, but other buyers and sellers who might have \textit{wanted to} include such a term would henceforth not have been able to do so. No future seller of consumer goods operating in low income neighborhoods would include a cross-collateral loan term, once the word was out on the street, so to speak, that a judge would be likely to strike the term as unconscionable. The seller who is not able to include such a term would lose some real and expected income by virtue of that fact: such a seller might after all be making very risky loans to poor customers, a steady percentage of whom will in fact default. If a seller does not have access to this possible form of debt structuring for this class of consumers so as to maximize his recovery in the highly likely event of default, and he wants to continue to do business in the neighborhood, he will obviously have to raise prices to cover the shortfall. If all such sellers in the neighborhood are similarly affected, what happens?

What happens, according now to legions of critics of this case, is that buyers, not sellers, bear the cost. Those buyers in poor neighborhoods who would prefer to buy cheaper consumer goods with onerous cross-collateral terms rather than higher priced goods without those terms–perhaps because they predict that they will not default–are out of luck. They don’t have such a package (low price plus cross-collateral loan terms) available to them. And, there may well be plenty of buyers who would prefer a deal with cheaper prices and onerous cross-collateral terms than to a deal with higher prices but no onerous loan terms. But this option is taken off the table by virtue of Wright’s decision. And that might happen quite a lot, if these policing doctrines are given free reign. Thus, poor consumers–one group the unconscionability doctrine is presumably designed to protect–lose out.

The decision, then, of a judge to simply strike a contract term such as the cross-collateral term that appeared in \textit{Williams v. Walker-Thomas Furniture Company} as \textit{unconscionable}, is also
paternalistic, and in two senses. The judge is first of all substituting his or her judgment for that of the weaker contracting party in the transaction itself, as determined at the time the party entered the contract. That party at that point in time viewed the contract in his or her own interest, even knowing (presumably) that there was a possibility he or she would default and lose the pre-purchased goods. The buyer, knowing that possibility, assumed the risk of her own future default, and the court is in effect undoing that party's judgment that the risk was worth taking.

The judge, in striking the term as unconscionable, essentially makes the judgment that that assumption of risk was ill advised at the time it was undertaken, not just in retrospect after the risked event did indeed come to pass. But second, and more importantly, it is paternalistic with respect to all those future parties who may be similarly situated to the parties involved in the initial litigation. To return to the facts of *Williams v. Walker-Thomas*, if the trial judge were to find the term unconscionable, he would in effect be deciding that whether or not they want to, poor people should not purchase consumer goods under cross collateral loan terms. (Wright did not himself make such a finding. He did, however, find that the trial judge had the power to make such a ruling, if the trial judge found the term morally repugnant, and remanded\(^{39}\)). Such a judgment would imply that buyers are better off paying higher prices without those terms, or, if they are priced out of the market, foregoing the goods entirely, regardless of what they want. Not just Mrs. Williams, then, but all future consumers “in her shoes,” should the trial judge so hold in Mrs. Williams' case, will have to either go without the stereo, television or Mixmaster they would otherwise have been able to purchase, or they will have to pay higher prices. This entire class of purchasers, not just Mrs. Williams, will not be able to buy goods on these terms, essentially because some judge at some point decided that a term of this nature does not in fact serve their interest, even though *they* believe that it does. They cannot buy goods under contracts
with such a term, even if they want to, because in Wright’s view, the term is unconscionable. Thus, the paternalism of the decision.

Williams v. Walker-Thomas was decided in the 1960s. What has happened to it in the meantime? Basically, the unconscionability doctrine across the board, but also Skelly Wright’s decision in Williams v. Walker-Thomas Furniture Company in particular, have been the subject of a steady drumbeat of criticism over the last thirty years, largely by scholars associated with the law and economics movement.40 Their criticism, as well as the response to it, has largely focused on what the legal economists regard as the unwarranted paternalism central to both the unconscionability doctrine itself and Williams v. Walker-Thomas specifically. First, the critics argue, there can be nothing morally objectionable about a seller’s conduct if both buyer and seller agree to terms and there are no adversely affected third parties: indeed the resulting contract is Pareto optimal. Everybody consented. There can’t possibly be grounds for moral complaint to a contract to which everybody affected by it also consented.41 So the paternalism can’t be justified on moral grounds. But furthermore, the judicial paternalism the doctrine effectuates can’t be justified on welfare grounds either; in fact, it will work against, not for, the interest of poor buyers, as those interests are reflected in those buyers' choices. These buyers, like all buyers, have privileged access to their own preferences—no one knows their preferences better than do they themselves. Those preferences are revealed in their market choices, as are all buyers' preferences. Those choices, and hence those preferences, and therefore those buyers’ individual and collective welfare, are quite clear, relatively speaking: the buyers prefer low prices and cross collateral terms, or they wouldn’t opt for them. They’d find some other seller offering a different package, or they’d forego the purchase altogether. Their welfare, like everyone’s welfare, is increased by satisfaction of their preferences, which are in turn revealed
through their market choices. Therefore, to remove this market choice by judicial fiat simply reduces their welfare.

So, although it is natural to “feel badly” for Mrs. Williams herself, as one contemporary commentator puts it\(^4\)–to sympathize with her, in effect–that sentiment is actually at odds with the interests, welfare, and desires of Mrs. Williams herself at the time of purchase, and with others in Mrs. Williams’ circumstances. That “feeling” we might have, or that a judge might have, for Mrs. Williams or for someone in her position, turns out to be a bad guide to the judicial decision that might aim to improve her wellbeing. Thus, the moralism the judge deploys with respect to the litigants before him, particularly those parts of it motivated by simple sympathy for the plight of a poor and uneducated buyer trying to deal with a sophisticated retailer, leads directly to a form of paternalism–in the form of the rule the court articulates–that decreases rather than increases the welfare of the class of people toward whom the decision is directed. In brief, it’s counter-productive.

That's the guts of the attack on this doctrine, and it has been made repeatedly and in various forms over the last forty years since *Williams* was decided. It has even become, in a sense, conventional wisdom, that what Skelly Wright did in *Williams v. Walker-Thomas* with all the best motives in the world, was in fact bad for poor people. If you want to help poor and uneducated buyers, for heaven's sake, hold them to their contracts. Judge Wright did the contrary, and the result was nothing but a loss of consumer surplus that otherwise would have been enjoyed by the very people he was trying to help.

That is where things stood, in the scholarly literature on *Williams*, until about the mid-2000s. Since that time, however, a “behavioral” rather than “classical” economic analysis of both *Williams* and the unconscionability doctrine has emerged, and with a strikingly different
conclusion. In an exceptionally lucid article entitled “A Traditional and Behavioral Law and Economics Analysis of Williams v. Walker-Thomas Furniture Company,” Professor Korobkin of UCLA law school also decries Skelly Wright's reasoning in Williams v. Walker-Thomas–and the reasoning he suggests the trial court below employ–but nevertheless ultimately defends the decision's outcome, and on economic grounds. Sometimes, Korobkin explains, according to the behavioral, as opposed to the classical legal economist, judicial paternalism of the sort deployed in Williams v. Walker-Thomas might be justified, and more often than the classical legal economist is inclined to believe. When it is though, it is justified not on the moralistic and paternalistic grounds that individuals just don't know what is good for them, and that it’s wrong for market actors to take advantage of people who are so deluded. Rather, limited judicial paternalism might be occasionally justified on the grounds that sometimes individuals are not very good at figuring out the probabilities that they'll get what they decide “is good for them” from the various choices in front of them, given certain constraints on their abilities to reason about their options. Paternalism is justified, in other words, not on the grounds that “people are idiots” (as Duncan Kennedy artfully put the point in his classic defense of judicial paternalism from the mid-1980s43) but rather, on the grounds that individuals – even smart and educated non-idiotic individuals–are often not particularly rational. We all suffer from a host of disabling defects in our ability to make rational judgments, all of which cause many of us, maybe even most of us, to misfire when choosing among the various options with which markets present us. Free markets, it turns out, given irrational market actors, don’t so reliably maximize human welfare, even in seemingly Pareto optimal transactions to which all parties consent. So, if it can be clearly shown that a litigant and the class of which the litigant is representative in a contract-
policing case suffers from some such defective decisional heuristic, then it’s sensible for the court to adjust the contract accordingly.

And, in the *Williams* case itself, it's quite possible that Mrs. Williams was suffering the effects of at least four such defective decisional heuristics, as Professor Korobkin goes on to show in his article. Her decision was likely “selective,” meaning that she failed to consider all attributes of the product she was buying (she focused on the stereo, rather than the payment clause); non-compensatory (meaning that she likely failed to compare and trade-off the utility of various attributes of the product against each other—the payment clause actually reduces the expected utility of the stereo in ways she did not appreciate); her assessment of the probability that she might default was likely and unduly discounted by virtue of her “overconfidence” or “optimism bias,” making her incapable of accurately understanding the limits to her own power to ward off bad future outcomes, and lastly, she likely underestimated the risk of bad outcomes because of her unwarranted reliance on an “availability heuristic,” meaning that she unduly relied on the low incidence of default among her friends and neighbors, when assessing her own potential risks, simply because those were the comparators available to her. Given the likely presence of all four of these defective decisional heuristics, her decision making was likely unsound because it was irrational, and thus cannot be relied on to insure that the clause would only be in the contract if efficient (if it truly benefitted sellers more than it hurt buyers, as reflected in the price). Because of her defective decision making, a court then might be justified in intervening—*not* so as to frustrate the welfare-maximizing efficiency-directed goals of contract law and markets, as the critics of unconscionability have charged, but rather, to promote them.44 This is paternalistic, Korobkin concludes, but it is a limited and warranted paternalism: it takes
the parties’ goals as given, but then nudges the parties in the direction they would have decided in light of those goals, if they'd been behaving rationally.45

Thus, behavioral economists such as Korobkin, like the classical economists he criticizes, urge courts to decide cases such as Williams by reference to the incentives the rule creates for similarly situated parties in the future, rather than by reference to the mendacity of the parties conduct or the outrageousness of the terms they strike. The behavioral economist, however, is more skeptical about the rationality of all individuals' reasoning when entering contracts. If the decisions made by contractors or potential contractors, and particularly consumers, are systematically distorted by various psychological tendencies that inhibit full rationality when they are seeking to translate their preferences into market choices, then there is a narrow opening for warranted paternalism. This limited paternalism, however, has nothing to do with and should not be motivated by a “shock to the conscience;” it has nothing to do with moral revulsion over the unconscionability of a term, or bargaining tactics that are “too clever by half,” or sharp dealing or shadowy bargaining. Rather, it should be motivated by a decision to compensate, in the direction of efficiency and social wealth, for widely shared near-universal design defects, so to speak, in our capacity to reason about risks and potential benefits. Turns out, we're not very good at it. Where our contract choices show that, a court might be warranted in undoing them.

The differences between classical and behavioral law and economics are important, but nevertheless, their commonalities are more so, and at any rate it is their shared distance from the traditional understanding of the unconscionability doctrine that I want to highlight. So let me directly address those differences, beginning with the economic understanding, and then turning to the traditional. First, as Seana Shiffrin has cleanly argued, law and economics scholars of the
unconscionability doctrine have largely ignored that doctrine’s moralism. Second, legal economists urge judges in these cases to focus not on the litigants’ behavior, but on the incentives the rules that will emerge from these cases will create for future litigants. Third, and related to the second point, both focus overwhelmingly on the terms of the contracts that are challenged, rather than on the interaction of the parties before them. Fourth, and most important, while the behavioral economist sees more irrationality in our choices, and thus more scope for a doctrine such as unconscionability, both the behavioral and the classical economist see efficiency or net social welfare as the goal that should guide the judge in these cases, rather than any judgment about or even concern for either the wellbeing of the parties before him or the morality of their conduct. Both see the role of the judge as being the third party who can facilitate contractual relations by enforcing contracts against later-regretful parties, and who will thereby set proper incentives that will efficiently increase social net welfare. The way to do that is to enunciate rules that steer the parties and all future contractors toward wealth-maximizing behavior—typically, although not always, by holding parties to the terms of their original bargain. Departures from that premise should be articulated in rules that compensate for systematic irrational behavior caused by decisional heuristics that cloud understanding of risk and benefit. The transformed unconscionability doctrine more or less holds as much.

Now contrast that with the traditional understanding of the doctrine. The judge in an unconscionability case might indeed “feel badly” for Mrs. Williams or someone in her position—its only human nature to do so, as Korobkin points out. She's poor, uneducated, was dealing with a sophisticated retailer, and she signed a contract with a ridiculously burdensome loan term in order to secure the credit to purchase consumer goods that she didn't particularly need. Likewise, such a judge might be appalled by the immoral behavior of the seller. On the
traditional model, those feelings—feeling badly for the weaker party, and feeling appalled by the conduct of the stronger—not only guide the judge's decision, they are virtually fully determinative. The decision the judge makes, on the traditional understanding, is a decision about the parties' behavior, and it is both informed and motivated by moral feelings of empathy, sympathy, and disgust. But those feelings, according to the legal economists, are not what the judge should attend to. He should put them aside. Indeed, the judge in such a case should not focus on the litigants at all. He should put them aside. Rather, the judge’s decision, according to legal economists—and on both sides of the paternalism debate—should be guided exclusively by concern for the incentives for future conduct that result from the rule his decision will create for the class of people “similarly situated” to the litigants. The judge’s role in these cases is not to judge the immorality of the conduct of the particular litigants that come before him, as judged by a test of conscience. Rather, it is to put forward a rule that is as efficient as possible, or that leads to the greatest net social welfare as understood in classical economic terms, for the type of contracts of which the particular is an instance. This basic premise—that the judge’s role is to specify a rule for future conduct that will incentivize wealth-maximizing behavior—is shared by economics-minded commentators on both sides of these cases. That shared methodological premise is at the heart of the new paradigm, and that shared premise, quite simply, is a commitment to scientific rather than moral judging.

2. BRAVE NEW JUDICIAL WORLD THAT HAS SUCH PEOPLE IN’T
Against these criticisms of the unconscionability doctrine and the transformation of that doctrine to which those criticisms have led, scholars outside the law and economics movement—notably, Duncan Kennedy,48 Anthony Kronman,49 and more recently, Seanna Shiffrin50—have defended either the doctrine’s moralism or its strong paternalism as warranted. Oftentimes, of course, buyers in contracts such as these will not know the terms they’re entering, and therefore may not have made an informed decision regarding the purchase. Sometimes, however, they do know, as might have Mrs. Williams—the Walker-Thomas Furniture store was well known in its Washington DC neighborhood to its residents, as were its lending practices.51 Even with full knowledge, Kennedy, Kronman and Shiffrin have all argued, albeit for different reasons, moralistic or paternalistic intervention here might be justified. Shiffrin justifies intervention on the grounds that judges—who are also of course themselves moral actors—have no business coming to the aid of immoral business practices, while Kennedy argues that buyers often do not know their own best interest and courts should help them promote that true interest where they have the opportunity to do so. Kronman argues, on the more deontological grounds, that the lack of knowledge, lack of integrity, or a lack of good judgment on the part of weaker parties sometimes justifies the attendant loss of some level of individual autonomy. Buyers, after all, are besotted by a consumerist culture that encourages sellers to construct consumer desire, and then consumer demand, for products that have no connection to either need or pleasure. And consumers fall for it, again and again and again. Consumers might fully understand the consequences of default, but underestimate, and badly, the chance that they will default, not because of hard-wired decisional defects in rationality, but because they have been over-influenced by advertisers who encourage identification of viewers with successful and healthy avatars. Similarly, consumers might fully understand what they want and don't what but not
understand at all the precariousness of their own finances. Or, perhaps they simply want too many things. They shouldn’t be buying television sets and stereos using bedroom furnishings as collateral, when they are on a severely limited budget with eight children to feed, clothe, and house. They are making bad choices, and those bad choices are adversely affecting not only them, but their children and other dependents as well.

I generally side with the defenders of Judge Skelly Wright, *Williams v. Walker-Thomas Furniture Company*, paternalism, moralism, and the unconscionability doctrine all. Consumer sovereignty in these circumstances sometimes is not worth the pain it brings. That judgment is well reflected in the hundreds of public law constraints on private contracting, from minimum wage and maximum hour laws, to child labor laws, limits on the alienability of body parts, safety and health regulations that constrain free contracting for employment, lemon laws that limit our ability to buy cheap and defective automobiles free of the cost of limited warranties, non-disclaimable warranties of habitability, and so on. There should be nothing alarming about common law doctrines that charge judges with the work of making the same sorts of judgments on a case by case basis through a limited number of doctrines in the course of common law reasoning.

Here, though, I don't want to focus on that debate. Rather, I want to note some interrelated features of the traditional understanding of the unconscionability doctrine that I believe are also emblematic of the traditional paradigm of judicial reasoning, and which are almost routinely overlooked in these debates, by both critics and defenders of judicial paternalism. Those features are jettisoned by the new paradigm of scientific judging, on which the modern version of the unconscionability doctrine now rests.
The first is the doctrine's moralism. As Seana Shiffrin suggests in her exhaustive philosophical reconstruction of the unconscionability doctrine, this doctrine, developed in equity courts, was motivated by moralistic revulsion at the contracting behavior of stronger parties, not simply on paternalism *per se.*\textsuperscript{52} It didn't have as much to do with consumers' bad choices, as it had to do with sellers' bad behavior. Courts didn’t want to lend their hand to immoral business practices.\textsuperscript{53} The early nineteenth century cases in particular, more directly influenced by the equitable maxims from which the policing doctrines themselves flowed, were quite explicit about this. The judge’s decision that a contract term was “unconscionable,” was grounded *not* in a desire to lay down a rule that would take a market option off the table for future parties, but rather, in a moral reaction to the specific conduct and circumstances of the parties before him. The twentieth century *Williams v. Walker-Thomas Furniture Store* was not much different in that regard. The offending term in *Williams* might, Judge Wright held, be found by the trial court to be “unconscionable,” but *not* because Wright believed that from that moment forthwith, buyers should never again be permitted to enter contracts with cross-collateral loan terms, even if they want to, either because “people are idiots” or because they suffer from impaired rationality. Rather, the trial court below should be empowered to strike the term if the judge found a cluster of factors that pertained to the particular case to be, simply, unconscionable: that the buyer was indigent, which the seller in that case knew, that the buyer had eight children, which the seller knew, that on the buyer’s limited monthly income, the buyer could not possibly make the requisite payments for the stereo she was seeking to purchase, which the seller either knew or should have known, that the buyer had only a small balance outstanding on the prior purchased items when she entered the offensive contract, which the seller knew, and that the buyer at the time of default had long since paid considerably *more* than the purchase price of those prior
purchased items, which of course the seller knew. On such a record, Wright held, the trial judge below would be within his power to strike the term.\textsuperscript{54} All of these factors, about these people and their interaction with each other, are what might collectively “shock the conscience.”

Second, the unconscionability doctrine, on the traditional model, rests on a particularism that is not only not reducible to the rule that might follow from these cases, but that is actually in considerable tension with it. This attribute of traditional judicial reasoning is completely elided in the contemporary intra-economic debate over the purported paternalism at the heart of the unconscionability doctrine. The judge deciding whether a contract or a term is unconscionable is concerned with the specific situation of the parties before him, and the morality of their interaction, as viewed against the backdrop of the commercial setting and informed by the dictates of conscience. The decision that a term or entire contract is unconscionable, on the traditional model, is about what these people did, as read against a backdrop of what they should have done, and what others in their industry as well as the judge himself thinks about what they did. It is not about a class of future contractors, or a generic type of term, or a form of contract, and how some potential future class of contractors might be incentivized. It is about whether this contractor’s past behavior did or did not conform to norms of decency. For the holding of a case about unconscionability to even affect market transactions in the future, whether or not “paternalistically,” it has to be cast in general terms. However, the moral emotion, as well as the judicial reasoning, that actually prompts a judge to strike a contract term, consists largely of a reaction to particular past behavior. The generality of the paternalistic rule that is the target of the contemporary critics of unconscionability is at odds with the particularity of the situation that on the traditional model is the object of the judge’s inquiry.
Thus, it is inaccurate to say that Skelly Wright held in *Williams v. Walker-Thomas* that cross-collateral terms in consumer contracts are unenforceable because they are unconscionable, or even that such terms in contracts with poor people are unenforceable. The trial judge below was repulsed by the reprehensible conduct of the particular seller in the case before him, and said so. He also said that he didn't think he had the power to strike the contract. Skelly Wright on appeal held that unconscionability is a constraint on common law contracts cases that arise in the District of Columbia, and was so even before the passage of the UCC, so that, contrary to what the trial judge believed about the state of the law, he did have the power to refuse to enforce the contract if he found it to be unconscionable. The case was then settled. However, the finding of unconscionability that might have been forthcoming had there been a retrial, and had the judge followed Wright’s lead, would have followed from the trial judge’s response to the particular circumstances, behavior, weaknesses, and needs of the parties.

Of course, had there been such a finding, and had the trial court written an opinion saying as much, then that decision in turn might have constrained future market behavior. Or, it might not have. The trial court might have found the term unconscionable *only* in these precise circumstances: eight kids, the price of the collateral goods less than the amounts already paid, non-essential item, and so forth. But the breadth of any rule the court might have articulated would have been *inversely* related to the strength of the finding of unconscionability, not correlated with it. So, if the trial judge had ultimately found that the seller’s callous disregard of the specific circumstances besetting the plaintiff rendered that seller’s behavior unconscionable, then the rule generated would have been quite specific, covering only circumstances in which sellers behaved just as had the Walker-Thomas Furniture Store salesman, and with buyers situated just as was Mrs. Williams. If, on the other hand, the judge had found that the cross-
collateral clause itself was unconscionable, regardless of the circumstances or behavior of either party, then the rule, as well as its paternalistic impact, might have been overbroad, because it would have been well beyond the circumstances that gave rise to the moral revulsion that prompted it.

Third and most important, both the backward-looking, particularistic, and moralistic ground of an unconscionability decision, and the forward-looking paternalistic rule that might follow from it on the traditional model, should be informed by the judge’s moral sense—and hence, in part, by moral emotions and moral sentiments, including both empathy and sympathy. The judge might or might not be morally repulsed by the parties’ behavior. He won’t know, however, whether the behavior is morally objectionable or not unless he can empathize with both parties to the transaction, and then register a stronger sympathetic response to either one or the other. That’s just the nature of the beast. If the commercial behavior of this retailer was shocking to the conscience, it was so because of the unreasonably exploitative nature of the seller’s tactics and the over-exposure of the buyer to excessive and unreasonable risk, as well as excessive and unreasonable costs of default. One cannot reach a judgment on either prong of this without exercising one’s moral sense, and hence employing one’s moral emotions. The background moral norms of the industry play a role, but not an exhaustive one. Whether the seller’s behavior was reprehensible or not depends upon the judge’s moral sense, and the exercise of that moral sense depends on his employment of his capacity for empathic regard for both litigants. That empathic regard, in turn, facilitates his sympathetic engagement with the buyer’s struggles, the market imperatives of the seller’s business and then with whether or not the seller treated the buyer decently in light of those struggles and imperatives. This is the basis of his decision.
These traditional structural features of the judge’s role are highly visible within the contours of the unconscionability doctrine: again, unconscionability law has its historical roots in “equity”, which was for several centuries a separate body of procedures and institutions, governed not by legal rules but by principles, themselves squarely premised on moral truths, and not particularly generative of legal precedent and holdings. Nevertheless, the three structural features I’ve noted above—the moralism, the backward-looking particularism, and the role of moral sentiments such as sympathy and empathy—of the traditional understanding of the unconscionability doctrine were not peculiar to that doctrine, and not at all peculiar to either policing doctrines or those policing doctrines that stem from equity. Rather, they were part of the traditional paradigm of good judging in common law cases quite generally. The judge in common law cases across the board was expected to understand the situation of the litigants before him or her, and make a judgment about their situation against the backdrop of pre-existing norms, many of which—not just a few—were quite explicitly moral in content. Some came from industry standards, some from the community’s positive morality, and some were simply universal moral standards outright. So: a defendant did or did not act “reasonably,” when it neglected to insulate an electrical wire along a bridge on which children played. Whether other bridge owners did so is relevant to the resolution of that issue, as should be the expense of the insulation and the probability of an electrical injury. But neither exhausts the inquiry. The judge must decide whether or not the failure to insulate the wire or place a warning sign was reasonable (or instruct a jury to do so), not solely whether or not other bridge makers thought it was reasonable. Similarly, a judge must decide whether a plaintiff did or did not “accept a risk” of injury when he foolishly boarded an obviously defectively designed motorcycle; whether a seller did or did not “unduly influence” a buyer with overbearing sales tactics, a buyer was or
wasn’t under duress when she foolishly agreed to a contract in an abortion clinic that relinquished too many of her rights against potential malpractice; whether a commercial dealer did or did not act in “good faith” when he reduced the quantity delivered under an outputs contract to zero; whether the price the parties agreed to for a piece of land was or wasn’t unconscionably low or the interest rate unconscionably high. These moralistic norms of conduct—the negligence standard itself, the acceptance of risk doctrine, undue influence, good faith constraints on output contracts, duress rules and of course the unconscionability doctrine—permeated the common law; indeed, moralistic norms well outnumbered the non-moralistic norms in tort law. When Holmes railed against moral categories, words, and turns of phrase in the “Path of the Law,” urging for the sake of clarity that we purge moral terms such as “duty,” “recklessness,” “intent,” and so on from consciousness as well as the law reports by “washing the law in cynical acid”57—thereby flushing them out of the legal system—he was not attacking a straw person, or a vague idea. Moral norms constituted the content of much of the common law. Unconscionability was one area in which they did so explicitly. It was certainly not the only such area. The common law was moralistic, through and through.

And second, not just unconscionability cases, not just the policing doctrines, and certainly not just equity cases, but in all common law cases, according to the traditional paradigm of good judging, the breadth of a rule generated by a decision’s holding was a function of the importance of distinguishing, particular facts. On the traditional understanding, a judge does not enunciate rules at all. Rather, he enunciates holdings. There is a difference. The holding of a case is subject to a particular kind of interpretation and can change over time. It has this open-ended, always-subject-to-interpretation quality, in fact, precisely because it is not a rule, and doesn't operate as one. Its content is subject to argument. It is narrow, when understood as
contingent upon a sizeable number of the case’s distinguishing facts, and broad, if contingent on only a few. It can be both at once, to different readers. It can be narrow one day and broad the next. Neither lawyer is in bad faith or misrepresenting a thing, when one argues “for” a narrow holding of a case decided yesterday, and another argues “for” a broad holding of the same case. Which it is depends not upon anything embedded in the case itself but upon the use to which the holding is later put, the art of the lawyer or judge using the case, and the circumstances of the new case in which the holding is invoked as authority. All of this is what is distinctive about the skill of reading and using cases in legal and judicial argument; all of this also distinguishes the judicial work of articulating holdings from the legislative or administrative art of issuing rules. The ability to read and use case-law by extracting holdings from a past case in such a way as to render the case authoritative for a present case is at least a part of the distinctive skill of good lawyering. It is not as large a part of the lawyer’s professional life as Langdell believed it to be, for sure. Law schools may well do contemporary law students a major disservice by focusing so exclusively on this work, this skill, or this art, particularly in the first year of law school. Surely students should learn much else besides, including the rule-making arts of legislation and the dispute-resolving functions of arbitration, and mediation. But nevertheless, the work of extracting the holding of a case by determining the breadth or narrowness of that holding by reference to the relevant facts, so as to apply it meaningfully to another “set of facts,” is unquestionably a major part of a lawyer and judge’s education, as well it should be.

Third, doing this well depends upon use of capacities for both empathy and sympathy—what philosophers used to call the moral sense. As discussed above, the bare work of analogy depends upon empathic ability. But more particularly, application of the relevant substantive law does as well. To decide that a contract is unconscionable requires empathic engagement with the
situation of both parties, and a dollop of situation sense as well. To decide that it was unreasonable not to insulate the wire on the bridge, or that it was so clearly not unreasonable as to not permit a jury to even consider the question, or that it was undue influence on the part of a medical professional to convince a young woman to sign a contract relinquishing legal rights in an abortion clinic, or that a usurious interest rate was agreed to only under duress, all requires empathetic engagement with both parties' perspectives. To then decide to come to the aid of one or the other of the parties, and relieve the distress or compensate for the injury or release someone from the obligation to perform a contract or pay damages, requires sympathy. One is inclined to help someone in such a situation if one has first empathized with that party and their adversary, and then finds their situation sympathetic. At least on the traditional understanding of good judging, the judge must embrace, not shy away from, his capacity for empathetic and sympathetic engagement with the parties before him.

So, the contemporary understanding of at least the unconscionability doctrine—forward looking, anti-empathic, and focused on future parties and general rules—is at odds not only with the traditional understanding of that doctrine, but with the traditional paradigm of good judging. Is this just an anomaly? Maybe the unconscionability doctrine, as currently understood by legal economists, is simply a poor fit with adjudicative method. The other possibility though is that the revised understanding of the unconscionability doctrine evidences the prevalence, or at least the power, of a new or emerging paradigm of judging with which the revised understanding is fully compatible. If so, then the structural features noted above regarding the ways in which judges should reason in unconscionability cases are true across the board: they hold for judging, period, not just for judging unconscionability doctrines. If so, then it is the new paradigm of judging, not just a new understanding of the unconscionability doctrine, that is explicitly and emphatically
anti-moralistic, forward rather than backward looking, abstract rather than particularist, and
reliant upon social science and empirical method, rather than empathic regard followed by
sympathy, for guidance. Is this right? Do anti-moralism, non-particularism, and a turn toward a
social-scientific regard for the decisional life of law's subjects (and away from ethical judgment
informed by empathic regard for the subjective wellbeing of litigants) characterize our new
paradigm of judging? Is scientific judging, rather than empathic judging, the new paradigm, the
ideal toward which our judges are being urged to aim?

Quite possibly. Beginning with Holmes’s pithy declarations on the topic, continuing
through a good bit of legal realist writing, and now in a wide swath of contemporary law and
economics scholarship, twentieth century legal scholars have urged, in opposition to traditional
understandings of the goals of adjudication, that net social welfare, particularly as created
through voluntarist transactions, should be the goal that judges pursue when deciding common
law cases of tort and contract, rather than the vindication of moral principle, or the protection of
parties from their own worst instincts, or the actions of private actors that would take advantage
of them. The consequence of this has been in part, but only in part, to tilt common law
adjudication toward libertarian outcomes—toward, rather than against Herbert Spencer's social
statics, in ironic point of fact. Another and somewhat less noted consequence of our journey
down this particular Holmesian path of the law has been a re-definition of basic common law
concepts and categories away from their natural language and moral or moralistic meanings,
toward an amalgam of the purely positivistically legal, and the social-scientific. Thus,
“unconscionability” is redefined to mean a contract that exploits a decisional heuristic that tilts
buyers toward irrationality in markets. Likewise, and much earlier in the century, “contract”
has been redefined to mean a “promise that either an event will come to pass or its equivalent
value in dollars will be paid,” rather than an exchange of promises carrying with them a moral obligation of their performance. 62 “Negligence” has come to mean “conduc[t] with regard to which the expected damage it might cause times its probability exceeds the cost of prevention,” 63 rather than that which a prudent and reasonable person should avoid, and “duty” means the absence of immunity from the obligation to act. “Tort law” is a catch-all word for liability that should be imposed if and only if transaction costs have rendered impossible a voluntary transaction between an actor and victim, with its content determined by the hypothetical contracts those parties would have entered into if they could have, rather than by any conception of what a healthy life with sensibly conscribed duties of care for others should entail. 64 Likewise, a contractual promise that is breached entails a duty to pay damages only if the expected payoff of the promise is higher than the promisor's expected cost of performance, and not otherwise—and so on. 65 All of this is just as Holmes hoped for in The Path of the Law, and all of it has more or less come to pass; the common law has been bathed in cynical acid, albeit with no guarantee that the bath has brought us the added clarity he hoped would be the happy result. One murkier result of that bath, whether or not it is one he championed, is that as in the unconscionability cases, judicial outcomes in a wide range of cases—torts cases that turn on definitions of negligence or contributory negligence, efficient breaches of contract, outputs contracts, duty or lack of duty cases—do not turn on the judge’s sense of the moral quality of the interaction between the litigants. Rather, such cases turn on the judge's understanding of how the incentives he creates through the rules he fashions might impact the welfare of others, as ascertained through a quasi-scientific study of their choices, hypothetical, implied, or otherwise.

Likewise, for a wide range of cases, scholars increasingly urge that common law judges should focus less on the litigants, and more on the future transactions or dealings that the rules
they articulate will effect. Law and economics scholars in particular quite routinely urge that judging should be neither backward-looking nor particularistic. But the view is by no means limited to law and economics theorists. Most mainstream legal scholars – including liberal, progressive and critical legal scholars–concur that adjudication should be forward-looking and general, and not limited to the particulars of the facts before it. Adjudication should be, in short, legislative in form and outlook. Given their indeterminacy, precedent and past cases in general provide little guidance in any event. Courts should seek to maximize welfare. Their work is no different than the legislator’s; it's simply housed in a different building.

This consensus that adjudication should be forward-looking and general, rather than backward-looking and particularistic, has its origin of course in realist reforms and jurisprudence: the true motive and meaning of a court's decision, according to Holmes and his legions of twentieth century followers, is “social policy.” The judge should act as a quasi-legislator within the interstices of rules laid down. The common law is simply an incomplete codification; the judge's work is to complete it. On this basic realist point, left-leaning critical scholars are in complete accord with libertarian-leaning legal economists: that the judge acts as a quasi-legislator is simply a reiteration of the lack of any substantive difference between law and politics. There are of course political differences between these groups of scholars and the differences show up in the scholarship: Kennedy and Kronman, for example, embrace paternalism in both the legislative and adjudicative sphere on political and moral grounds, while Epstein and Posner resist it in both. But they are all as one on the nature of judging. The judge's job is to maximize net social welfare. They differ only over their conceptions of in what that welfare might consist. They don't differ on the judge's role in creating it.
And lastly, the new paradigm of judging has no need for the exercise of judicial moral sentiment, or the faculties of sympathy and empathy at the core of that human capacity. Empathy, in fact, is basically the collateral damage in this ideological war between traditional and scientific paradigms of adjudication. Neither empathy nor sympathy is required by the new model, for any of the judicial tasks for which it was seemingly central, in the old model. The judge on the new model is less concerned with precedent, so there is no need to engage in the sort of empathetic imaginings that Susan Bandes and others have characterized above as essential to analogical reasoning. Nor need the judge exercise whatever moral sense (or sentiment) is required to appreciate and apply moralistic legal categories. Once the law is washed in cynical acid, the judge has no need for those moral sentiments that might register engagement with the moralistic categories that have been washed away. The judge need not empathically walk in litigants’ shoes before judging them: his decision should attend, rather, to the incentives or disincentives for future conduct that his decision might create, with the goal of maximizing future net social welfare. When doing so, he might have to acknowledge, at least if he attends to the teachings of behavioral economics, the need for limits on consumer voluntarism in unfettered markets, and might accordingly be inclined to enunciate rules to that effect. He will then have to decide whether a group of buyers or market actors might be susceptible to a decisional heuristic that will pervert the rationality of their choices on various markets. If so, legal rules that will restrain those markets might come into play: limits on the waivability of warranties, the unconscionability doctrine itself, tort-based limits on contractual agreements, and so forth. But the target of this paternalistic intervention is decidedly not human suffering, but rather, human irrationality, and the goal of it is not relief from suffering or immoral or unethical business behavior, but rather, correction of irrational choice. The determination, then, of whether or not
there is such a failing of rational choice requires deference to social-scientific expertise on the behavior of actors in markets, not empathic engagement with litigants. Whether or not the judge ought to respond, and how, once a finding of such irrationality has been made, depends on the judge's view of the relation between the ideals of rationality, and his understanding of the importance of individual choice, even assuming perverse irrationalities. Should he favor the former—call it welfare, ideally and rationally construed—he might intervene into market choices, re-jiggering in line with what a perfect choice would have yielded. If he favors the latter—call it liberty—he might let the perverse or irrational market choice lie. Either way, though, the decision is not informed by empathy, and most decidedly not motivated by either a disgust with immoral business behavior, or with a sympathetic identification with the plight of litigants, poor or otherwise, who might be seeking relief from the suffering occasioned by their own ill-conceived choices.

3. THE ROOTS, APPEAL AND LIMITS OF SCIENTIFIC JUDGING

A full history of the emergent paradigm of scientific judging is obviously beyond the scope of this discussion, but it's worth identifying just three of the “signposts along the road” originating either in law or sister disciplines. The first was a development in American legal theory; the second, a development in economics; and the third, in political theory.

First, legal theory. In the first three decades of the last century, “legal realists” famously rebelled against the then-traditional paradigm of moralistic judging, as well as the “brooding
omnipresence in the sky” that informed it, by which they meant the common law in general, and Langdellian pretenses of the common law’s autonomy and “completeness” in particular. That “brooding omnipresence,” it’s now easy to see in retrospect, came with some profoundly conservative biases: biases toward capital and against labor, for stronger contracting parties and against weaker ones, and for business and industry as against their victims, both on the job in dangerous workplaces, and off, in rural fields and urban streets alike. Realists railed against the identification of the nineteenth-century common law with both an immutable natural law and with constitutional law that favored individual rights of property and contract over collective interests, and all with a moralistic overlay, and they found plenty of allies in the progressive politics of their era, from labor organizers to some state court judges, a somewhat progressive Congress, FDR’s White House, the American Pragmatist movement in the academy, and eventually of course a majority of the Supreme Court. The existing common law, the realists argued, was not perfect, not complete, and most important, not in line with the needs of the people. Judges of the common law and Justices of the Supreme Court, with Oliver W. Holmes leading the charge in both fora, were broadly encouraged to find a way to turn away from common law precedent, as a guide to both adjudication and constitutional interpretation.

If the common law is not only unduly protective of capital, but also incomplete and at best an indeterminate guide for decision making in any event, then what? To what should courts, judges, and lawyers turn, when filling the interstitial gaps in the law, if not from general principles drawn from prior cases? First Holmes and then the realists had an imperfect answer, but they did have an answer to that question: judges should turn to the then-nascent social sciences. The lawyer and judge of the future, again, would be the man of the slide rule and economics, not the man of Blackstone, precedent, and the past. Science should guide the judge's
inquiry into the content of social welfare, and social welfare should guide his inquiry into the content of the law. Science should be the method, and welfare the goal.

And what are the teachings of the sciences, on the question of social welfare? How do we ascertain welfare? The second signpost, I believe, came from one influential answer to that question that emerged from mid-century economics. Central to mid-century economics was the claim, which eventually became an article of faith, that actors cannot intersubjectively compare the subjective utilities of other persons.\textsuperscript{67} The gulf between our minds is just not bridgeable. We cannot know whether a pinprick hurts someone else more than a broken leg from a fall,\textsuperscript{68} to paraphrase a twentieth century version of this claim; we cannot know whether pushpin is more or less pleasurable, welfare enhancing, or worthy, than poetry, to borrow from Jeremy Bentham’s formulation of a related skepticism.\textsuperscript{69} We are all too different to make such comparisons by generalizing from our own experience, and the difficulties in grasping the hedonic pleasures and pains of others bar our ability to make such comparisons directly. The consequence of a firm belief in this severe limitation on our abilities, for purposes of any political activity that aims to increase welfare, is profound. One person, whether judge or legislator, with the power to distribute goods or services or resources who aims to do so in a welfare-enhancing way cannot truly \textit{know} whether one person's enjoyment of a dollar, or sufferance of the infliction of a kick in the shins, is “comparable” to, or lesser than or greater than, that of another. We can't truly know that a rich man's enjoyment of a marginal dollar is less than a poor man's, or that the kick in the shins hurts less than the broken bone, or more than the pinprick. Therefore, the simple quantitative or additive function that Bentham envisioned, when he imagined utility metrics as a pathway to welfare maximization, is just dysfunctional. They don’t work. We can't \textit{know} overall welfare by adding utiles, where utiles are tied to subjective pleasure, because we can't compare
them across persons. The empathic knowledge of the subjectivity of others—the knowledge that
the loss of a dollar by a rich person actually is less painful than the loss of a dollar by a poor
person, or that the loss of collateral is so painful to a buyer as not to be worth the loss of the
consumer surplus that might be enjoyed, should a clause requiring that loss be allowed is just not
up to the task of generating enough information to actually answer questions of total welfare that
in turn require that sort of interpersonal comparative knowledge. And this is empathic knowledge
which any potential sympathizer who aims to increase welfare will need, whether the
sympathizer be Adam Smith or Karl Marx. We can't empathize our way to the knowledge that
Bentham's utility calculus demands.

If we want to maximize social welfare, then, as Holmesian realists proclaimed, whether
through adjudication or through legislation, the best and only window, so to speak, into the
subjective individual utility functions of others, and therefore into their subjective wellbeing, is
revealed preferences, as demonstrated by choices in open markets. In part, and as commonly
understood, the inclination of contemporary utilitarians, welfare economists and others to rely on
revealed preferences as a window into subjective welfare—and in turn to rely on fulfilled market
choices as a vehicle for maximizing the satiation of those preferences—is because, absent
infirmity, the individual himself has come to be regarded, for familiar anti-paternalist or Millian
reasons, as the best judge of his own interest. But not exclusively. Reliance on preference as a
window into wellbeing, and on fulfillment of choices that reflects preference as the best vehicle
for maximizing that wellbeing, is also the natural consequence of the assumption that came to be
widely held among economists at mid-century, to wit, that the individual is just as incapable of
knowing the subjective utility of others, as he is omniscient regarding his own. He knows his
own wellbeing perfectly or at least better than others do, for Millian or liberal reasons. As
important, though, he knows the wellbeing, pleasures, and pains of others not at all—he can't know or compare their subjective utility with that of others. Put the Millian and economic claims together and they yield this sum: the individual can't be wrong about his own utility functions, and he can’t be right about the subjective pains and pleasures of others. The individual's preferences are best revealed through his choices, and his choices are fully discoverable through the empirical methods of the social sciences.

If we take seriously the inability to intersubjectively compare utilities, then it directly follows that empathy is both inadequate to the task of learning enough of the subjective wellbeing of another so as to increase social welfare—we can't intersubjectively compare the subjectivity of others—as well as unnecessary. Revealed preferences are what we need to know; indeed, they're all we need know, and furthermore, all we can know. The contemporary ubiquity of this claim – the claim that we are incapable of intersubjective utility judgments, that we just don't know whether someone is more hurt by a broken knee than a foregone candy bar, given the irreducible differences between us and the difficulty of penetrating the mind of another—is, thus, the second “signpost along the way.” With the acceptance of the claim that one moral agent cannot possibly intersubjectively compare utilities, I believe, came a degradation of the acceptability of moral judging that required empathic and sympathetic engagement with the wellbeing of others—an engagement with others that requires precisely the intersubjective comparisons of those others' mental states that the economic hypothesis warns are impossible. Moral judging then took another hit.

The third signpost along the path from moral to scientific judging was the rise, two thirds of the way through the twentieth century, of a theory of liberalism steadfastly committed to state neutrality regarding questions concerning the nature or content of the good life, in both political
theory and in jurisprudence, that coincided in time with a turn toward robust libertarianism in the
country's politics. Both counsel deference to an individual's assessment of his own welfare, and
both then counsel likewise a deference to either markets or democracy on questions regarding the
content of the social welfare, to which courts should attend. If we synthesize all of this – the
forward looking jurisprudence of the realists, economists' skepticism regarding our ability to
understand empathically the pains of pleasures of others, and political liberals' disdain for public
morality and the rise of liberal and libertarian theories of the state committed to neutrality on
questions of the good in the 1970s through to the present–the increasing dominance of scientific
judging, and the demise of moral judging, I believe, is hardly surprising.

There are, finally, additional emotional or indeed sentimental reasons, I believe, for the
appeal of scientific adjudication to contemporary scholars. Let me point to two. First, legal
scholars and judges now fear the erratic results suggested by untethered empathic adjudication
more than we did in the past, partly because we now, in contrast to then, broadly assume a
radical indeterminacy in pre-existing law. Radical legal indeterminacy is no longer the view of
outliers; it is, rather, a widely shared conventional wisdom. Obviously, scientific judging in part
appeals, simply because it speaks to the craving for certainty in the face of a presumed
indeterminacy that underscores a good bit of both law and legal writing. If indeterminate law
can't provide certainty, and many judges and lawyers and likely most scholars are convinced it
can't, then scientific ideals might.

In larger part, though, I believe, the continuing appeal of scientific adjudication as an
ideal of judging stems, at least in legal scholarship, from the blurring of legislation and
adjudication, as well as of administration and adjudication. The claim that there is no difference
between the goals of administration, legislation and adjudication is now widely shared not only
among law and economics scholars, but also by critical legal scholars and to a lesser degree mainstream legal scholars as well. Both Richard Posner and Duncan Kennedy have argued, in very different contexts of course, that judges are in effect quasi-legislators, and should reason as such. For Kennedy, our resistance to this idea stems from a residual false consciousness that accords fetishistic validity to democratically obtained ends, and for Posner, it stems from an old-fashioned, pre-pragmatic, pre-Holmesian faith in the wealth-enhancing virtues as well as coherence of nineteenth century common law. For most legal thinkers today, the judge is a quasi legislator. The ideal of good adjudication, then, should not be notably different from the ideal of good legislation.

So, where does empathy fit, in the skill set, so to speak, for the ideal legislator? For many political theorists today, and for many scholars of legislation in the legal academy, it ranks low. Both public choice theorists and their critics value social-scientific expertise—not empathy—as that which should guide legislation and administration. On this view, which I am not commending, legislators should be committed to improving the welfare of all, but the tie that binds them to that common good is electoral accountability, not moral sentiment. If the electoral system is working properly, legislators can make legislative decisions on the basis of their own self-interest, and the value of those decisions, in effect, will trickle down to those to whom the legislator is electorally responsive. So, if adjudication is truly no different in goal from legislation—law is politics, judges no less than legislatures aim and should aim for social welfare, as Holmes and his followers all said—then there is no reason on earth that their methods should differ. Judges too, then, should use the slide rule rather than the heart to ascertain social welfare, and then should rule accordingly.
Finally, what's to lose, as we move from moral to scientific ideals of adjudication? I think we lose two things of consequence. First, we lose the moral interpretation of many of our common law concepts that have been given articulation in moral adjudication over the last century and a half. We lose, for example, the idea of a contract as a promise, rather than a prediction of the occurrence of either an event or a damage payoff. We lose the idea of a tort as a harm occasioned by individual recklessness or negligence and born by relatively innocent individuals that therefore deserves recompense, rather than the terms of a hypothetical contract between strangers who can't make deals in the face of transaction costs. We lose the idea of the “policing doctrines,” such as the unconscionability and undue influence rules, as distinctively moral limits on market behavior rather than as rules that attempt to capture and correct for heuristic defects in rationality, and we lose the last thread of a connection between our current legal doctrine in these common law areas to the abandoned moral principles at least sometimes employed by the equity courts of the past.

Second, and I believe of greater consequence (these judicially created common law moral rules are of limited scope, no matter how they are defined), or at least what I've tried to stress here, we lose the distinctive adjudicative arts. We lose, for example, the idea of the difference, and the idea that there is a difference, between a holding and a rule. More broadly, we lose the idea of the common law and of the judicial opinion as a repository for wisdom that can flexibly mutate to meet changing facts, but that emerges from particularistic decision making. Of course, we gain as well: we gain, perhaps, more finely tuned rules, a better sense of when market transactions are driven by irrationality, and, at least if judicial decision making is effective, we gain a more rational marketplace. In that rational utopia, judicial empathy has no place, but nor is it needed; we will all do just fine on our own deciding what pleases us.
No matter how we regard it, though, it is clear that judicial empathy has no role to play in scientific judging. Thus my conclusion: the demise of judicial empathy is best regarded as a piece of the collateral damage in the movement from traditional, moralistic, and particularistic reasoning, to forward-looking scientific adjudication. Empathy is as irrelevant to the new paradigm of judging as it was central to the old. It can only do mischief. No wonder then, that Justices Sotomayor and Kagan, no less than the Chief Justice, have so little to say in its favor.

NOTES

1 “The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties. . . The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due.” Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), 181-2 (emphasis added).


3 “Another cousin of intuition and another major factor in judicial decisions in the open area is “good judgment,” an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a

4 “I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontës, Emily Brontë, I think, or *Jane Eyre* that she wrote. He said if you want to know what that is like, you go and look out at the city, he said—I think he was looking at London—and he said, you know, you see all those houses now, even at the end of the 19th century, and they look all as if they are the same. And you think all those people are out there, going to work, and they are all the same. But, he says, what Emily Brontë tells you is they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book. So sometimes, I have found literature very helpful as a way out of the tower.” Testimony of Stephen G. Breyer, United States, Cong., Senate, Committee on the Judiciary, *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States*, 13 July 1994, 103rd Cong., 2nd sess. (Washington: Government Printing Office, 1995).

5 Stevens is often lauded as having been our most empathetic Supreme Court Justice, particularly given the narrowness and privilege of his background. See, *e.g.*, Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995), 99-104.


8 Ibid., 643.


10 In the 1970’s, the Supreme Court loosely analogized sex distinctions in state and federal law to other insidious forms of discrimination, eventually concluding in a handful of cases that sexual distinctions in law should be subjected to a “rational basis” review – generally, the lowest and most easily met standard – but finding a number of state and federal laws or regulations unconstitutional under the test. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (preference in state law given to male estate administrators ruled unconstitutional); Frontiero v. Richardson, 411 U.S. 677 (1973) (military benefit automatically given to widows but not widowers, on presumption that widows but not widowers are “dependents,” ruled unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (state statutes that precluded the sale of low alcohol beer to boys under the age of 21 and girls under the age of 18 ruled unconstitutional).


19 Griswold, 381 U.S. 479 (1965).


25 The classic statement of this account of empathy comes from Adam Smith. Adam Smith, The Theory of Moral Sentiments (Boston: Wells and Lilly, 1817), 1-23.
“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” Justice O. W. Holmes, “The Path of the Law,” Harvard Law Review 10 (1897): 457-478, 469.


28 Smith, The Theory of Moral Sentiments, 4 (defining the moral sentiments of his examination as “our fellow-feeling with any passion whatsoever,” i.e. sympathetic feelings both pleasant and painful).

29 See Williams, 350 F.2d 445 regarding the viability of the unconscionability doctrine prior to the passage of the Uniform Commercial Code in the District of Columbia, and Uniform Commercial Code § 2-302 for the Code's unconscionability rule. In Williams v. Walker–Thomas, the Court explained the doctrine in now familiar procedural and substantive terms:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. ... In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. ... The manner in which the contract was entered is also relevant to this consideration. 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, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of
its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.


Undue influence is a defense to the enforcement of a contract where a stronger party has acted upon a weaker party's infirmities in extracting agreement to an unfair contract. The infirmities may arise from a status differential – ward and guardian, teacher and student, professional and client, or even husband and wife, – or from temporary conditions impeding upon the weaker party's will that do not rise to the level of contractual incapacity, such as extreme distress over a pending termination of a job, or the emotional distress of needing to procure an abortion. See, *e.g.*, *Odorizzi v. Bloomfield School District*, 54 Cal. Rptr. 533 (Cal. Ct. App. 1966), (agreement to resign after being threatened with being exposed by employer/school district as a homosexual was obtained under undue influence, and Plaintiff is not bound by it). See also *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (invalidating an arbitration provision in a medical clinic's admittance form because of patient's emotional distress, stating that an adhesion contract will not be enforced unless “they are conscionable and within the
reasonable expectations of the parties. This is a well-established principle of contract law; today we merely apply it to the undisputed facts of the case before us.”).

31 Uniform Commercial Code §1-201 b (20) (““Good faith”… means honesty in fact and the observance of reasonable commercial standards of fair dealing.”).

32 Odorizzi, 54 Cal.Rptr. at 533.

33 Constructive fraud might exist in the absence of an actual intent to deceive when a party fails to disclose material facts regarding the value of a transaction, in circumstances in which the co-contractor is incapable of discovering those facts. A good discussion can be found in Strong v. Jackson, 781 N.E.2d 770, 772 (Ind. Ct. App. 2003).


36 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (C.A.D.C. 1965).(quoting the lower court opinion, which condemned the “sharp practice and irresponsible business dealings” of Walker-Thomas, but held that the contract was enforceable).


38 See Uniform Commercial Code §§1-201 (b) (20) (“good faith” means honesty in fact), 2-302 (courts may strike unconscionable contract terms), 2-314 (unless modified or excluded, all goods have an implied warranty of merchantability), 2-315 (when a seller knows of a buyer’s particular
purpose for a good, there is an implied warranty of fitness for that particular purpose unless the warranty excludes or modifies the expectation).

39 *Williams*, 350 F.2d at 448.


41 For a full argument to this affect, see Richard Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1983), 88-115 (discussing the ethical value of consent).


range of concerns, sometimes including pure concern for the position of the disadvantaged party, a dominant concern of judges is self-regarding: it is to avoid facilitating the actions of an exploiter rather than to act to protect the disadvantaged party. A survey I conducted of many leading unconscionability cases reveals that in nearly every successful claim the court focused on the conduct of the stronger party, not on the weakness or needs of the weaker party.”).


50 Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” page.


52 Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” 223-4.

53 Ibid. 221.


55 Williams v. Walker-Thomas, 198 A.2d 914, 915 (D.C. App. 1964) (“A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy.”).

56 Judge Wright cited both Supreme Court doctrine and the Uniform Commercial Code as authorities. Williams 350 F.2d at 448 (“We do not agree that the court lacked the power to refuse
enforcement to contracts found to be unconscionable… the notion that an unconscionable bargain should not be given full enforcement is by no means novel.”).


58 “I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said.” Ibid. 488; “You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.” Ibid. 469.


60 See Locher v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating, famously, that the Constitution “does not enact Mr. Herbert Spencer’s Social Statics.”)


62 Holmes, “The Path of the Law,” 462 (“If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.”).

63 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947) (“Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than P.”).

65 Richard Posner explains the theory of efficient breach in *Lake River Corp. v. Carborundum Co.*:

A better argument is that a penalty clause may discourage efficient as well as inefficient breaches of contract. Suppose a breach would cost the promisee $12,000 in actual damages but would yield the promisor $20,000 in additional profits. Then there would be a net social gain from breach. After being fully compensated for his loss the promisee would be no worse off than if the contract had been performed, while the promisor would be better off by $8,000. But now suppose the contract contains a penalty clause under which the promisor if he breaks his promise must pay the promisee $25,000. The promisor will be discouraged from breaking the contract, since $25,000, the penalty, is greater than $20,000, the profits of the breach; and a transaction that would have increased value will be forgone.

*Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985).

66 With thanks to then-Judge Cardozo for this lovely phrase, which he used in a classic common law case to guide the courts toward recognition of a promissory estoppel doctrine. See *Allegheny College v. National Chautauqua County Bank of Jamestown*, 159 N.E. 173, 175 (N.Y. 1927).


(“Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry.”).
